THE CLASH OF RIVAL AND INCOMPATIBLE PHILOSOPHICAL TRADITIONS WITHIN CONSTITUTIONAL INTERPRETATION: ORIGINALISM GROUNDED IN THE CENTRAL WESTERN PHILOSOPHICAL TRADITION

LEE J. STRANG*

* Assistant Professor of Law, Ave Maria School of Law. I would like to thank my loving wife Elizabeth for her sacrifice to allow me to write this Article. Special thanks to Steve Safranek and Phil Pucillo for their comments. I would also like to thank Professors Richard Parker and Lewis Sargentich for their guidance, and Johnny Hayes and Kurt Koehler for their research assistance.

I. INTRODUCTION

This is the capstone Article in a series of three articles. This series of articles offers a comprehensive understanding of constitutional interpretation. It grounds original meaning adjudication[1] in what is

1. I will use originalism and original meaning adjudication synonymously and interchangeably throughout this Article. By these terms I refer, tentatively, to the meaning of the text of the Constitution when it was ratified. Thus, originalism refers to the meaning of the text of the body of the Constitution when it was ratified in 1789. Since I wish to avoid the difficult questions—questions not directly relevant to my Article—of the content

arguably the central tradition in Western philosophy.[2] I rely on the central propositions of this, what I label the Aristotelian tradition, in grounding originalism.[3]

In the first Article of the series I argued that originalist appeals to self-government by the People are incomplete and that the countermajoritarian difficulty posited by nonoriginalists does not exist.[4] In a subsequent Article of the series, I will describe the central Western philosophical tradition, its defining characteristics, and some major exponents from Aristotle to modern scholars.[5] In this, the

---

of the original meaning of the text and of how that meaning is derived, I only posit that the meaning of the text is defined with reference to the relevant group in society at the time of ratification. *See* Gerard V. Bradley, *Beguiled: Free Exercise and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248–58 (1991) (providing a sophisticated account of originalism). Thus, for example, the meaning of the Due Process Clause of the Fifth Amendment is defined by reference to lawyers and other members of society familiar with the nature of due process in 1791.

2. I endeavor only to give the barest sketch of each and enable the reader to see the differences in each tradition and how those differences carry themselves forward into intellectual endeavors including constitutional interpretation.

3. Before we go any further I must define, in preliminary fashion, key terms that I will use throughout the series of articles. I draw my definitions from Jacques Maritain in his *Man and the State*. JACQUES MARITAIN, MAN AND THE STATE (1951) [hereinafter MARITAIN, MAN AND THE STATE]. I will use the terms society and body politic (or polity) interchangeably to refer to the entity that encompasses all other subsidiary (in the Latin meaning of the term *subsidium*, or assistance) communities and organizations. *Id.* at 2–4. For a discussion of subsidiarity and the relationship between the state and subsidiary organizations, see Pope Pius XI, *Quadragesimo Anno* para. 79 (1931) ("[I]t is an injustice . . . for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower associations. This is a fundamental principle of social philosophy . . . . Of its very nature the true aim of all social activity should be to help members of a social body, and never to destroy or absorb them."). The term society points to a moral entity the existence of which is the result of both biological and rational processes. MARITAIN, *supra*, at 2–4. In common parlance we refer to the state or the nation when we refer to what I am labeling society or the body politic. Community, as I will employ the term, refers to those lesser entities that are the result of biological processes such as the family, clan, or nation (considered in the racial or ethnic sense like the English nation or people). *Id.* The state, by contrast, is a unit of the larger society and is the official, designated governing structure of the society. *Id.* at 12–19. The state is that portion—the uppermost portion—of society entrusted with guiding the innumerable communities that comprise the society toward its end. *Id.* Thus, the state is simply one part of the larger unit of society and is necessarily subordinate because the purpose of the state is the flourishing of the whole. Lastly, I will use the term authority to mean that the authoritative person, structure, institution, or doctrine has the "*right* to direct and command, to be listened to or obeyed by others." *Id.* at 126. One must thus distinguish between authority and power, which is the concept of having the force by which one coerces others to obey. *Id.*

4. Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism and the Aristotelian Tradition*, 2 GEO. J.L. & PUB. POL'Y 523, 524 (2004).

5. I will pay particular attention to what the tradition had to say concerning the nature of man and of society. Part and parcel with exposition of the Aristotelian tradition I will attempt to defend the tradition and explain how it offers a coherent, commonplace view of man and society. I will also compare against the Aristotelian tradition the thought and writings of major proponents of the Enlightenment tradition. I will argue that the

central Article of the series, I will tie original meaning adjudication to the Aristotelian tradition[6] and explain why originalism follows from the tenets of the tradition.

A. Preview of the Defense of Originalism Based on the Tenets of the Aristotelian Tradition

Following the view of the nature of man and society found in the Aristotelian tradition, I offer three arguments as to why those who adhere to the Aristotelian tradition should also adhere to originalism. They are titled: prerogative of authority, jurisdiction, and competence. Of course, if one does not accept the truth of the Aristotelian tradition, then the defense of originalism grounded in that tradition will likely not be persuasive. Even if one accepts the tenets of the Enlightenment tradition, my hope is that the other claims in this series of articles will remain telling: first, that there are two rival and incompatible philosophical traditions and how one views the nature of the Constitution drives how one interprets the document; and second, how one views the nature of the Constitution is in turn driven by one's underlying philosophical commitments to one of the two traditions.

Here is a short synopsis of my first argument. Under the Aristotelian conception of the nature of man and society, human beings have ends (happiness) that they all strive to achieve. Humans cannot reach their end outside of society and thus are members of society in order to reach their end. Society enables its members to reach their ends by securing the common good. An authoritative determination of which path a society shall take to secure the common good is necessary because, although all societies strive for

---

Enlightenment tradition arose in reaction to the Aristotelian tradition, a reaction caused by the onset of pluralism from the Protestant Reformation, and building on the nominalist ideas first described by William of Ockham.

6. Some preliminary remarks are in order regarding the series of articles. I am arguing in this Article that belief in natural law requires one to view our Constitution, and indeed, any constituting or social ordering document (or body of tradition) for any society in a certain manner. I use the label Aristotelian to describe the philosophical tradition I rely upon. My references to documents of the Catholic Church or to adherents of that Church simply recognize the fact that the natural law tradition, and Aristotle's thought, were initially incorporated into the corpus of Christian philosophy, and since the Middle Ages, preserved and developed primarily by members of the Catholic Church. The Catholic Church is also, as John Finnis notes in the introduction to his *Natural Law and Natural Rights*, the body "unique in the modern world in claiming to be an authoritative exponent of natural law." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS vi (1980) [hereinafter, FINNIS, NATURAL LAW]. My hope then, is that readers will look beyond the proponents of the tradition to its merits as a system of philosophy with a unique understanding of the nature and purpose of man and society.

the common good, what actually constitutes the common good for a particular society is elusive, and the paths to happiness are unclear and numerous. Both what constitutes the common good for a particular society and the most appropriate means to pursue the common good are rationally underdetermined: there is no demonstrable principle of reason by which one can, *a priori*, order a society to the common good and determine which means the society will utilize to achieve the common good.[7] For our society, the authoritative determination of how we shall pursue the common good is found in the Constitution.

In the Aristotelian tradition "democracy" is understood as a society governing and ordering itself *through time* to achieve the common good. Society is "transtemporal." It is an entity existing through time and acting for a purpose. One temporal slice of society and whatever the majority of its citizens believe at that point in time is not society and government by that majority is not democracy, at least not all of it. The Aristotelian tradition rejects the "presentist" views of society and thence of democracy that arose in the Enlightenment. Under the Aristotelian understanding of democracy, a society can, at Time 1, make a decision regarding the ordering of itself that is binding on it and its members until some time, Time 2, when society determines to abide by another ordering. A society may reorder itself through the means prescribed by the initial ordering of the society (if there are any).[8]

Society can only achieve the common good if members of the society abide by society's authoritative prudential ordering decision. Since members of society are members for the very purpose of achieving happiness—which requires their adherence to the social ordering decision—they must, to rationally pursue the end they already pursue, abide by the prudential ordering decision. The argument of individual obligation is straightforward: men pursue happiness (perfection); men are members of society to achieve perfection; the common good is necessary for society to perfect its members; common action is necessary to the common good; common action is based on a unity of judgment; unity of judgment is exceedingly rare (and practically impossible) without authority; therefore, individuals must abide by the authoritative social determination.

Carried over to our society, I argue that we (our society) bound

7. The measure of the most appropriate means to achieve the common good is the man with practical wisdom.

8. If a particular binding social ordering gravely threatens the ability of the society to effectively pursue the common good, the social ordering may give way to necessity and allow the society to alter the social ordering outside of the prescribed means.

ourselves to the constitutional ordering.[9] Our society—we—exercised self-government. Our society made a prudential social ordering decision when it ratified the Constitution. Society intended that decision, embodied in the Constitution, to be binding into the future. Part of that decision was that the original meaning of the text of the Constitution would be binding. This constitutional prudential ordering decision has enabled our society to pursue the common good, which enables members of our society to achieve their end, including members today. Thus, individuals today are bound by the original meaning of the Constitution.[10]

I label the second argument as to why those who adhere to the Aristotelian tradition should also be originalists jurisdiction. It is related to the first. Within the Aristotelian tradition, how authority to govern a society is divided and who is going to make the natural law effective in a society is a prudential question settled by positive law (or tradition). In our society, the constitutional settlement of 1787-1789 determined that "primary" law-making responsibilities would devolve to the legislature while the judiciary would have "secondary" law-making authority. Thus, under the binding constitutional settlement chosen by our society to enable us to pursue the common good, the judiciary's primary role is enforcement of previously

9. Our society elected representatives in 1787-1789 to ratify the document that would constitute the authoritative decision-making structure for our society. The People of our society transferred to these representatives their governing authority. These representatives had the authority to make decisions on how our society would constitute itself because the People transferred to them that authority. Their authority, which originated in the People, was binding in conscience on those living in society because it was constituted to allow the society to strive for and achieve the common good without which those living in the society could not reach their end.

10. Of course, only certain provisions of the Constitution explicitly apply to members of our society who are not governmental officials.

An example of how the first argument works in practice is the Commerce Clause. As discussed below, the lack of authority in the Continental Congress under the Articles of Confederation to regulate international commerce greatly impeded the ability of the newly independent United States to effectively pursue the common good. The states were engaged in trade wars with each other, foreign nations played the states off against each other, and there was no ability to enforce international commercial agreements. The result was that trade suffered dramatically. To remedy this situation—to enable our society to effectively pursue the common good—the Constitution in Article I authorized Congress to regulate interstate and international commerce. This authorization, to be effective, required the cooperation of all states and their members. Without this cooperation, Congress could not regulate commerce and the common good would not be pursued effectively. The members of our society are bound by the Commerce Clause because their purpose of being members of society is to effectively pursue human flourishing which can occur only if the common good is effectively pursued which can only occur if Congress has the ability to regulate commerce. Therefore, to be rational, members of society will abide by the Commerce Clause and Congress's legitimate acts pursuant to the Commerce Clause's grant of authority.

created positive law. The judiciary does not have the authority to "make law" in the primary sense—the office of judge does not have the authority to directly apply natural law norms—but can only interpret and apply the law, including the Constitution. For a judge to act beyond the authority of his office would contravene the authoritative social ordering decision designed to effectively pursue the common good that was binding on the judge and the positive law determination that created the judge's authority in the first instance.

Competence is the last argument. It is based on the distinction in the Aristotelian tradition between legislative and political prudence. The first is possessed by legislators, who in making the natural law effective in their polity, make positive law. The second, the virtue of following the positive law of a polity, is possessed by judges. Judges only possess the first virtue incidentally as secondary law-makers. Thus, it is proper for judges to refrain from legislating in the manner of legislators—that is, directly making the natural law applicable.[11]

Part II will provide a brief overview of the two rival and incompatible philosophical traditions in the West. A subsequent Article of the series will flesh out the traditions.

Part III will begin by discussing the means and extent to which a society may legitimately bind itself to a particular social ordering in order to effectively pursue the common good. Thereafter, Part III will argue that our society, in 1787-1789, bound itself to a particular social ordering through the ratification of the Constitution. Part of this constitutional social ordering was the bindingness of the original meaning of the text of the Constitution. Lastly, in Part IIIC, I will argue that, assuming the tenets of the Aristotelian tradition, members of our society are bound by the original meaning of the Constitution.

II. THE RIVAL AND INCOMPATIBLE PHILOSOPHICAL TRADITIONS

A. Introduction

In this Part I will provide a brief overview of what I am claiming

11. The purpose of this series of articles is to defend the bindingness of the original meaning of the Constitution on those alive today, especially judges. While the framework I develop below is suggestive of the manner by which the original meaning of the text of the Constitution is binding, I will avoid the question. The question of what form of originalism is entailed by my articles is a large and complex topic which these articles and their author are unequipped to handle at the present time. However, in an article to follow the series, I will set forth the method of constitutional interpretation that follows from the view of the nature of law held by the Aristotelian tradition.

are, broadly speaking, the two rival and incompatible philosophical traditions in the West. The Aristotelian tradition is the older tradition. It began with the Greeks, was received into the Roman world, and after a time was to some extent synthesized by the Church Fathers with Christianity. Saint Thomas Aquinas incorporated Aristotle's thought into Christian philosophy. The tradition was carried up to the Enlightenment by the Scholastics, both Catholic and others, such as the Anglican divine Richard Hooker. In Catholic Europe, in some Protestant countries such as Scotland, and in America, the tradition continued with more recent exponents including Heinrich Rommen, Jacques Maritain, Yves Simon, John Finnis, and Robert P. George.[12] The second, the Enlightenment tradition, arose in reaction to the first. In making this distinction between two traditions in Western Civilization, I rely on scholars such as Alasdair MacIntyre,[13] Servais Pinckaers, O.P.,[14] Romanus Cessario, O.P.,[15] Heinrich Rommen,[16] and Leo Strauss.[17] In what follows I will briefly define the general characteristics of each tradition.

B. The Central Western Philosophical Tradition

The Aristotelian tradition, broadly speaking, has six characteristics which, for purposes of this Article, differentiate it from other schools of thought—and especially theories of man and society that have arisen since the Enlightenment—and which serve to ground my defense of originalism.[18] These characteristics are: (1) man is created with a purpose or end; (2) he is essentially rational and not egocentric;[19] (3) man can correctly discern his end through human

12. I recognize that there is disagreement among proponents of modern natural law theory. *See, e.g.*, RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY 5 (1987).

13. ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed., 1984) [hereinafter MACINTYRE, AFTER VIRTUE].

14. SERVAIS PINCKAERS, O.P., THE SOURCES OF CHRISTIAN ETHICS ch. 10 (Sr. Mary Thomas Noble, O.P. trans., 3d ed. 1995).

15. ROMANUS CESSARIO, O.P., INTRODUCTION TO MORAL THEOLOGY (2001).

16. HEINRICH A. ROMMEN, THE NATURAL LAW (Thomas R. Hanley trans., 3d ed. 1998) (1936) [hereinafter ROMMEN, NATURAL LAW]. *See also* HEINRICH A. ROMMEN, THE STATE IN CATHOLIC THOUGHT 24–27 (1945) (providing a comprehensive history of the Aristotelian tradition's understanding of the nature of society).

17. LEO STRAUSS, NATURAL RIGHT AND HISTORY 7 (1953).

18. Here I will provide a brief summary of the Aristotelian and Enlightenment traditions that is to be fleshed out in a subsequent Article in the series.

19. A further gloss on this is that man's reason guides and orders his will toward what is truly constitutive and good. One's non-rational will does not determine an object to pursue and then employ one's reason to determine the means to attain the end as is held true by the Enlightenment tradition.

reason; (4) man's nature is political (or social) and thus finds its fulfillment in society; (5) the body politic or society is a natural outgrowth of man's political and rational nature; (6) society is constituted to help the individuals that make up the body politic achieve human flourishing by securing the common good of the community.[20] While different adherents to the tradition from different eras and different cultures emphasize certain characteristics over others, and later thinkers often expand upon and more fully elucidate the thought of prior proponents,[21] the central characteristics of the tradition are maintained throughout.

The rough outline of the tradition set down in the following pages is intended to gather and record the main lines of thought, common claims, and characteristics in the thinkers.

1. Rational Man With a Purpose

In the Aristotelian tradition man is understood to have a purpose. This teleological view of the nature of man arises from man's soul or form. The Aristotelian tradition posits that man, like all corporeal beings, is composed of the unity of a form and a body. The form directs the being's development toward actualization of the being. Thus, to become a fully actualized being—to move from potentiality to act—man must pursue the actualization of his rational soul. "In this way," writes Heinrich Rommen,

> from the content of the primary norm, "strive for the good," arises the norm, "realize what is humanly good," as it appears in the essential form of man. The supreme norm of morality is accordingly this: Realize your essential form, your nature. The natural is the ethical, and the essence is unchangeable.[22]

In the Aristotelian tradition our ultimate end is communion with God. Our immediate end is happiness in this world. Happiness is doing that which man does *qua* man. Man is distinguished from all other creation (other than incorporeal beings) because of his ability to reason.[23] Man's end in this world, then, consists of acting rationally

---

20. A further corollary to this proposition is that how a particular society is ordered under particular circumstances is a prudential question not susceptible to deductive reasoning.

21. For an example of the development of a body of thought in the analogous area of religious doctrine, see JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (6th ed., University of Notre Dame Press 1989) (1878).

22. ROMMEN, NATURAL LAW, *supra* note 16, at 15.

23. "And God created man to his own image: to the image of God he created him."

excellently.

Unlike modern thought which is, at most, agnostic about the ability of human reason to discern the good and act upon it, the Aristotelian tradition posits that what is distinctive about man is his ability to discern the nature of reality through his reason. We are made in such a manner that we can know the essential nature or form of beings, including ourselves. Men, like all other corporeal beings, consist of both a form and matter. The form is what makes a being that type of being and not some other type of being. The form directs the being to its end. Man can know and act to achieve his end. Human reason can discern man's end and the essential natures of other beings. On this reading of man's nature, actions of the rational intellect precede and direct those of the will. One's reason identifies some good worthy of pursuit that one places before one's will, and then one's will pursues the good. The nominalist character of the Enlightenment tradition denies all of this.

If we know the broad outline of man's end—acting rationally excellently—of what does this particularly consist? The Aristotelian tradition answers this question by looking to how we answer the same question in other areas of human endeavor. Elsewhere, when there is a human activity, the measure of excellence in that activity is the master of the activity. Speculative thought and inquiry in the Aristotelian tradition is guided by analogy to crafts.[24] One begins as an apprentice to a master of the craft, trusting the master to guide one to the fullness of knowledge from which vantage point one can survey the field of the craft and properly judge work within the craft and one's own progress in the craft. Similarly, regarding virtue, which is what is required to act rationally excellently, we look to the virtuous man as the measure. Man's end is happiness, which is acting rationally excellently, which is acting with virtue.

The acquisition of virtue is like the acquisition of any habit. One must, first, perform acts consistent with virtue and after the habit has formed (or during the process), one comes to realize that these virtuous acts are valuable in themselves, and then one decides to pursue the acts because one loves acting virtuously. The more virtuous one becomes the easier it becomes to resist corruption:

Gen. 1:27.

24. ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION 61–66 (1990) (arguing that St. Thomas adopts Aristotle's use of the analogy to crafts where one must first become a master of the craft before one can properly judge work in the craft).

distraction from the pursuit of the good. But the converse is also true. One can acquire a vice by continuously performing vicious acts. One then becomes more and more corrupt, less able to resist the vice and less able to pursue virtue. One's natural aptitude for virtue plays a role here. If one is naturally apt to virtue, one is more likely to become virtuous quickly and more likely to take longer to become vicious.

Virtue gives a person the ability to perform an activity excellently. Different virtues enable persons to perform different activities excellently. For present purposes, there are two virtues of note: regnative or legislative prudence, and political prudence. The first, possessed by legislators, is "the capacity to make and impose laws."[25] Regnative prudence allows the legislator to issue laws that order society toward the common good. Political prudence, by contrast, is the virtue of directing oneself in accord with the commands of superiors.[26] Judges possess this virtue more abundantly than regnative prudence.

The Aristotelian tradition subscribes to the proposition that man has an end and that human reason can discern the end. As discussed next, this view of the nature of man justifies the imposition of duties on the individual (thereby circumscribing his autonomy) regardless of that individual's consent.

2. *Man is Naturally Political*

An essential axis of the Aristotelian tradition is that man is naturally social. This belief is built on a number of bases. I will lay out two broad, but here truncated, arguments taken from the Aristotelian tradition as to why one can know this is true.

First, one must ask what is man's end? As noted immediately above, man's end in this world is happiness. No one person, however, can achieve happiness by himself. Everyone needs society to enable him to pursue excellence. Society is necessary to provide the material, spiritual, and cultural background that makes the pursuit of excellence possible. If one lived in isolation one would spend all of one's time simply acquiring the bare necessities of material existence. One would have no opportunity to pursue religion, the arts, leisure, and other goods that constitute human flourishing. For this reason men

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

26. *Id.*

chose to enter into society.[27] Society is the rational outgrowth of the pursuit of mankind of its end.

People are not born virtuous, but we are all born with the capacity for virtue—some more, some less. We need education and training to enable us to achieve virtue. For some, the guidance of parents is enough to lead them to virtue. For many, however, something more is needed. That something is effective government intervention to prevent the individual from harming himself and/or others, and to help the individual continue his advancement toward his end. The level of governmental oversight depends on the circumstances of the society and the individual. Thus, to achieve our ends, many of us need the controls society can offer without which we could not achieve happiness.[28]

Men are born into community with other human beings. We are, if all goes well, born into the company of two parents (and very often share an extended family and broader community). In this (hopefully) loving and nurturing environment we are cared for when we are at our most vulnerable.[29] We are given all that is necessary to allow us to become fully human. But man's social nature is not only expressed from the baby's perspective. The parents of a child, out of love for each other and for their new infant, maintain their community. We all, when we become parents, express our social nature by creating a larger and more perfect community for the purpose of creating more perfect people.

Second, consider those goods everyone seeks thinking that such goods will bring happiness. We all seek love, friendship, companionship, and other goods that are only possible (in their fullest

---

27. When I say men chose society I do not mean that each individual today consciously chooses.

28. Society has a duty to protect individuals' pursuit of their goods and the social pursuit of the common good from those persons who remain or become vicious despite the best efforts of their parents and society to inculcate virtue. In one of his sermons, Martin Luther King, Jr., made this argument:

> There are always those who say legislation can't solve the problem. There is a half-truth involved here. It is true that legislation cannot solve the whole problem. It can solve some of the problem. It may be true that morality can't be legislated, but behavior can be regulated. It may be true that regulation cannot change the heart, but it can restrain the heartless. It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important.

Martin Luther King, Jr., Sermon to St. Paul's Church Cleveland Heights, Ohio (May 14, 1963) *available at* http://www.stpauls-church.org/archives/sermons/king05141963.html.

29. For a discussion of how our dependence leads to the conclusion that humans need virtues see ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999).

sense) in a community with other human beings. In addition, the fact that we (human beings) have the *capacity* to seek and obtain things like love and friendship suggests that we are made or exist *in order to* seek and obtain them.

Mankind also has the capacity to do other things that are only necessary or possible in community with other men. For example, speech is necessary to communicate ideas about reality to others in order to allow everyone, as a collective, to order their lives accordingly. Our bodies are made for communion with other humans, and we have the wish to experience such communion.[30] One prominent example of this built-in physical ability for communion is sexual intimacy. Men and women have bodies suited to bringing them physically, emotionally, and spiritually together, so perfectly that they can create, together, another complete human being.[31]

Acts that are "other-directed" and the need to do such acts point to a social nature. Yves Simon has noted that men have "generous" needs: the need to "act by way of superabundance."[32] We fulfill these generous needs by giving to others. We give money and other material gifts to those in need. We give comfort to those who are sorrowful. We give our presence (visit) to those who are shut-in because of sickness or imprisonment. Generous needs are social needs that one can only fulfill in a community of other people.

Nearly all of mankind has lived and lives as a social being. We live in families, towns, and states. We have social intercourse with countless other individuals throughout our lives.

In sum, the different characteristics of human beings point toward a social nature. Without society the individual cannot achieve the happiness he seeks. Further, many of our innermost needs and longings can only be fulfilled in a community of other humans.

3. *Society as a Moral Entity Pursuing the Common Good Through Time*

Society is the natural (rational) outgrowth of man's social nature. But it is more. Society is also (or at least can be depending on the circumstances of how a particular society arose) the rational

30. *See, e.g.*, KAROL WOJTYLA, LOVE & RESPONSIBILITY (H.T. Willetts trans., Ignatius Press 1993) (1960) (discussing the nature of human sexuality and sexual communion).

31. No other human activity has the capacity to bring people so closely together making them "two in one flesh." Gen. 2:24.

32. YVES SIMON, A GENERAL THEORY OF AUTHORITY 24–25 (1962) [hereinafter SIMON, AUTHORITY].

outgrowth of man's pursuit of his end. The prominent modern Thomist Jacques Maritain has stated that: "[I]n a society the object is a task to be done or an end to be aimed at, which depends on the determinations of human intelligence and will and is preceded by the activity . . . of the reason of individuals."[33]

The family unit today remains the basic unit of society. From clans and tribes consisting of related families the larger society expanded into the city-state, and from there the modern nation-state was born. The twentieth century has seen the establishment of the United Nations and calls for a global state.[34] At each step along the way towards the nation-state (and discussion regarding the global state), the needs of men—spiritual, intellectual, and material—compelled the further expansion of society. Each larger unit of society was better able to provide for its members' wants and needs and better enabled its members to reach their end. Spiritually, culturally, militarily, and economically, the nation-state is better able to serve its citizens than the preceding forms of social organization. The city-state, prior to that, was better able than previous social arrangements to provide, through the division of labor, for the countless human goods each member of the city needed if he was to reach his end. For example, in a family there is no person specialized in the more basic arts of carpentry and blacksmithery, much less the more refined arts one can obtain only through extended periods of study, such as artistry or philosophy. The tribe cannot provide for all of the spiritual needs of its members as well as a nation-state, with a whole section of the population dedicated exclusively to religion, theology, and the religious needs of its citizens. The nation-state can provide resources of manpower and material for purposes of defense undreamt of by any other form of social organization.

The purpose of society is to help the members of the society, in collective action, achieve their individual goods and common goods, which together is the common good. Because of its purposeful existence, one can judge society's actions as good or bad by how well or badly they advance the society to the common good. Jacques Maritain wrote on this subject:

> The notion of moral or collective personality—in which "personality" has a *proper analogical* value—applies to the *people* as a whole in a genuine manner: because the people as a whole (a

33. MARITAIN, MAN AND THE STATE, *supra* note 3, at 3.

34. *See id.* at 188–94.

> natural whole) are an ensemble of real individual persons and because their unity as a social whole derives from a common will to live together which originates in these real individual persons.
>
> Accordingly, the notion of moral or collective personality applies in a genuine manner to the *body politic*, which is the organic whole, composed of the people.[35]

Society, on the understanding of the Aristotelian tradition, is a moral actor capable of being judged accordingly.

The common good is the good of the society. Pope Pius XII, in his 1942 Christmas Broadcast directed against the Nazis, defined the common good in these terms:

> [T]he right to maintain and develop physical, intellectual, moral life, and in particular the right to a religious training and education; the right to worship God, both in private and public, including the right to engage in religious works of charity; the right, in principle, to marriage and to the attainment of the purpose of marriage, the right to wedded society and home life; the right to work as indispensable means for the maintenance of family life; the right to the free choice of a state of life, and therefore of the priestly and religious state; the right to the use of material goods, subject to its duties and social limitations.[36]

The common good includes the basic material, cultural, and religious necessities that enable individuals to pursue their goods. According to John Finnis, the common good includes "a set of conditions which enables the members of a community to obtain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other."[37] The individual goods of the members of the society are a part of the common good, but not its entirety. The common good is also the united action of all of the members of the community acting together. The farmer and art professor are both acting for the common good when, in accord with the order of society, each contributes to society: the farmer contributes food while the professor provides the ability to appreciate beauty. As St. Thomas wrote:

> it is not possible for one man to arrive at a knowledge of all these

35. *Id.* at 16 n.11.

36. Pope Pius XII, The Rights of Man, Christmas Broadcast 1942, *in* SELECTED LETTERS AND ADDRESSES OF PIUS XII 290 (G.D. Smith trans., Catholic Truth Society, London, 1949).

37. FINNIS, NATURAL LAW, *supra* note 6, at 155.

> things by his own individual reason. It is therefore necessary for man to live in a multitude so that each one may assist his fellows, and different men may be occupied in seeking, by their reason, to make different discoveries—one, for example, in medicine, one in this and another in that.[38]

Both are acting together for the good of the community. Both are benefited by the other and by the countless other members of society each providing their part to the common good of everyone.

Society is a *transtemporal* entity. Thomas Aquinas wrote that "the community of the state is composed of many persons; and its good is procured by many actions; nor is it established to endure for only a short time, but to last for all time by the citizens succeeding one another."[39] Society is composed of the people of the society, in succeeding generations, *together* pursuing the common good of all.

A majority of the members of a society at one point in time is not the essence of a society, but depending on how a society orders itself, one temporal majority may make decisions on how the society shall pursue the common good—decisions that are binding on future generations. The governance and ordering of society in its pursuit of the common good involves the complex interrelationship of temporal majorities with all members of the society: past, present, and future. The Anglican Divine, Richard Hooker, was the last major English scholastic. His understanding of society, taken from the Aristotelian tradition, was of a transtemporal entity pursuing the common good of all of the members of society through time. He wrote: "[T]he act of a public society of men done five hundred years hence standeth as theirs who presently are of the same societies, because corporations are immortal; we are alive in our predecessors, and they in their successors do live still."[40] Society is an entity moving through time that encompasses the collective pursuit of the members of that society of the common good: members from the past, present, and future.

In the Aristotelian tradition, the state, which oversees the parts of the society and coordinates them toward the common good, is itself good. It is good because it allows man to reach his end.[41]

---

38. ST. THOMAS AQUINAS, ON THE GOVERNANCE OF RULERS (DE REGIMINE PRINCIPUM) 34–35 (Gerald B. Phelan trans., Sheed & Ward 1938).

39. ST. THOMAS AQUINAS, SUMMA THEOLOGICA I–II, q. 96, a. 1 (Fathers of the English Dominican Province trans., Burns, Oates, & Washbourne Ltd. 2d ed. 1927).

40. RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 194–95 (1969) (1593).

41. Government is not a necessary evil, as in the view of the Enlightenment tradition. James Madison expresses the Enlightenment's view well in Federalist 51. There, Madison

Yves Simon is the best exemplar for the Aristotelian tradition's position. Government is necessary because of defects in members of society (e.g., lack of virtue or knowledge), but more importantly, it is also necessary to provide the authority required to coordinate members of society to the common good. This "essential function" of government results from no defect in the members of a society but from the nature of society and individual human beings. Even a society composed of perfectly virtuous members needs authority to determine, for example, which of a number of *equally rational* means to an end that is part of the common good the society shall choose. Simon concludes that "authority is neither a necessary evil nor a lesser good nor a lesser evil nor the consequence of any evil or deficiency—it is, like nature and society, unqualifiedly good."[42]

If a society is going to achieve the common good it *must* make certain ordering decisions about how the members of the society will interact. For instance, the society must ensure that a (mostly) just internal order is in place. It must create a legal system with positive laws to enforce an internal order and make the natural law effective in the society. Rommen has argued along these lines:

> "The natural law calls, then, for the positive law. This explains why the natural law, though it is the enduring basis and the norm of the positive law, progressively withdraws, as it were, behind the curtain of the positive law as the latter achieves a continually greater perfection."[43]

The emphasis on order arises from the nature of the common good which is "nothing else than the unification of men for the purpose of performing some one thing in common," as St. Thomas stated.[44] The

---

is concerned with ensuring that the governmental structure to be created by the Constitution is suited to man's nature and will therefore endure. He states: "If men were angels, no government would be necessary." THE FEDERALIST NO. 51, at 348 (James Madison) (Heritage Press, 1945). In other words, if men were perfectly virtuous, no government would be necessary and government is only necessary because of man's vicious nature. This was John Locke's view. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION §13 (2003) [hereinafter LOCKE, TWO TREATISES] . Government is needed to restrain men from harming one another.

42. YVES R. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 59 (1951).

43. ROMMEN, NATURAL LAW, *supra* note 16, at 230.

"Positive law," wrote Maritain,

> deals with the rights and duties which are connected with the first principle, but in a contingent manner, by virtue of the determinate ways of conduct set down by the reason and the will of man when they institute the laws or give birth to the customs of a particular society, thus stating of themselves that in the particular group in question certain things will be good and permissible, certain other things bad and not permissible.

MARITAIN, MAN AND THE STATE, *supra* note 3 , at 99 (emphasis omitted).

44. ST. THOMAS AQUINAS, CONTRA IMPUGNANTES DEI CULTUM ET RELIGIONEM iii.

lack of order makes impossible attempts by individuals to secure the basic human goods. Saint Thomas concurred: "If we remove order from created things, we remove the best they have. For though the individual beings are good in themselves; joined, they rise to the highest goodness because of the order of the universe."[45] By securing a just order the society ensures that its members can carry on their daily work of securing the basic human goods unmolested. To achieve a just order, the society will impose standards of conduct on its members and enforce those standards through social institutions. Relatedly, a society must ensure its security against external threat. For obvious reasons, if a foreign invader conquers a society, the members of the conquered society can no longer pursue their good together. In sum, a society must coordinate the activities of its members to ensure that material, cultural, and spiritual necessities are provided to enable the members to achieve their ends.[46] The specific ordering arrangements to achieve the common good each society will make are heavily context dependent. They call for *practical wisdom* to enable the authoritative decision-maker of the society to rightly order the society *under the circumstances*.[47] A society can order itself

45. 3(1) ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES 69 (Vernon J. Bourke trans., 2001).

46. The society must attempt to ensure that its members are virtuous. Like the first goal of a just internal order for society, this too is a prudential matter requiring practical judgment. A society can build schools to help parents educate their young. A society could enact more or less stringent "morals" regulations depending on how virtuous the character of the members of the society already are. A society surrounded by enemies may choose to have a period of military training for all of its men to ensure that the military virtues, such as courage, are present in its soldiers. To achieve virtue, a society must also attempt to ensure that the basic necessities of human life are available in sufficient quantities to permit leisure to pursue virtue and the goods necessary to act virtuously. There are countless avenues that a polity can take that are dependent on the concrete circumstances of the society itself.

47. Because it is imperative that a society take into account the circumstances and concrete nature of itself and its members, one cannot lay out, *a priori*, how a particular people should organize itself. It was thus a flaw, as Edmund Burke observed, of the French philosophes and other radicals that they attempted to posit mechanical rules of governance that were applicable to all peoples and times. "The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*." Edmund Burke, *Reflections on the Revolution in France, reprinted in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 453 (Peter J. Stanlis, ed. 1963) (1790). The philosophes sought to organize society, down to minute detail, through abstract thought. However, because of the distinction between necessary and contingent matters and the corresponding distinction between speculative and practical reason in the Aristotelian tradition, how a particular society is to be organized is, within broad parameters, a matter of prudential judgment best performed by men with practical reason. For a discussion of these distinctions see ARISTOTLE, THE NICOMACHEAN ETHICS §§ 1140, 1143b; (Harris Rackham trans., Wordsworth Editions Ltd. 1996); AQUINAS, SUMMA, *supra* note 41, at I, q. 79, art. 11,12, I–II, q. 90, art. 1, I–II, q. 91, a. 3, I–II, q. 94, art. 2, 6, I–II, q. 95, art. 2 (Fathers of the English Dominican Province trans., Burns, Oates,

under various forms of government, various governmental structures, and various legal regimes.[48] It can choose from different manners of ordering economic life as well as private life. This is the process of making the natural law effective in the polity. As Robert George has stated, one

> cannot identify a uniquely correct scheme of . . . regulation which can be translated from the natural law to the positive law . . . . A number of different schemes—bearing different and often incommensurable costs and benefits, risks and advantages—are consistent with natural law. So the legislator must exercise a kind of creativity in choosing a scheme. He must move, not by deduction, but rather by an activity of the practical intellect that Aquinas called *determinatio*.[49]

Without a social ordering, a society cannot achieve the common good. To make a social ordering effective—to enable the society to effectively pursue the common good—the members of the society must adhere to the social ordering. Simon has argued along these lines that "[t]he existence of a plurality of genuine means in the pursuit of the common good excludes unanimity as a sufficient method of steadily procuring unity of action."[50] As Finnis has put it: "Now there is no need to labour the point that unanimity about the desirable solution to a specific co-ordination problem cannot in practice be achieved in any community with a complex common good."[51] This leaves only an authoritative decision-maker making ordering decisions toward the common good. Members of society will abide by societal prudential ordering decisions because the members' reason and purpose for being a member of society was to achieve happiness, and without the common good, they cannot achieve happiness and their purpose for social membership would be thwarted. As a result, rational members of society are rationally bound to authoritative determinations regarding social ordering to achieve the common good.

Societies, when they order themselves to effectively pursue the

---

& Washbourne Ltd. 2d ed. 1927).

48. For example, rule by one or a few of wisdom is prudentially sound when the bulk of the population lacks the ability to effectively govern and there are mechanisms in place to properly educate and inculcate virtue in those bound to rule. The Middle Ages come to mind as such a period. The vast bulk of the population of Europe was, although by most accounts virtuous, ill-prepared to take on the mantle of governing a society. The ruling houses and families educated their young and, in the ideal, inculcated the Christian virtues in the future rulers.

49. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 108 (1999).

50. SIMON, AUTHORITY, *supra* note 34, at 47.

51. FINNIS, NATURAL LAW, *supra* note 6, at 232–33.

common good, usually create offices whose purpose is to oversee either portions of society—such as the head of an administrative agency or a judge or a town mayor—or the entire society—such as a king or president or governor—and their respective pursuit of the common good. Such authoritative offices are necessary because individuals and subsidiary entities in the virtuous pursuit of their own goods may pursue goods, or pursue them in such a manner that society's overall pursuit of the common good is harmed.[52]

The offices—their duration, scope, jurisdiction, form, etc.—and the authority of the officers, are a positive creation and are not themselves a requirement of the natural law. There is no natural law norm that requires the lodging of official authority in a particular person or institution. As a result, the officers of a particular society receive their authority from that society's prudential social ordering decision. Further, the officers may not exceed the bounds of their office's authority in the name of the natural law because to do so would undermine the efficacy of the society's prudential social ordering decision of which the limited authority of the office was part.

In summary, if one understands society to be a transtemporal, moral entity, as do those who adhere to the Aristotelian tradition, the society, through its duty and authority to effectively pursue the common good, may impose obligations on members of the society to which those members have not consented. Further, depending on the manner in which a society organizes itself, it may make certain social-ordering decisions binding on both present and future members of the society.

52. This can occur for a number of reasons. First, an individual's or subsidiary entity's good may conflict with the common good. For example, a father may want his son to attend college and engage in the profession of his choice, whereas, because of a dire war, the society needs the son for defense which may entail the son's death, and the responsible officer conscripts the son for that purpose. The father in this scenario rightly wills his son's happiness. However, the officer, who has the care of the entire society's common good, has the authority to, and rightly does so, conscript the son for service of the common good.

Second, different individuals and subsidiary entities, in their pursuit of their respective goods, may clash. An officer who has the care of the common good must have the authority to coordinate their respective pursuits such that the pursuits are as effective as possible and consistent with the common good.

C. The Enlightenment Tradition

The rise of the ideas advanced by the Enlightenment tradition[53] is due, in large part, to the rise of pluralism, first religious and then otherwise.[54] Following the Protestant Reformation, rulers and theoreticians sought alternative ideas to justify the continued place of social coercion in the lives of its citizens.[55] For a number of reasons, the prior Aristotelian understanding was no longer suitable. First, many of the Reformers' doctrines were at odds with the underlying premises of the Aristotelian tradition. John Calvin and his view of man's nature was typical of the Reformers.[56] Man, according to Calvin, is so utterly corrupted by sin (from the Fall) that his reason is unable, without God's grace, to discern his proper end; man cannot discern his telos and thus cannot achieve it. Second, the Reformers had a natural aversion to any set of ideas as strongly associated with the Catholic Church as were those of the Aristotelian tradition. Martin Luther called Aristotle "that buffoon who has misled the Church."[57]

The rise of religious pluralism occasioned by the Reformation destroyed the unity of belief in the philosophical foundation of the claims previously made as to why society and its authority were justified. No longer was society a natural instrument of the perfection of its members. Instead, at most, society was the instrument by which men's base passions and corrupted reason were restrained, allowing men to live in relative peace to pursue their individual goals.

Religious pluralism required that society become agnostic regarding competing views of the (religious) good held by individual members of society. The Hundred Years War exhausted Europe and made apparent to everyone the ineradicable fact of religious pluralism. From that point on, instead of attempting to restore the previous unity of belief (both religiously and philosophically), society

---

53. Those thinkers whom one could place in the Enlightenment tradition form a very broad and diverse group. These thinkers have many common attributes that are characteristic of the Enlightenment tradition as I have been defining it. There are other strains of thought that I am unable to survey that form part of the Enlightenment tradition.

54. MACINTYRE, AFTER VIRTUE, *supra* note 13, at 53–55.

55. One need only look to Ronald Dworkin's idea of law as integrity found in LAW'S EMPIRE, and moral membership, found in FREEDOM'S LAW. These concepts seek to justify social coercion based on autonomy and equality, not on teleology.

56. *See, e.g.*, MACINTYRE, AFTER VIRTUE, *supra* note 13 , at 53–54.

57. *See id.* at 165. Given this view of man's nature held by the Reformers, it is no surprise that most Enlightenment thought originated in Northern Europe: Hobbes, Hume, Locke, Kant, and the Utilitarians. Most of those Frenchmen who participated in the Enlightenment were either not Catholic and were in fact anti-Catholic, such as Voltaire, or were educated by a very Protestant-like portion of the Gallic church.

would become ever more agnostic regarding religion. Thus at first, the countries in which the Reformers were most successful maintained their own Protestant religious establishments. But as time went on, the principle of individual judgment broke its denominational bonds and forced each society to increasingly restrict the state's interference in religion as ever greater religious pluralism caused the number and level of shared religious beliefs to dwindle. In other words, as different denominations arose with conflicting views on the nature of Christianity, society was forced to relegate the state's religious activity to the remaining areas of social consensus.

The English experience is instructive. A church which began with Henry's break from Rome as a relatively unified entity little differentiated from Rome became, by the time of John Henry Newman, a church which defined its doctrines so vaguely that most Protestant Christians – both high and low church – could adhere to them in good conscience. The Anglican Church and the English State thus ensured sufficient social consensus to avoid civil strife. Those Christians who would or could not subscribe to those vague doctrines continued to be penalized in an attempt to maintain a thin religious consensus. Since the number of such Christians was relatively small, civil peace was not threatened by such penalties.

Gone, however, was the former teleological view of society. No longer was society the instrument by which men were guided to their end. Instead, civil society would maintain a certain order and enable its members to each pursue their individual view of the good. Autonomy and its preservation thus became the source of social legitimacy. Society could act to maintain the individual's ability to pursue his vision of the good and prevent individuals from impeding the similar pursuits of other individuals.

This liberty in religious areas inevitably spilled over into all areas of social reality. What gradually emerged through the Enlightenment was the radical (in the Latin sense of the term) pluralism of modernity. Competing and contradictory views of reality vie with one another for adherents. In the face of ever more radical pluralism, society retreated completely from the sphere of religion. By now, religious pluralism did not consist of merely different Christian denominations; it now included agnostics who thought very little about religion, and atheists, some of whom believed that religion was positively harmful. In such a society the state could not, without causing unending civil strife, enter the arena of religion.

But even more importantly, the state attempted to retreat from

affirming any view of the good, even in non-religious terms. Scholars and others began to urge that society had no role to play in affirming any one view of the good. Thus, the level of regulation of individual lives by society began to decline. Freedom of speech became the norm. Restrictions on sexual mores began to fall. These and other movements within the law originate in a rejection of any social role in the formation of the individual toward one view of the good and its replacement with the affirmation of the pursuit of maximal individual autonomy.

Obviously the tale I have been telling is not as neat and clear as I have described it. Different countries, and different regions within those countries, moved at different rates towards an Enlightenment ethic. Some have yet to arrive. Persons within certain religious traditions, especially orthodox Christians and Jews, still openly reject the tenets of the Enlightenment tradition. Also, in many countries dominated by the Enlightenment, the laws and customs of the countries reflect the uneven movement away from the former tradition. For instance, although most Americans are rooted in the Enlightenment tradition, most also continue to affirm a view of the nature of marriage at odds with the Enlightenment tradition, privileging it over other social relations. Our society also, for example, affirms the equal dignity and worth—a specific view of the good—of individuals regardless of color through antidiscrimination norms enforced through the law.

Although the rise of religious and other pluralism provided the forum for the rise of the Enlightenment tradition, the ideas that became dominant in the Enlightenment have their origin much earlier. Indeed, the seeds of the Enlightenment were sown during the height of Aristotle's influence in the West. A contemporary of St. Thomas, William of Ockham, contrary to St. Thomas' and Aristotle's teaching of the essential nature of man, argued that there are no universals; there is only the singular.[58] William advocated what is known as nominalism. Unlike Aristotle, for example, who posited that there is a form or essence of tree that each tree has, and that the essence of the tree directs its growth and development to its natural end, William

58. ROMMEN, THE NATURAL LAW, *supra* note 16, at 51–55. *See also* ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY 119 (2d ed. 1996) (discussing Ockham's thought and its divergence from the Aristotelian tradition); JOSEF PIEPER, SCHOLASTICISM: PERSONALITIES AND PROBLEMS IN MEDIEVAL PHILOSOPHY 147–51 (1960) (describing the rise of nominalism).

urged that the only thing that is real is the singular tree, and that generalizations of "tree" are nothing more than the arbitrary categorization of reality; nothing more than the actions of arbitrary will.[59]

William's rejection of universals further caused him to reject any idea of a telos, and thus a concept of natural law based on anything other than God's (now arbitrary) will. Since man does not have a telos, he cannot discern his purpose using reason. Luckily for us, argued William, God has revealed His Will to us through Revelation, but that Will is arbitrary and can change what is right and wrong as He sees fit.

Given the framework set out above, we can place Locke, Rousseau, and Rawls in a context that gives broader meaning to their writings. First, they rejected the Aristotelian view of man as having a telos. Consequently, their common starting point of reflection is a state of nature. Instead of looking at man-as-he-should-be they sought man-as-he-is. For Locke, man-as-he-is is one who seeks to protect his property, broadly conceived to include life and liberty. Rousseau argued that man, for self-preservation, entered society. Additionally, Rawls conceived of man as a radically separated, self-interested individual and constructed a model of society upon that premise.

These writers, reacting to a pluralism which had shattered the previous adherence to Aristotelianism, also sought to ground social obligations in a view of the nature of man that, they believed, even those with divergent religious and philosophical beliefs all could agree was accurate. Stated differently, as increasing pluralism made consensus impossible on the previously acceptable specific grounds (man has a purpose and is rationally able to discern that purpose), liberal theorists sought to justify social obligation on broader, more general grounds (man is self-interested). Locke, Rousseau, and Rawls, therefore, sought to argue from the premise that man was self-interested.

By rejecting a teleological view of man, these theorists also rejected Aristotle's view that man's reason is sufficiently strong to discern his proper end. The justification for society was no longer that society would perfect its members, but rather that each individual's self-interest required that he live in a society to help satisfy that self-

59. This fits well with Kant's attempted synthetic dialectic. *See* ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY 190–98 (2d ed. 1996).

interest. Society, under this view, no longer had the authority to impose any vision of the good on its members because its role was now circumscribed by self-interest unconstrained by any view of the good.[60]

Second, Locke, Rousseau, and Rawls followed Hume and the nominalist position by positing that will precedes reason, and that reason is nothing more than the servant of the will.[61] If one man's characterization of something as good is in conflict with that of another, where both characterizations are the result of an arbitrary choice of will, under the nominalist position there is no basis in reason upon which to choose whose characterization is correct. Only force (or an appeal to the Divine Lawgiver) can settle the dispute.

If everyone in a polity is equally free and they have equal access to knowledge of the truth, there is no unarbitrary method to choose between the choices of two or more of the members of the polity. However, since the members of the polity entered the polity to preserve themselves and their property, and a choice must be made if the polity is to serve its preservative purpose, counting heads—the greater *force* of *will*—serves as the only permissible method to determine the course the polity will take.

The body politic is understood by Locke and Rousseau as a sort-of being in its own right. Locke, for example, stated that upon uniting into a community, the members form "one Body, with a power to Act as one Body."[62] Rousseau stated that the giving of himself, by each individual to the community, "produces a moral and collective body . . . which receives by this same act its unity, its common *self*, its life and its will."[63] This collective being has a will which is motivated, not by reason about the good, but by the simple cumulative weight of individual wills.

---

60. By beginning their analyses with man-as-he-is and adopting the position that one man's view of the good is no more correct than the next man's, Locke and Rousseau arrive at their premise that men are equal. If everyone has the same type of self-interest that justifies the imposition of social authority, and if everyone's ability to reason about his end is equal, men are, in their most important aspects, equal.

61. Rawls, for instance, follows this line of thinking for those behind the veil of ignorance. The individuals behind the veil do not choose based on *reasons*; instead, they choose based solely on the fact of their self-interest. That is, the fact that *they* (as opposed to someone else), as an individual, will hold a certain view of the good or social position in the resultant society. They do not choose based on the fact that the view of the good they will hold, for example, is rationally superior to other competing views.

62. LOCKE, TWO TREATISES, *supra* note 43 , at § 96.

63. JEAN-JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT at bk. I, ch. vi, at 56 (Christopher Betts trans., Oxford Univ. Press 1994).

Within the Enlightenment tradition the primary point of inquiry is the autonomous, willing individual. Further, it is illegitimate to constrain the will of the individual except pursuant to that individual's consent (or some substitute for consent). A passage from a draft of Rousseau's *The Social Contract* illustrates the impact of this thinking on political thought: "Now the general will that should direct the State is not that of a past time but of the present moment."[64] Rousseau saw that the thinking of the Enlightenment led to the conclusion that, like the individual to which the body politic was analogized, only the *current majority* of a society could bind itself, and that any decisions by past majorities could not bind a present majority. Rousseau's and the Enlightenment's disciples in America, such as Thomas Paine, explicitly noted that the Enlightenment premise of the autonomous individual required government by the current majority, unhindered by the decisions of past majorities. Paine wrote: "Every age and generation must be as free to act for itself, in all cases, as the ages and generations which preceded it . . . . [A]s government is for the living, not for the dead, it is the living only that has any right to it."[65] According to Paine, only the will of the current majority may legitimately bind the current majority; any other restraints on the current majority's will are illegitimate.[66]

This rejection of past constraints is found in Locke's chapter on paternal power in the *Second Treatise*, where he discussed the extent and duration of parents' authority over their children.[67] In his conception, parents retain their authority until children reach the age of reason.[68] At that point, the children acquire the ability to follow the natural law of their own accord.[69] It would be unjust, on Locke's account, for parents to continue to exercise authority because to do so would infringe on the equality and freedom that all men have who possess reason.[70] Similarly, any restrictions imposed by past individuals or generations (or majorities of past generations) on the

64. Jean-Jacques Rousseau, *On the Social Contract (Geneva Manuscript), in* ON THE SOCIAL CONTRACT, 157, 168 (R.D. Masters ed. & J.R. Masters trans., 1978) (1762).

65. THOMAS PAINE, RIGHTS OF MAN (1791), reprinted *in* THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 251, 254 (Philip S. Foner ed., Citadel Press 1961).

66. *See also* Adam Smith, *Private Law* (1766), *reprinted in* LECTURES ON JURISPRUDENCE 459, 468 (R.L. Meek et al. eds., Cambridge Univ. Press 1978) ("The earth and the fulness of it belongs to every generation, and the preceeding one can have no right to bind it up from posterity.").

67. LOCKE, TWO TREATISES, *supra* note 43, bk. II, ch. VI.

68. *Id.* §§ 55, 58–59.

69. *Id.* §§ 58–59.

70. *Id.* § 59.

will of present individuals or the present majority are illegitimate.[71] "'Tis true, that whatever Engagements or Promises any one has made for himself, he is under the Obligation of them, but cannot by any Compact whatsoever, bind his Children or Posterity. For his Son, when a Man, being altogether as free as the Father, any act of the Father can no more give away the liberty of the Son, than it can of any body else."[72]

Thus, following the Enlightenment tradition, the radical autonomy of the individual, with the corollary that limits on that autonomy are legitimate only if based on consent, leads to a presentist view of the nature of democracy. Keith Whittington demonstrates that many have argued that "each generation must itself consent to the government. Past generations are thought to be no more able to bind future generations without their consent than some individuals may bind others. The result is a discontinuity in the popular sovereign. Each generation is assumed to be a self-contained unit."[73] Under the presentist view, a passing temporal majority of a society can bind only itself and no future members or generations of that society.[74]

In sum, there arose in response to the Aristotelian tradition a rival and incompatible philosophical tradition. The Enlightenment tradition built on the nominalist ideas whose origin was in the High Middle Ages, and was given impetus by the pluralism caused by the Reformation and the doctrines of the Reformers. Central to the Enlightenment tradition's view of the nature of man is the lack of a teleology and an emphasis on individual autonomy. Consequently, society retreated from affirming a particular vision of the good, and society became presentist in orientation.

---

71. *Id.* § 73.

72. *Id.* § 116.

73. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 149 (1999).

74. Applying the Enlightenment understanding to the strongly inter-generational binding of the proposed Constitution found in Article V, some contemporaries of ratification, such as Jefferson and Noah Webster, objected. Webster thought the constitutional project illegitimate root and branch: "[T]he very attempt to make *perpetual* constitutions, is the assumption of the right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia." Noah Webster, *On Bills of Rights*, 1 AM. MAG., Dec. 1789, at 13–14. There was also Jefferson's famous letter to James Madison objecting to the proposed Constitution on the basis "that the earth belongs in usufruct to the living." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392 (Julian Boyd ed., 1958) (italics omitted). As Jefferson noted at the foundation of our Constitution, "[w]e seem not to have perceived that . . . one generation is to another as one independent nation is to another." *Id.* at 395.

D. Summary

This Part has briefly reviewed the two rival and incompatible philosophical traditions in the West. This Part also concisely explained the origins and characteristics of the two traditions. It is my contention, explained below in Part III, that original meaning adjudication follows from the tenets of the Aristotelian tradition.

III. ORIGINALISM GROUNDED IN THE CENTRAL WESTERN TRADITION

A. Whether and in What Manner a Society May Bind Itself

This section will show that a society may bind itself (including its future members) to a particular social ordering, and that in some circumstances, the binding should be semi-permanent and in written form. In Part IIIB, I will argue that our society did just that through the adoption of the Constitution.

As we have seen, a society, in the Aristotelian tradition, is a collection of people acting together for the common good. The people generally (but not necessarily) live in the same geographic area and have a common language, culture, and history. Essential to the notion of a society is the ordered cooperation of members of the society toward the common good. It is the common pursuit of the common good that is at the heart of society and what makes society transtemporal.

The people who comprise a society utilize their reason to organize the society. Obviously, some societies rely explicitly on reasoned arguments regarding social ordering more than others, and some societies explicitly use reasoned arguments more or less at different stages in their development.[75] But all societies *must* bind their

75. The evolution of Rome's constitution is an example of organic growth with periodic explicit usage of reason. Early on, the tribes that would later become Rome were agricultural and did not need to regularly reconfigure the organization of their society, relying instead on immemorial custom and tradition. The Roman state expanded slowly at first, seeking generally for its protection to expand. Expansion was piecemeal and unplanned. Later, after Rome became the dominant force in the Mediterranean, it began to expand, and its social organization changed in response. The older republican structure could no longer deal effectively with the burdens of governing an enormous empire. The result was the principate.

Great Britain and its present political structure is more often than not the result of an evolving tradition. But this does not mean that the political structure of Great Britain is irrational or did not evolve rationally. At each step of the way where tradition was changed, either the tradition was changed consciously and the change was thus the explicit result of reasoned argument or it was changed unconsciously and the change retained,

members to a social ordering if they are to effectively seek the common good.

The core purpose of any society is to promote the common good of its members. Having an end makes society a moral entity. Like an individual, a society can err when it acts contrary to its end: contrary to the common good. A society that does not provide for defense of its citizens or does not enact and enforce laws for its internal public order has erred, gravely. Few if any members of such a society would have the ability to achieve their individual ends if foreign invaders pillaged the countryside or if anarchy reigned internally because of a lack of law enforcement. Consequently, a society *must* act to secure the common good. To idly sit by while its citizens are deprived of their ability to secure the basic human goods is a grievous sin for a society.

To achieve its purpose of securing the common good, a society must consider the circumstances in which it finds itself. A society composed primarily of peasants should not spend the bulk of its budget on high technology acquisition that no citizen will understand how to or care to operate. A society whose members are highly literate, virtuous, and wise should provide them a say in the governance of the society, and the political structure of the polity must be constructed accordingly. If a society finds itself surrounded by hostile neighbors, it must secure its defense through preparation for that defense, whereas a country with only peaceful neighbors can occupy itself more directly with helping its constituents achieve their goods.

Like an individual who must choose a life-plan if he is to rationally seek human fulfillment,[76] a society must choose how it will organize itself if it is to rationally seek the common good. Regarding the individual, there are numerous goods from which one can choose, but one cannot rationally attempt to pursue all of the goods at the same time and in the same amount. As a result, depending on one's

---

which is also the result of reason though less explicitly so. An example of the former is the Glorious Revolution where, after the experience of the Protectorate and the Restoration Stuarts, the British offered the throne to William of Orange subject to a number of conditions designed to avoid the previous problems. When the prime minister and his cabinet evolved from a true minister of the monarch to a representative leader of the majority of the Commons, the change was found beneficial because it comported with the new reality of political authority in Britain and was retained, and rationally so. The evolution of the office of prime minister is an example of the implicit use of reason in social ordering.

76. For a discussion of the concept of a life-plan see FINNIS, NATURAL LAW, *supra* note 6, at 103–5.

inclinations and gifts, one must order one's pursuit of the goods. For example, if one is suited to be a professor, one will pursue knowledge to a greater degree than leisure. One will continue to pursue the other goods but in a rationally ordered manner to allow one to achieve the goal of being a professor. Similarly with a society. Depending on the society and its circumstances (inclinations and gifts) the society will order its pursuit of the goods that comprise the common good differently.

An individual cannot haphazardly seek now this good and now that good. He must choose a life-plan to organize his pursuit of the basic human goods in a coherent manner that will rationally allow him to pursue and realize human fulfillment *over time*. In a similar manner, a society must choose a life-plan to enable it to coherently and rationally pursue all of the individual components of the common good. A society surrounded by peaceful neighbors cannot rationally choose to expend a disproportionate amount of its wealth on defense to the detriment of the other elements of the common good. The society must prudentially choose to allocate its resources and legally order itself to goals.

This brings us to the role of written constitutions in the organization of a society. One thing that a society does *not have to* do, necessarily, to secure the common good is abide by a written constitution. However, a society *may have to* enact and abide by a written constitution if the circumstances of the society prudentially call for one. In the face of an unjust state the people of a society may wish to have the laws publicly stated to prevent the unjust enforcement of good laws and the enforcement of bad laws.[77] Or a people may seek to prevent the government, its agent, from abusing its power.[78]

The fact that a society may or must enact a binding written

77. Although Rome did not enact a written constitution the story of how it created the Twelve Tables offers an example of the need for written rules governing social life. The plebeians of the society, feeling themselves aggrieved by harsh and erratically enforced laws, secured the writing of the Twelve Tables so that they could have a public declaration of the laws and the manner by which they were supposed to be enforced, to prevent the former injustices.

78. The experience of Great Britain and the Glorious Revolution provides another example of a people requiring of their state a set of written rules—a partial written constitution—to prevent the perceived abuses by former monarchs. William and Mary accepted the conditions attached to the crown offered by Parliament ensuring that the People of Great Britain would rule in a broader area of public life and that the monarch was more circumscribed. This restriction on the monarch's prerogative helped ensure that the difficulties encountered with the Stuarts would be less likely repeated.

constitution is a different proposition than saying that a society may *perpetually bind itself* by that constitution. Certainly, history does not readily produce any examples of such binding. And perpetual binding clashes with a central notion of the Aristotelian tradition, that society is a moral being with an end and capable of erring. To analogize, an individual can bind himself, but he cannot morally bind himself to the point that he is precluded from reaching his end because of (radically) changed circumstances. The end of the individual is what makes him human. Thus, he cannot, consistent with his end, bind himself in such a manner as to thwart reaching his end.

In a similar manner, a society could prudentially find that the common good, because of a people's physical, economic or moral circumstances, requires it to bind itself to a certain social ordering. Although a society can bind itself, there is *always* (at least) the implicit reservation that if the common good of the society is dramatically threatened, the binding will give way to the common good.[79] Again, this result follows from the nature of society. The "essence" or end of society is the common good, which is what makes a collection of individuals a society. To be faithful to its nature, the society must pursue the common good.[80]

At what point the binding must give way, once again, is a prudential judgment - but not one without guidance.[81] A society that binds itself will have certain reasons for doing so. These could include, like in Rome and Britain, the people's desire to restrain the organs of the state from perpetrating injustices. Reasons like these are unlikely to dissipate. Other reasons for binding may change or cease to exist. A society could bind itself to a certain form of government

---

79. *See, e.g.*, Opinion of the Justices of the Supreme Judicial Court, concerning the altering or revising of the constitution in any specific part thereof, 60 Mass. (6 Cush.) 573, 574 (1833), *available at* 1833 WL 3423 (considering whether the mechanism for amendment in the state constitution provided the sole means for altering the Massachusetts constitution, and noting the possibility that "in cases of great emergency, or upon the obvious failure of [the people's] existing constitution to accomplish the objects for which it was designed," the people had the authority to alter or abolish the binding state constitution outside of the mechanism recognized in the constitution).

80. I do not defend any set of criteria by which to determine when a binding social ordering may give way outside of the means for change set by the social ordering itself.

81. A possible example of a prudential judgment regarding the giving-way of a legal obligation in the face of a grave threat to the common good was when Abraham Lincoln suspended the writ of habeas corpus in order to preserve the Union. Lincoln stated: "[T]he whole of the laws which I was sworn to [execute] were being resisted . . . in nearly one-third of the states. Must they be allowed to finally fail of execution? . . . Are all the laws but one to go unexecuted, and the government itself . . . go to pieces, lest that one be violated?" Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 430 (Roy P. Basler et al. eds., 1953).

because the vast majority of its citizens were not trustworthy enough to govern the society, and those governing and choosing to bind (and framing the governing document) the society were men of practical wisdom. The people of the society may one day become capable to govern in their own right and agitate for that prerogative- in that case, the former binding should give way to allow them some say in governance.[82]

At base, while a certain form of state may work for a given society under a given set of circumstances for a period of time, if the society changes so radically that the original mode of governance prevents effective pursuit of the common good, a new one should arise to enable the society to pursue the common good. This is equally true of political systems that do and do not purport to bind a society to one political form; the difference lies in the gravity of the threat necessary to justify a change to the social ordering—the enormity of the change in social conditions preventing the state under the current social ordering from achieving the common good. Some systems only bind themselves loosely, so that the next time the authoritative decision-maker determines the binding no longer serves its purpose it may change or eliminate the binding. Great Britain's Parliament is empowered to change the constitution at its whim (although it does not do so lightly).[83]

Our society has imposed two important kinds of bindingness on itself, its members, and agents through a written Constitution. The first is the strong-bindingness associated with the Constitution. Through the requirements of Article V our society has determined that certain decisions regarding social ordering require a large

82. In a society which has bound itself there are a number of considerations that it must take into account prior to a decision to abandon the binding. These are prudential considerations that weigh heavily against abandonment. The foremost is, obviously, stability, or rather, the instability and damage to the order of the society that abandonment would cause. Saint Thomas discussed how order is of paramount importance to any society because without order it is impossible for members of the society to pursue the basic human goods. He stated: "[T]he welfare and safety of a multitude formed into a society lies is the preservation of its unity, which is called peace . . . . The chief concern of the ruler of the multitude, therefore, should be to procure the unity of peace." AQUINAS, DE REGIMINE, *supra* note 40, at ch. 2 § 17.

A society which, at one stage in its development, was suitable for a more socialist economic system may, at another, be radically hindered by that same system from achieving the common good. Since how a society may best pursue the common good is a prudential judgment dependent on countless factors, a change in those factors will/may change how the society can best pursue the common good.

83. Or it generally does not do so lightly. Witness the recent radical alteration of the House of Lords done, cynics claim, to remove impediments from the more conservative chamber to the Labor Party's agenda in the House of Commons.

supermajority to change.[84] The other major division involves those relatively binding social ordering decisions susceptible to change by a majority (or approximately so given the requirements of bicameralism and separation of powers). Thus, Congress can statutorily alter much of our nation's social ordering.[85] Statutes, in the United States, serve to bind the polity until the relevant decision-maker, Congress, determines the statutes are no longer in the polity's best interest. These levels of social bindingness were incorporated into our society's social ordering through the ratification of the Constitution.

A society may (or must), under appropriate circumstances, justly bind itself to a certain legal and political system. How is such a binding to take place? In any established society there is a process by which changes to the manner of governance of the society take place. There is a vast range of acceptable choices for such a process to remain just, dependent on the circumstances. Some societies, mostly those that are smaller in size and number of members, may have some form of direct democracy. Periodically, the relevant group of citizens will assemble and become, in assembly, the authoritative decision-maker for that society. The assembly's decisions govern the members of the society for the time period while the assembly is disbanded. While assembled, those citizens who comprise the society take on the mantle of representatives of the society and are delegated the authority to legislate in the name of the society. Those same citizens, when back in their usual occupations, are bound by the decisions of the assembly. Therefore, in direct democracies, the binding lasts only so long as the time until the next assembly and is not a strong form of binding (absent other restraints on the will of the majority in tradition or custom).

Different societies came to have a binding arrangement by different means. Some arrangements arose peacefully, where the ultimate sovereigns of a land (the people, and God) proclaimed certain men as rulers. Often, though, the ruler unjustly conquered a land or people

84. Our society has also bound itself more strongly still through the Entrenchment Clause. U.S. CONST. art. V. The Entrenchment Clause provides that "no state, without its consent, shall be deprived of its equal suffrage in the Senate." *Id.* Effectively, the Entrenchment Clause eliminates change. Smaller states required the Entrenchment Clause as a condition for ratification of the Constitution and viewed it as a major protection for their continued corporate existence.

85. For an interesting discussion of the forms, levels, and types of bindingness associated with our society's laws see Carlos E. Gonzalez, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment not Amend the Constitution?*, 80 WASH. U. L.Q. 127, 128–63 (2002).

and imposed a regime. This fact has long caused difficulty for political theorists of all stripes, Locke's discussion of the formation of society as much as Aristotle's. However, under the Aristotelian tradition, at some point the illicit act perpetrated by the new ruler, although not forgiven, becomes irrelevant to the legitimacy of the regime.[86] Is the regime basically just? Does it secure the common good for the people? If the answer is "yes" then members of society must then afford the ruler and his laws their proper respect. John Finnis has argued to this effect: "[F]or an understanding of the authoritativeness of rulers, as a concern of practical reasonableness, it is the sheer fact of effectiveness that is preemptively (not indefeasibly) decisive."[87]

The theoretical quandary of the legitimacy of the process of social ordering that often arises because of conquest does not arise in our society. The path chosen by the Framers to procure ratification of the Constitution—through state ratification conventions—was accepted as legitimate by nearly all parties.[88] As Keith Whittington has found:

> The astonishing acquiescence of the anti-Federalists to the result of the constitutional ratification could only come from their acceptance of the Constitution itself . . . . The fact that [opponents of the Constitution accepted the ratification] is indicative of their acceptance of the Constitution as written as the authoritative expression of the popular will, binding themselves as well as their opponents.[89]

The Framers, in using ratification conventions to ratify the Constitution, built on the socially accepted notions of popular sovereignty and popular conventions. Chief Justice John Marshall, in *McCulloch v. Maryland*, relied on this general acceptance:

> [W]hen, "in order to form a more perfect union," it was deemed necessary to change this alliance [of the Articles] into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people,

86. St. Paul's admonitions are similar. *See* Rom. 13:1–4 ("Let every soul be subjected to higher powers: for there is no power but from God: and those that are, are ordained of God. Therefore he that resisteth the power, resisteth the ordinance of God. And they that resist, purchase to themselves damnation . . . . For [the prince] is God's minister to thee, for good.").

87. FINNIS, NATURAL LAW, *supra* note 6, at 247.

88. WHITTINGTON, *supra* note 74 , at 146.

89. *Id. See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 6 (1980) ("It is also instructive that once the Constitution was ratified virtually everyone in America accepted it immediately as the document controlling his destiny.").

> and of deriving its powers directly from them, was felt and acknowledged by all.[90]

Assuming that the decision-maker for a society is justly representative of the people, that is, he acts for the common good of the society and is recognized as such, the decision-maker may, if required by the common good, bind the society to a particular social ordering.

I have argued that to pursue the common good and the goods that constitute the common good society must make prudential ordering decisions. Dependent on the circumstances, a society may rationally determine that the common good of the society requires that certain social ordering decisions be made binding. There are different possible levels of bindingness and different means of effectuating the binding. However, there are circumstances in which the binding must give way and there are limits to the bindingness to which a society may agree.

B. Enter the Framers: Our Society's Road to the Binding Constitutional Social Ordering

1. Introduction

In this section I will endeavor to show that, at some point, the British colonies on the eastern seaboard were united into one society. Generally, the fundamental point at which a group of individuals becomes a society is when they are socially ordered to act together (common action) for the common good of the society.[91] Our newly formed society, like all societies, had authoritative decision-makers who made authoritative and binding prudential judgments on how the society was going to organize itself. I will argue that, during the eighteenth century, our society made two such prudential judgments. The first resulted in the Articles of Confederation, the second, the Constitution. Both were strongly binding on the society (and understood as such by members of the society), the subsidiary institutions of the society (including the states), and individuals regardless of consent or acquiescence. I will attempt to show that even though the Articles was strongly binding, its complete failure to

90. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404–05 (1819).

91. ST. THOMAS AQUINAS, AGAINST THOSE WHO ATTACK THE RELIGIOUS STATE AND PROFESSION, *reprinted in* AN APOLOGY FOR THE RELIGIOUS ORDERS ch. iii (John Proctor ed., Sands 1902).

secure the common good of the country and the threat it posed to the survival of the society made it *necessary* that its prior bindingness give way to another ordering of society that would effectively pursue the common good. As a part of the prudential judgment made by our society regarding the Constitution, I also will establish that the ratification of the Constitution was understood as an ordering of society—its members, communities, and institutions—that was binding on future generations. Second, I will show that our society, in 1787-1789, determined that the original meaning of the text of the Constitution was a primary mechanism through which the prudential ordering decision embodied in the Constitution would remain binding on future members and institutions of society.

2. *Criteria to Determine When a Group of People Becomes a Society*

At some point the colonies, distinct from each other but united in one society with the United Kingdom, separated themselves from that unity and then established our present national society. The original colonies were, from the beginning, in some ways one society. In other ways the colonies were separate societies until, at least, the adoption of the Articles of Confederation.

The criteria from the Aristotelian tradition used to identify a society are applicable to the situation at the beginning of our society. A society is a moral[92] entity pursuing the common good of its members. It has a rational end: the common good. As Maritain states: "[I]n the case of society the objective and rational element in social life explicitly emerges and takes the leading pole."[93] A society (as opposed to other social forms) attempts to establish a just order internally, and defend the polity externally. It has a number of subsidiary organizations that enable the individuals to achieve their good.

There is a sense of "peoplehood" among the members of the society. The individuals recognize that they are "in this together"; that they have a duty to support the common good. The people themselves recognize their peoplehood. They have a common manner of viewing reality. Often (almost always) a common culture, heritage, religion,

92. Recall that I mean moral in the sense that a society can act rightly or wrongly depending on whether it does or does not reasonably pursue the common good of its people. Hence, one can say that German society prior to and during WW II acted wrongly by harming its own citizens (or those who were formerly citizens).

93. MARITAIN, MAN AND THE STATE, *supra* note 3, at 3.

and language accompany this sense of peoplehood. Sometimes the people will be of the same ethnicity but that is not a necessary characteristic.[94]

3. *Differences Between the Colonies Prior to the Revolutionary Period*

The colonies as initially settled, and for a long period of time thereafter, did not constitute their own national society. Rather, they were separated by legal, historical, religious, cultural, linguistic and ethnic differences, and yet were tied to the United Kingdom as part of one larger society. Each colony had its own distinct relationship to the United Kingdom—some colonies were governed by a royal appointee, others, like Pennsylvania, were in the hands of a proprietary lord like William Penn while Massachusetts was allowed a certain level of self government through its corporate charter. Colonies also differed widely in when and why they were founded—though the earliest settlements dated from 1620, Georgia was only established in 1733, and Maryland, founded by the first Lord Baltimore, was intended as a refuge for Catholics from England, while Massachusetts, New Hampshire, and Connecticut served as bastions for Puritans seeking to build Jesus' Kingdom on Earth. Further, the colonies were divided ethnically and linguistically. For instance, New York was partly Dutch, while Pennsylvania was partly

94. The paradigmatic example of a people is the French. They have all of the characteristics and behave as if they were a people. A people or nation is not a rational development like a society but the product of history, birth, geography and other factors. A people is not, by itself, a society because it is not rationally ordered to and acting for the common good.

Generally, in the Aristotelian tradition, the understood mode of progression is from a family and tribe to a city, a society. In other words, the mode is from the biologically ordered to the rationally ordered. Our society began, following the Revolution which dissolved ties between the colonies, with separate societies that had much in common and then formed one, overarching society. The formation of our politically unified society created our national community, that is, our sense of peoplehood. The members of the independent colonies had so much in common that all that was needed to become an integrated body politic—a society—was political and legal unification.

If a number of very different societies are combined into one larger unit it is very difficult for a national community to form. The examples of communist societies in Eastern Europe, such as Yugoslavia, and the Soviet Union attest to this fact. In those cases a national society was imposed from without by force on disparate, previously existing national communities and societies. The previously existing national communities were so strong and different from one another that no new, overarching national community—no sense of peoplehood—developed. After the external force was withdrawn the artificial societies disintegrated. Our case was different because our previously existing societies had very much in common and the forging of a new national community was therefore not so difficult. That forging of a new national society and national community, a sense of peoplehood, is the essence of the tale of the Revolution and Ratification.

German, and the southern colonies had many Scots-Irish. Lastly, the colonies were split along a North/South divide when it came to economic bases and interest.

In the last analysis, colonies had their own unique relationships to the crown, own forms of government, and a separate legal system. The colonies were, however, all part of the British Empire. Thus, though the colonies were separate from each other, they were separate only in the sense that different states in the modern United States are separate, but all recognize that the states are part of a larger political unit. Following the break with Britain, the newly independent states dissolved their political relationship with Britain, but they did not yet have any political ties to the other colonies; they became independent states and independent societies, and the members of the states recognized them as such.

4. The Road to One National Society: Unification of the Colonies During the Revolution and Under the Articles of Confederation

This subsection describes how the peoples of these independent though intimately connected societies became one society, together pursuing the common good. The history of our society prior to, during, and following the Revolution until the Ratification of the Constitution is one of movement from separate societies to one society.

The road to one society began with the close cultural, linguistic, religious, historical, and legal connections that existed among the peoples of the newly independent states. John Jay wrote of this close affinity:

> Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty.[95]

Indeed, the connectedness of the societies far outweighed the differences making it relatively easy, once a national political union was established, for the national society to arise.[96]

---

95. THE FEDERALIST NO. 2 (John Jay).

96. In all states the bulk of the people were small farmers, some only just able to make a living. They lived simple, hard lives. Most had come to America to seek the greater opportunities, socially, economically, and religiously, that America had to offer.

Intertwined with the cultural connectedness of the colonists was their common origin and common history. The importance of these facts to a sense of oneness cannot be overestimated. Often, what has made a people a people is nothing more than the simple fact that they, as a group, have lived together under similar circumstances over a period of time. Such a common history gives them a past from which they look at themselves and the world in a similar manner. Historical forces often mold a group of people living together into a people.[97]

What caused the colonies to sever their connections with the Crown

---

a living. They lived simple, hard lives. Most had come to America to seek the greater opportunities, socially, economically, and religiously, that America had to offer.

Because of the less populous nature of the colonies, and also because of the greater opportunities offered by cheap land, the governments of the colonies were minimal. The form of government in the colonies was generally similar with a representative portion and a representative of the crown in the government.

The overwhelming majority of people in the colonies were Protestant. Literacy rates were high and many read the Bible and imbibed the common threads of the Protestant culture. Not only were the people Protestant but they were, relative to today, very religious. In many colonies church attendance and financial support of the establishment was mandatory. Governors and legislatures of the colonies, in the spirit of the age, often proclaimed days of thanksgiving, prayer, and fasting. The charters and governing documents of the colonies attested to the religious nature of the peoples often citing to Divine Providence, seeking Divine Guidance, and always requiring officeholders to profess a belief in God. The common law's blasphemy prohibitions were enforced in the colonies. Other regulations guiding people to Christianity, such as Sunday closing laws and sumptuary laws, were very common.

Little else builds a national community or cements it more strongly than a common language. The vast bulk of the country spoke English as their first language making communication, travel, and commerce between the colonies easy (for the day). There were pockets of non-English speakers such as the Dutch in the Hudson River Valley, the German immigrants throughout the country but heavily concentrated in Pennsylvania, and the few French Protestant immigrants.

Although the culture of the colonies was modified, like the common law, as necessitated by the changed conditions of the New World, it was English. The planters in the South sought to emulate the lifestyle and culture of the English aristocracy with refined manners, food, and clothing. The merchants of the major cities had frequent intercourse with their English counterparts. All of the colonies sought news from the mother country. The colonists read English literature, knew English philosophy, kept abreast of English politics, and were educated in the manner of the English.

97. This experience can be seen at work in the United Kingdom. Prior to William's conquest, England was somewhat united under the Saxon kings. Following William's conquest of England and Wales those countries were united unlike before into one unit and, after a period of time, the peoples of England and Wales, and the different classes (the Saxon peasantry and Norman lords) became and viewed themselves as one society. Much later, Scotland was added to the society and its people incorporated into the people of England and Wales. Ireland is the exception to this trend in the British Isles. Although the whole of the island of Ireland was subject to the British monarch, the (Catholic) people of Ireland never became part of the society of Britain, Wales, and Scotland. Differences of history and culture, and most importantly, religion, precluded the Irish Catholics from the modern day Irish Republic from incorporating into the body politic. History and a common past has formed the people of the United Kingdom into a people but has also made the people of the Irish Republic a distinct society. The history of *our* break with the United Kingdom and events following independence gave our people a sense of peoplehood.

also caused them to come closer together, both as a national and political community. Though this process began even before the revolutionary era, as the colonies drew together during the formative experience of debating Benjamin Franklin's Albany Plan, and with their firm action in response to the much-reviled Stamp Act, we can trace the beginning of real coalescence to the Second Continental Congress, which met on May 10, 1775. On July 6, 1775, it effected a Declaration of the Causes and Necessity of Taking up Arms.[98] The language of unification continued from previous documents. The Declaration frequently used terms like "our" and "we." After stating the British injuries that forced the colonists to action, the Congress boasted that "[o]ur union is perfect." But such strong claims must be measured against other statements to the effect that the colonies did not mean "to dissolve that union [with Great Britain] which has so long and so happily subsisted between us."[99] In other words, the colonies were united in their opposition to oppression but still remained part of the Empire.[100]

The Declaration of Independence and the resolution passed in Congress preceding it point to an understanding of the organization of the national society following the severing of ties to Great Britain. That understanding is that the colonies ceased to be a part of the organic unit of the Empire and became independent societies.[101] The June 7, 1776, Resolution for Independence called for the severance of ties with the United Kingdom, and the Congress recognized that such an action would create, not one society, but thirteen independent societies, by calling for "a plan of confederation."[102] Further, the Resolution urged that such a plan be approved by each of the colonies.[103] On this reading, once the colonies severed their imperial

98. *Declaration of the Causes and Necessity of Taking up Arms, July 6, 1775*, *reprinted in* DOCUMENTS OF AMERICAN HISTORY 92 (Henry Steele Commager ed., 1958).

99. *Id.* at 93–95.

100. The Declaration explains that the colonists do not take up arms to "establish[] independent states," but only in self-defense. Note, the colonists saw that a revolution would establish independent "states," not an independent state. *See id.*

101. Reasonable people can disagree about the effect the Declaration of Independence had on the nature of American society. James Madison believed that the Declaration itself created an independent society: "By that compact, they agreed to form one society." James Madison, *quoted in* WALTER BERNS, TAKING THE CONSTITUTION SERIOUSLY 25 (1987). Even if Madison is correct and we became a society with the Declaration my overall argument remains strong because, for my thesis to prove correct, I need only show that at some point we became a society.

102. *Resolution for Independence, June 7, 1776*, *reprinted in* DOCUMENTS OF AMERICAN HISTORY 100 (Henry Steele Commager ed., 1958).

103. *Id.*

ties, the colonies were freestanding political and social units that must agree to any unification.

This reading applies to the Declaration of Independence itself. Following the reasons why King George was a tyrant, thus justifying the colonies' break with Britain, the Declaration goes on to declare independence.[104] While the Declaration begins with language of a unified people—"one people" and "a free people"—the last portion of the Declaration shows that the newly independent Americans likely had no such understanding of themselves. Instead, the revolution would bring about thirteen independent states: "these united Colonies *are* . . . Free and Independent *States* . . . and that as Free and Independent States they have the full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[105] The people(s) of the colonies were a people united in their fight for independence but not united politically into one polity. The strongest argument for this reading of the results of the revolution on the colonies and their movement toward peoplehood is the very struggle for the Articles of Confederation, and after the Articles' failure, for the Constitution.[106]

As noted above, the Resolution that called for the Declaration of Independence also envisioned a plan of confederation. Congress accordingly established a committee for the purpose of that confederation and, on November 15, 1777, adopted the Articles of Confederation; the new document was then sent to the states for ratification. The Articles was finally approved by the last state, Maryland, in March 1781, over three years later. The difficulty occasioned by the refusal of states to ratify the Articles was a continuation of and prelude to continued interstate quarrels and the difficulties faced by the national government created by the Articles.

---

104. *The Declaration of Independence, July 4, 1776, reprinted in* DOCUMENTS OF AMERICAN HISTORY 100 (Henry Steele Commager ed., 1958).

105. *Id* at 100, 102 (emphasis added).

106. There is, however, reasonable disagreement on the exact nature and impact of the Declaration. *See, e.g.*, Thomas B. McAffee, *Does the Federal Constitution Incorporate the Declaration of Independence?*, 1 NEV. L.J. 138 (2001) (arguing that the Constitution did not incorporate the Declaration until the Fourteenth Amendment); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993) (same); Patrick M. O'Neil, The Declaration as *Ur*-Constitution: The Bizarre Jurisprudential Philosophy of Professor Harry V. Jaffa, 28 AKRON L. REV. 237 (1995) (Book Review) (same); Dan Himmelfarb, Note, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169 (1990) (arguing that the Declaration "is fundamental to a proper understanding of the Constitution").

The Articles established a "confederacy" and "firm league of friendship" of "free[] and independen[t]" states.[107] It purported to create a "perpetual Union" between the same.[108] As has often been noted, the Articles ensured strong state governments and a weak national government by strictly limiting the authority and power of the national government. Article II stated that each state retained all sovereignty and independence "which is not by this confederation expressly delegated to the United States."[109] The last Article, which caused so much difficulty for the Federalists seeking to amend or replace the Articles, stated that "the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state."[110] The states, through the unanimous consent requirement for amendment in Article XIII, the strict construction clause of Article II, the limited delegation of powers to the national government, and through the lack of any effective means of enforcing the national will, retained most of their former independence. This also shows that the states were, prior to entering the confederation, completely independent societies.[111]

I believe that the confederation was an attempt to create the legal and political institutions necessary for a national society to secure the common good. Whether the ratification of the Articles of Confederation created one national society is a difficult question to answer. On the one hand, the people in the colonies had very much in common with each other. In fact, they were engaged in a mutual struggle for independence from Britain. On the other hand, the confederation established only the weakest sort of political union between the states. The extent of political union was minimal, but it was a union nonetheless, and with the extensive nature of the cultural ties binding the peoples of the states together, little was needed to create one national society. The national government was entrusted, at

107. *The Articles of Confederation, November 15, 1777, reprinted in* DOCUMENTS OF AMERICAN HISTORY 111–16 (Henry Steele Commager ed., 1958).

108. *Id.*

109. *Id.* Art. II.

110. *Id.* Art. XIII.

111. The primary difficulties that were to arise because of defects in the Articles were the lack of authority granted the national government to directly collect taxes and regulate commerce, both internal and foreign, and the lack of national enforcement mechanisms, especially regarding treaties. *See* JACK N. RAKOVE, ORIGINAL MEANINGS 26–27 (1996).

least in principle if not practice, with guiding the external relations of the states and providing for that portion of the common good. While one today may think the scheme established by the Articles would never work, that fact should not obscure the political unity created, thus overcoming the only major obstacle to a national society. The fact that the Articles reflected poor judgment as to the needs of the national society does not detract from the document's unitive nature.[112] The Articles established a unity whereby the members of the entity worked together to secure (at least a portion of) the common good.

The Articles of Confederation was therefore the unitive moment when our national society came into existence.[113] Prior to that time, the United States consisted of thirteen separate, independent, societies whose peoples had much in common with each other. All that was lacking was the legal and political structure necessary to make a society function in an ordered manner: necessary to enable a people to pursue the common good. The Articles purported to provide the lacking element and sought to enable the new national society to pursue the common good. While the Articles failed to enable the national society to *effectively* pursue the common good, it did unify formerly disparate peoples into one society.

The difficulties occasioned by the Articles had already appeared during the Revolution and would continue to surface with increasing regularity until it was superceded by the Constitution. In fact, even before final acceptance of the Articles by Maryland, the inadequacies of the Articles were recognized and efforts to amend it began.[114] Every effort at amendment over six years was to fail for one or more reasons, often because only one state refused to ratify the proposed amendment.[115]

In April 1783, the superintendent of finance Robert Morris

112. If one believes that no national society arose until the ratification of the Constitution my argument is all the stronger. If there was no national society striving for the common good then the later abrogation of the Articles by the ratification of the Constitution did not "violate" a binding social judgment on how the national society was to be ordered.

113. It is possible that the Articles was a reflection of the prior reality of social unity and was a specification on how the society would order itself.

114. This first attempted amendment was to give the Congress the authority to impose a five percent impost on all imported goods to shore up its finances which had, for a long time, been dreadful. RAKOVE, ORIGINAL MEANINGS, *supra* note 113, at 25.

115. For example, referring to the proposed impost amendment just discussed, Rhode Island refused to ratify the impost because of the harm that would have befallen its commercial interests.

persuaded Congress to pass another proposed amendment seeking to revise Congress, ability to raise revenue by granting it the authority to levy an impost for twenty-five years. That amendment also failed, [116] as New York only ratified it with conditions that were unacceptable to other states.[117] When asked if it would reconsider its conditions—because the national government was bankrupt and, if the confederation was to survive it needed the revenue—it refused.[118] In 1784, Congress submitted an amendment to the states seeking authority to regulate foreign commerce, which failed to receive unanimous approval.[119]

Beyond failed amendments Congress was unable to address other difficulties that arose. Congress was unable, because of inadequate resources, to police and regulate settlement of western lands.[120] In a related matter, Congress failed (because of its lack of authority) to enforce compliance among the states with the peace treaty that guaranteed creditors recovery of their debts, thereby giving the British an excuse to maintain troops at western forts they were supposed to have abandoned.[121] As another example, Congress had no leverage, because of its impotence, with which to persuade Spain to reopen the Mississippi to American commerce, thus western settlers were greatly harmed economically.[122] Congress could not regulate commerce and, as a result, the British could close their ports to American goods with impunity, greatly harming American merchants.[123]

A large portion of the blame for the failure of the Articles and the national government must lie at the feet of the state legislatures. As Professor Jack Rakove has argued:

> The failure of the states to approve proposed amendments to the Articles, to meet the financial requisitions of Congress, and to abide by the provisions of the Treaty of Paris all called into question the fundamental premise of the Confederation; that the states would exercise their sovereign powers in good faith to fulfill

116. RAKOVE, ORIGINAL MEANINGS, *supra* note 113 , at 25.

117. FORREST MCDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790 at 243 (Liberty Press 1979) [hereinafter MCDONALD, E PLURIBUS UNUM].

118. *Id.*

119. RAKOVE, ORIGINAL MEANINGS *supra* note 113, at 28.

120. *Id.* at 26.

121. *Id.* at 26–27.

122. *Id.*

123. *Id.*

rather than frustrate essential national interests.[124]

For instance, in 1786, New Jersey determined that it would no longer provide its allotted portion of the revenue requested by Congress.[125]

Further, besides the failure of the states to support the confederation as they had promised, the states themselves were racked with problems which many came to believe only a new national constitution could rectify. For example, the state legislatures were often captured by one or more factions which used their authority to enrich themselves at the expense of the polity and/or other factions. These schemes often entailed the prodigious printing of paper money to service the state's debt.

By 1786 the authority of Congress was at its nadir. Congress had all but ceased to function. Between October 1, 1785, and January 1, 1786, a quorum was present in Congress for only ten days and, even then, only seven states bothered to send delegates.[126] There were only three days between October 1, 1785, and April 30, 1786, that the minimum working number of nine states for important matters was represented.[127] The revenues paid by the states to the Congress could not even cover one-third of the *interest* on the national debt.

Hopes for reform from the national level evaporated and reform-minded individuals turned to their states for answers. In January, Virginia called for a convention at Annapolis, Maryland, to discuss whether to grant Congress the authority to regulate commerce.[128] Madison, by this point, was near despair and believed the future of the nation in grave peril. "I despair so much of its accomplishment at the present crisis that I do not extend my views beyond a Commercial Reform. To speak the truth I almost despair even of this."[129] By September of that year, only twelve delegates from five states had arrived at the Annapolis Convention.[130] The delegates issued a report calling for a general convention to "devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union."[131]

124. *Id.* at 26–27.
125. *Id.* at 31.
126. MCDONALD, E PLURIBUS UNUM, *supra* note 119, at 237.
127. *Id.*
128. RAKOVE, ORIGINAL MEANINGS, *supra* note 113, at 32.
129. *Id.* at 44.
130. *Id.*
131. *Id.*

The prospects for the confederation were poor, but impetus for the federal convention substantially increased following Shay's rebellion in Massachusetts.[132] In August 1786, farmers from western Massachusetts convened and drafted a list of grievances.[133] During the same month, approximately 1500 men stopped the Hampshire County Court[134] from sitting, in protest against the fees imposed by the antiquated Massachusetts legal system for even minor transactions, and the high taxes imposed to pay for depreciating public securities.[135] By September, the same month that the Annapolis Convention convened, the government of Massachusetts had ceased to operate in the western portion of the state.[136] Even though the Massachusetts assembly rectified the legitimate grievances (and more) of the farmers, the mob continued to grow in strength, drilled, and organized themselves into a fighting force.[137] The final confrontation occurred on January 25, 1787, but by this time seven states had decided to send delegates to the proposed Federal Convention.[138] Others soon followed.[139] In light of the rebellion and other difficulties George Washington saw that a stronger union was required:

> What stronger evidence can be given of the want of energy in our governments than these disorders? If there exists not a power to check them, what security has a man for life, liberty, or property? . . . Thirteen sovereignties pulling against each other and all tugging at the federal head will soon bring ruin on the whole, whereas a liberal and energetic constitution, well guarded and closely watched to prevent encroachments, might restore us to that degree of respectability and consequence to which we had a fair claim and the brightest prospect of attaining.[140]

By 1787 those who valued the national society saw the Philadelphia Convention as their last opportunity to save it. The Articles of Confederation had been a dismal failure leading to the

---

132. *Id.* at 33–34.

133. MCDONALD, E PLURIBUS UNUM, *supra* note 119, at 244–45.

134. *Id.* at 245.

135. *Id.*

136. *Id.* at 246. Also during September there was an uprising in New Hampshire, though for different reasons. *Id.* at 248. The mob of 1500 men was swiftly put down. *Id.*

137. *Id.* at 248–53.

138. *Id.* at 254–57.

139. Except Rhode Island which, by this time, had earned the nickname Rogue Island for its obstinacy.

140. WILLIAM PETERS, A MORE PERFECT UNION: THE MAKING OF THE UNITED STATES CONSTITUTION 11 (1987).

brink of dissolution. Professor Forest McDonald describes the situation in this manner:

> Congress had gone to hell, and so had the principle bonds of union and so had the mottoes around which the Union had rallied in the first place . . . . It was the Critical Period of American history only to those who thought that the American Republic was worth creating and saving.[141]

Congress recognized the peril of the nation's existence, and on February 21 decided to ask the states to send delegates to the Philadelphia Convention.[142] The language it used admitted the failures of the Articles: "render the federal constitution adequate to the exigencies of government and the preservation of the Union."[143]

In conclusion, our society arose out of the dissolution of the bond between the colonies and the United Kingdom and the creation of new bonds of society by the Articles of Confederation. Through the social ordering of the new national society found in the Articles, our society attempted to pursue the common good. However, it became clear that the Articles failed on many points and greatly impeded society's pursuit of the common good. As a result, the very purpose of the creation of a national society was in jeopardy unless, that is, some way was found to enable the effective pursuit of the common good.

5. *Philadelphia: The Framers Propose a New Social Ordering to Save Society*

The Framers[144] were a unique group of men. This was the view also, of James Madison, who wrote in his own short review of the Federal Convention:

> [I wish to] express my profound and solemn conviction, derived from my intimate opportunity of observing and appreciating the view of the Convention, collectively and individually, that there never was an assembly of men, charged with a great and arduous trust, who were more pure in their motives, or more exclusively or anxiously devoted to the object committed to them, than were the members of the Federal Convention of 1787 . . . .[145]

---

141. *Id.* at 257.

142. *Id.* at 256.

143. Congress did, however, purport to limit the actions of the delegates to the "sole and express purpose of revising the Articles of Confederation."

144. It is important to recall, however, that the Framers of the Constitution who met in Philadelphia did not give the Constitution its binding authority over members of society then and now.

145. 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 551(Max Farrand ed., rev.

Madison, by many accounts, was the greatest of the men whom he lauded, and he saw himself and the other delegates in a position of great historical importance: "[I]t was more than probable that we were now digesting a plan which in its operation will decide forever the fate of Republican Govt."[146] Madison saw God's Providence at work in the Convention.[147] The men who met in Philadelphia believed they had the duty to save the national society from disintegration and to propose an alternative to the Articles that would make it possible for the new nation to secure the common good.

Madison is the best example of what made the delegates in Philadelphia special, combining great knowledge, vision for the nation, and wisdom. In the beginning of 1786, in response to the crisis of the national government (and the state governments), Madison essentially locked himself in his room and devoted himself to the task of mastering the history of government, especially of republics.[148] He took notes on the virtues and vices of prior republics, what made them endure, and the reasons for their inevitable collapse. Madison sought to derive axioms governing the life of republics and, by controlling the causes of collapse, preserve the republican form of government he hoped to propose. He also wrote a memorandum describing the major faults of the Articles, which he saw as lying at the feet of the states whose rash and erratic democracy threatened the entire society.

Even Thomas Jefferson, who opposed the intergenerational bindingness of the Constitution, wrote that the Federal Convention was "an assembly of demigods."[149] The members of the Convention included the most respected and venerated men of the nation. Ben Franklin, whose distinguished name was eclipsed only by that of George Washington, attended and was instrumental in times of need to guide the Convention. George Washington was revered by all, not only as the Father of the Nation, but as a virtuous man. The delegates were ministers, lawyers, doctors, farmers, men of commerce: men from all walks of life.[150] They were leaders in their states. These were

---

ed. 1937).

146. RAKOVE, ORIGINAL MEANINGS, *supra* note 113 , at 36.

147. *See* THE FEDERALIST NO. 37 (James Madison) (stating that his "fellow Americans must perceive in the Constitution a finger of that almighty hand which has been so frequently extended to our relief in the critical stages of the revolution").

148. RAKOVE, ORIGINAL MEANINGS, *supra* note 113 , at 42–43.

149. LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 267 (A. Koch & W. Paden eds., New York 1944). Also quoted in THE FEDERALIST PAPERS 13 (Isaac Kramnick ed., 1987).

150. For a listing of the professional lives of the Framers see FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 86–88 (Transaction

mature men who had lived full lives acquiring the experience necessary to judge how best to steer the nation. They were men of education and understanding, able to discourse on abstract subjects such as the nature of government. The fifty-five Framers had, amongst them, a vast wealth of lived experience from a vast range of life. They had been in many different circumstances and had learned from those experiences. They had acquired practical wisdom that they brought to the Convention. In sum, they were a unique collection of individuals who brought their substantial wisdom to bear on the critical issue of the day.

Unsurprisingly, for so talented a group, the Constitution they created is well designed. Referring to one of the Framers' more striking innovations, federalism, the Supreme Court in *Alden v. Maine* noted that "[t]heirs was the unique insight that freedom is enhanced by the creation of two governments, not one."[151] They created an instrument premised on the nature of man and designed a government structure to take that nature into account.[152] The Framers were not abstract philosophers like the Frenchmen who wrote the Declaration of the Rights of Man, but practical men determined to create a working government.[153] The national government economized on virtue and even harnessed the self-interest of men to compensate for the corruption of human nature.

In sum, when the survival of our national society as a society was at stake, there came together a group of men of practical wisdom that proposed to the nation a social ordering that would allow society to effectively pursue the common good.

6. *Ratification of a New Constitutional Ordering*

a. *Introduction*

The People of our society, when given the opportunity to ratify the Constitution, understood their act in a manner consistent with the Aristotelian tradition. It is because the People were understood as more than just a passing majority of citizens alive in the society at any one time that Madison directed those seeking to understand the

Publishers ed., 1992).

151. Alden v. Maine, 527 U.S. 706, 758 (1999).

152. *See* THE FEDERALIST NO. 10 (James Madison) (explicitly relying on the corrupted—but not totally so—nature of man to build a government).

153. *See* RUSSELL KIRK, RIGHTS AND DUTIES (1997) (arguing that the Framers, unlike the French and the continental philosophers the French admired, were men of practical wisdom who retained many of the beliefs of the Aristotelian tradition).

Constitution to look, not to the Framers in Philadelphia, but to the understanding of the Constitution held by the People:

> Whatever veneration might be entertained for the body of men who formed our Constitution the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.[154]

Madison understood that sovereignty resided in the People who could make binding decisions for society.[155]

I will argue that our society, with the ratification of the Constitution, chose to bind itself to the original meaning of the text of the Constitution, which embodied a prudential social reordering of society.[156] I will first discuss the historical record to show the contemporary understanding of the nature of ratification and its bindingness on future generations. The evidence will show that the ratification of the Constitution was understood as an ordering of society—its members, communities, and institutions—that was binding on future generations. In other words, the vision of society was transtemporal: all members of society—past, present, and future—working together to secure the common good.

Second, I will show that our society, in 1787-1789, determined that the original meaning of the text of the Constitution was a primary mechanism through which the prudential ordering decision embodied in the Constitution would remain binding on future members and institutions of society. In conjunction with this I will show why a

---

154. 3 FARRAND, RECORDS, *supra* note 147, at 374.

155. The People of our society, with the ratification of the Constitution transferred authority for governance. As Maritain has stated: "The people exercise this right [to transfer authority] when they establish the Constitution . . . of the body politic." MARITAIN, MAN AND THE STATE, *supra* note 3, at 25.

156. I leave for another day what the original meaning is and leave open the possibility that many clauses in the Constitution, as understood when ratified, were principles capable of or fulfilling a broad range of tasks in new and unforeseen environments. Thus, any argument that originalism is too wooden to meet changing circumstances must be premised on a belief that the original meaning is narrow and does not consist of principles. Further, such an argument belies the non-originalist decisions most praised by non-originalists—*Brown*, the reapportionment decisions, the criminal rights cases, *Roe*, *Casey*, *Romer*, *Lawrence*—where the society had not changed but change was forced upon it.

society composed of rational individuals might want to bind itself (and future individuals) in such a manner.

b. Contemporary Understanding of the Nature of the Ratification of the Constitution

i. The People, Through Ratification of the Constitution, Prudentially Ordered Society, Including Future Generations, Toward the Common Good

The text of the Constitution itself serves to show that our society believed itself to be (corporately) binding itself and future majorities of citizens to the social ordering embodied by the Constitution to enable effective pursuit of the common good. The text of the Constitution begins by recalling the entity that established the authoritative nature of the Constitution: "WE THE PEOPLE of the United States."[157] The Convention had rejected an enumeration of the states in the place of "United States."[158] The People was the members of the society encompassing the former British colonies acting corporately.

The People had recognized that the union under the Articles was incomplete and sought to make it "more perfect."[159] The Articles' government had been unable to achieve its purpose: it had been unable to effectively pursue the common good. Something new was needed.

The very next words of the Constitution establish that the People was authorizing the Constitution to further its (the People's) pursuit of the common good of society. The People sought to re-order its society to achieve: justice, domestic peace, external defense, and the general welfare of the members of our society.[160] This is the essence of common good. The People recognized that the common good, and thus the individual goods of the members of the society, were not being achieved under the Articles and sought to use the Constitution to re-order society to achieve these ends.

The People of our society knew that society was not simply a passing majority. Society instead encompassed the current generation, in partnership with those who brought society to the present point,

157. U.S. CONST. preamb.
158. PETERS, *supra* note 142, at 204.
159. U.S. CONST. preamb.
160. *Id.*

and those who would enjoy the fruits of society's labors in times to come. As a result, the People ordered society for its current members and their "Posterity" through the Constitution.[161]

The United States was no longer the loose-knit union of the Articles in which the states retained a vast amount of their sovereignty. Now, the states were subject to numerous restrictions on their autonomy through the agency of the People. They were bound together in one society for the common good of everyone.[162]

Article V is the portion of the Constitution most supportive of my argument that society intended, with the ratification of the Constitution, to bind itself, its agents, and future majorities to the social ordering in the Constitution.[163] Article V helps make the Constitution strongly inter-generationally binding on our society. Unless the original meaning of Article V is binding and exclusive, its purpose would be thwarted. Article V is both a supermajority and a federalism requirement. The supermajority required is enormous, spanning both national and state constituencies. Article V strongly embeds in the fabric of our society one prudential social ordering: the ordering made in 1787-1789. On this reading, Article V is the exclusive means of amendment to the Constitution.

There were a number of reasons why our society decided to embrace the strong bindingness embodied in Article V. One of the more prominent reasons at the Convention and the ratification conventions was the protection of states as entities. This motive is clear from the face of Article V's Entrenchment Clause: "[N]o state, without its consent, shall be deprived of its equal suffrage in the Senate."[164] Many, not just the Anti-Federalists, were concerned that the new national government might turn the states into weak administrative units. This Clause firmly entrenched a strong form of

---

161. *Id.* ("ourselves and our Posterity").

162. It is appropriate to here mention our national motto: *E pluribus unum*, out of many, one. The motto was, as I have been discussing, entirely appropriate as thirteen formerly separate societies became more fully one society united in the pursuit of the common good.

163. Some states have faced the question of the bindingness of amendment processes in the states' existing constitution and whether amendment outside of the designated process was legitimate. For example, the Supreme Judicial Court of Massachusetts issued an opinion on the subject in 1833 and concluded that there was "no authority" by which any amendment to the "constitution can be made, in any other manner than that prescribed in the ninth article of the amendments adopted in 1820." Opinion of the Justices of the Supreme Judicial Court, 60 Mass. 573, 573 (1833), *located at* 1833 WL 3423.

164. U.S. CONST. art. V. *See also* FEDERALIST PAPERS No. 43 (James Madison) (stating that the Entrenchment Clause was "meant as a palladium to the residuary sovereignty of the states").

federalism in our social ordering and protected the states as viable political entities. The Entrenchment Clause itself approaches the strongest form of social binding that a society may legitimately attempt.[165] No change to the rule that states will be equally represented in the Senate is ever permissible, absent the consent of those states themselves. For all practical purposes, this Clause makes the rule a permanent part of our social ordering.

James Madison argued along these lines to establish that Article V is the exclusive means of amending the Constitution. Faced with the task of arguing, in *Federalist 39*, that the new government was not a national consolidated government, but was instead federal, Madison explicitly appealed to the federal character of the document's amendment provisions.[166] Specifically, he argued that the Article V amendment process does not focus on a majority of citizens of the United States but instead gives a substantial role to the states as corporate entities. If Article V was not the exclusive means of amendment, then his argument would have been incoherent. If a national majority could circumvent Article V's strictures, then any protections to the smaller states would have been illusory.

In *Federalist 43* Madison further discussed Article V's requirements.[167] He gave no hint that other modes of constitutional amendment were permissible. He stated that the mode of amendment prescribed by Article V "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[168] If Article V was not exclusive and a simple majority of Americans could alter the Constitution outside of Article V,[169] Madison's claim that Article V struck a proper balance between competing values would be unintelligible.

---

165. As explained earlier, no society may bind itself in such a manner that the society's ability to effectively pursue the common good is gravely threatened. It is difficult to conceive of a situation in which the Entrenchment Clause could gravely threaten our society's ability to effectively pursue the common good because the Clause's focus is so narrow. If such a situation arose, however, as occurred when the unanimous consent provision of the Articles caused the near-collapse of our society, the bindingness of the Entrenchment Clause would have to give way.

166. FEDERALIST PAPERS NO. 39 (James Madison).

167. FEDERALIST PAPERS NO. 43 (James Madison).

168. *Id.* at 296.

169. *See infra* note 211 and accompanying text (discussing Akhil Amar's argument that Article V is not exclusive). Professor Bruce Ackerman also argues in his magnificent *We the People* series that Article V is not exclusive. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS, 81, 92 (1998).

Professor Henry Monaghan, in his article *We the People[s], Original Understanding, and Constitutional Amendment*, supports the view that Article V is a mechanism that ensures the strong intergenerational bindingness of the Constitution.[170] There, he convincingly rebuts the claims made by Professor Akhil Amar that Article V was not originally meant to be the exclusive means of constitutional amendment and that a simple national majority vote can alter our constitutional social ordering.[171] Monaghan makes two main arguments: both federalism and the Framers distrust of direct democracy are incompatible with a non-exclusive reading of Article V. First, Monaghan notes that the moderate nationalists who comprised the bulk of the federal convention delegates wanted protections in place for states as "independent political societies."[172] He quotes numerous Framers and Ratifiers for the proposition that the states were to remain viable entities and that Article V was one of their protections.[173] Monaghan questions the logical compatibility between the principle of federalism so beloved by the Framers and Amar's principle of national majority rule outside of Article V.[174] Monaghan also relies on the Framers' explicit mistrust of direct democracy to show that Article V is the exclusive means of constitutional amendment.[175] He argues that the Constitution is not a democratic document because it purposely seeks to thwart the will of the majority in favor of supermajorities through federalism, separation of powers, bicameralism, staggered elections, the lack of any direct popular action, and Article V's stringent requirements.[176]

Discussions of the Constitution's nature, purposes, and intended effects beyond Article V and the text itself present an equally strong picture of intergenerational binding. Perhaps most persuasive are the arguments made by the authors of the *Federalist Papers*, who recognized that the nature of the Constitution was incompatible with Enlightenment principles. [177]

---

170. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

171. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458–59 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988).

172. *Id.* at 140–47.

173. *Id.* at 140–56.

174. *Id.* at 157–59.

175. *Id.* at 165–73.

176. Monaghan, *supra* note 172, at 126–30.

177. The *Federalist Papers* were and have continued to be held in high esteem, both for

Alexander Hamilton, in *Federalist 78*, provided an extended defense of the Constitution's formulation of a federal judiciary[178] with protected tenure. In doing so, he also sought to maintain that a judiciary so protected was not a possible source of oppression.[179] Rather, the federal judiciary would be a bulwark against that most dangerous of branches, the legislature. To serve its purpose (part of which was to keep the legislature in check) the judiciary had the authority to declare acts of the legislature contrary to the Constitution "void."[180] But would this ability not imply, asks Hamilton's interlocutor, the superiority of the judiciary?

Hamilton responded with an answer understandable only within the Aristotelian tradition. No agent is greater than its principle, said Hamilton.[181] Thus, the legislature, which is the agent of the "people," cannot exercise authority contrary to its commission from its principle[182]: "[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid."[183] This was because the "representatives of the people" are not "superior to the people themselves."[184] The courts, in the federal scheme of government, are an "intermediate body between the people and the legislature" to ensure that the legislature remains within its commission; within the authority delegated it by the People.[185] If a statute is beyond the authority of the legislature to enact under the Constitution

---

their defense of the Constitution and for their discussion of political philosophy. James Kent in his *Commentaries on American Law* stated, regarding the *Federalist Papers*: "There is no work on the subject of the Constitution, and on republican and federal government generally, that deserves to be more thoroughly studied . . . . I know not, indeed, of any work on the principles of free government, that is to be compared, in instructive and intrinsic value, to this small and unpretending volume . . . not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke." I JAMES KENT, COMMENTARIES ON AMERICAN LAW 241 (New York 1836).

178. THE FEDERALIST NO. 78 (Alexander Hamilton).

179. Hamilton argued that the judiciary was the weakest branch of the federal government for a number of reasons. First, it lacked the authority of the executive, which had the power of the sword, or of the legislature, which possessed the power of the purse. He concluded by noting that the judiciary had "neither FORCE nor WILL but merely judgment" of the requirements of the law. *Id.* The judiciary is thus limited to declaring the meaning of the law, including both statutory and constitutional law. *Id.* At 522–23.

180. *Id.* at 524.

181. *Id.*

182. For a thorough review of the role agency concepts played in the formulation of the Constitution see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432–65 (1987).

183. Hamilton, *supra* note 218, at 524.

184. *Id.*

185. *Id.* at 525.

> that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents . . . . [T]he power of the people is superior to both [the legislature and judiciary], and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.[186]

Hamilton's defense of judicial review is unsupportable on the presumptions of the Enlightenment tradition, as some critics then and now—notably Thomas Jefferson and Alexander Bickel—argued, but is readily understood within the Aristotelian tradition. The People, viewed as the broader transtemporal society, sought to order its social life through the Constitution by designating certain officials to carry out the duties necessary in a government dedicated to guiding the members of society to the common good. For a number of prudential reasons,[187] the People limited the authority of the government's officers and put those limits in writing. One of the departments of the government, the judiciary, was intended by the People to ensure that the other departments and officers did not act beyond the authority the People had delegated to them. The judiciary could look to the Constitution, which contained the limits on and extent of the delegation to the officers, and determine whether the officers' acts were consistent with the delegation.

The "people" referred to by Hamilton was not just the contemporary majority. The People is our society conceived transtemporally. Hamilton understood that the People rationally chose to bind its government agents *and itself* (including future majorities) to the social ordering embodied in the Constitution. As Hamilton argued, the essence of republican government is "the right of the people to alter or abolish the established Constitution."[188] Until altered or abolished, the Constitution "is binding upon themselves *collectively*, as well as *individually*, and no presumption, or even

186. *Id.*

187. Hamilton argues, and Justice Scalia echoes him, that one of the reasons for placing the society's fundamental social ordering in writing is to ensure that the "rights of individuals" are protected. *Id.* As discussed below, a written Constitution accomplishes this in a number of ways: it makes clear to government officials how far they may tread; it makes clear to the People the extent of their rights and government's authority so when the government oversteps its authority the People can readily detect the breach; and it makes it more difficult for future generations wishing to reduce the protection afforded rights to argue that such rights are not protected.

188. *Id.*

knowledge, of the [present majority's] sentiment can warrant their representatives in a departure from it prior to such an act."[189]

Hamilton's picture is of a society binding itself in the strong sense contemplated by Article V, not just the weak sense that would allow any future majority to overrule the prior binding. The Constitution, Hamilton argued, prevents the majority, "whenever a momentary inclination happens to lay hold of [it] . . . incompatible with the provisions of the existing Constitution," from violating its provisions.[190] Society has bound itself with the ratification of the Constitution, Hamilton believed, and no government agent or individual—and not even the People itself—can violate that binding decision. Judges, whose duty it is to restrain both the elected branches and the current majority when they act against the social ordering embodied in the Constitution, have a profound duty as servants of society. They must, Hamilton argued, have the independence that life tenure brings if they are to carry their burden.[191]

Madison's broader discussion also describes a society in keeping with the Aristotelian tradition. In his famous *Federalist 10* discussion of faction and the benefits of a large republic, Madison defines a faction as a "passion" or "interest" contrary to "the permanent and aggregate interests of the community."[192] In other words, desires contrary to the common good of society. Importantly, Madison distinguishes between a present *majority* and *society* and its good. A present majority can wrongly mistake the common good of the society. Society, in *Federalist 10*, is not presentist but is instead transtemporal. There is a good that pertains to an entity other than the present majority and this good, according to Madison, is "permanent and aggregate." That is why in *Federalists 62* and *63*, Madison argues that the Senate is a good obstacle to "sudden and violent passions" contrary to the common good. The present majority is not identical with the larger society and in some cases must be restrained as contrary to society's interests.

---

189. *Id.* (emphasis added).

190. *Id.*

191. Alexander Bickel recognized that Hamilton's understanding of the nature of the People was transtemporal. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–33 (1962) (rejecting Hamilton's defense, in *Federalist 78*, and Marshall's defense, in *Marbury v. Madison*, of judicial review in favor of a defense compatible with Bickel's presentist view of the nature of society). Bickel thereafter rejected Hamilton's view with no argument for doing so. *Id.* at 16–17. I discuss Bickel's rejection in Strang, *supra* note 4.

192. THE FEDERALIST NO. 10 (James Madison).

Two of our most important legal authorities, Justices Marshall and Story, agreed with Madison and Hamilton on the bindingness of the Constitution, and did so in terms of the Aristotelian tradition. Chief Justice Marshall's views are set forth in a number of important opinions, often where he is implicitly referring to the *Federalist Papers*.

Chief Justice Marshall's arguments made in support of constitutional judicial review in *Marbury v. Madison* rely on premises at home in the Aristotelian tradition.[193] After a questionable construction of the statute at issue, the 1789 Judiciary Act, the Court ruled that the Act's grant of jurisdiction to the Court to allow it to decide *Marbury* was unconstitutional. "The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States . . . appears not to be warranted by the constitution."[194]

The question then faced by the Court was whether an act of Congress that contravened the Constitution was yet valid and binding on the Court. Answering that question required the Court to delve into political philosophy in order to describe the nature of the Constitution and of the authority of acts of Congress vis-à-vis the Constitution. Chief Justice Marshall first turned to the Constitution:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.[195]

As in the *Federalist Papers*, the People described in *Marbury* is not just the present majority, but is the People binding itself, its government agents, and future generations (future majorities) to one form of government, one permanent social ordering embodied in the Constitution to secure the common good: "their own happiness." The People intended the social ordering to be permanent to avoid the dangers associated with such momentous occasions.[196] Different

193. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

194. *Id.* at 176.

195. *Id.*

196. Like any delicate operation one wants to avoid the risks associated with repeating it by setting up a system where the delicacy no longer arises but the goals of the original operation are achieved in large measure.

departments of government were established, each with a specific and limited role.[197] The People wished the Constitution to be written so that it could maintain the limited nature of the powers delegated to the branches of government.[198] The writtenness of the Constitution was an "attempt[], on the part of the people" to limit the power of its agents.[199]

Chief Justice Marshall concluded that the duty of the Court was to declare void any acts of Congress inconsistent with the fundamental law of the Constitution.[200] This ruling vindicated the ability of a society, conceived of transtemporally, to govern itself and its government (agents) through time. The nature of society described in *Marbury v. Madison* was distinctly Aristotelian.

Marshall's friend, Joseph Story, argued in his justly famous *Commentaries on the Constitution of the United States* that the Framers and Ratifiers of the Constitution sought to bind society, in the strong Article V sense, to remedy one of the major defects in the Articles.[201] According to Story, one of the great difficulties with the Articles was the argument that it was in the nature of a compact between states dissolvable at the will of one of the states that was a party to the compact.[202] To remove this threat to the new Constitution, the Framers endeavored to ground the authority of the Constitution in the consent of the People and make it binding on the whole of society.[203]

In place of the purported previous compact between states, Story saw that the Constitution and its authority to bind future generations could not be based on a form of consensual social contract: "Mr. Justice Blackstone has very justly observed, that the theory of an original contract upon the first formation of society is a visionary notion."[204] Consent could not be the foundation of any society:

> Every state, however organized, embraces many persons in it, who have never assented to its form of government; and many, who are deemed incapable of such assent, and yet who are held bound by its fundamental institutions and laws. Infants, minors, married

197. *Id.*
198. *Id.* at 176–77.
199. *Id.* at 177.
200. *Id.* at 177–80.
201. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 322 (1987 ed.) (1858).
202. *Id.*
203. *Id.*
204. *Id.* § 326.

> women, persons insane, and many others are deemed subjects of a country, and bound by its laws; although they have never assented thereto . . . .
>
> . . .
>
> It is a matter of fact, therefore, in the history of our own forms of government, that they have been formed without the consent, express or implied, of the whole people . . . . How, then, can we assert with truth, that even in our free constitutions the government is founded in fact on the assent of the whole people when many of them have not been permitted to express any opinion, and many have expressed a decided dissent?[205]

Story directly and with great understanding saw the difficulty with attempting to justify a written and binding constitution on Enlightenment premises.[206]

Story recognized, at least implicitly, that one could not justify the bindingness of the Constitution under traditional Enlightenment thought but rather one had to understand society in the same manner as the Aristotelian tradition.[207] Story quoted Cicero for the proposition that society is "a multitude of people united together by a common interest, and by common laws."[208] Quoting Edmund Burke, Story argued that society is intergenerational, that society is ordained by nature to enable men to achieve a better state, and that society can bind itself and its members.[209]

Society, according to Story, is a common endeavor ordered to the common good of the members of society.[210] Further, to achieve the common good, later generations and individuals may justly be bound regardless of consent.[211] Our society, with the ratification of the

---

205. *Id.* §§ 328–29.

206. Story even rejected arguments made by modern consent theorists that "by entering into the society an assent is necessarily implied to submit to the majority." *Id.* § 329. He questioned how anyone could know if a majority of such people would actually have assented to the Constitution, especially those "subjected by birth to such society." *Id.*

207. I am not making the claim that Story was an Aristotelian. Instead, as one reared in Protestant America, Story's political philosophy is rather muddled with a mix of Aristotelian and Enlightenment elements. *See* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION ch. 2 (1990) (describing Story's conflicted understanding of philosophy and natural law).

208. STORY, *supra* note 244, at § 325.

209. *Id.* § 325 n.2.

210. *Id.* § 326.

211. *Id. See also id.* § 338 ("[T]he people 'ordain and establish,' that is, in their sovereign capacity, meet and declare, that shall be the fundamental LAW for the government of themselves and their posterity."); *id.* § 337 ("having been adopted by the majority of the people, the constitution of the state binds the whole community *propio*

Constitution, sought to bind itself to better pursue the common good. He wrote that the Constitution "is a permanent form of government, where the powers, once given, are irrevocable, and cannot be resumed or withdrawn at pleasure."[212] In sum, just like his august contemporaries, Story saw that our constitutional social ordering was binding on society and its members into the future and that this intergenerational binding could not be based on consent.

Finally, it is important to note that those who objected to the Constitution often did so on Enlightenment grounds. The claimed bindingness on future generations was immoral precisely because, as Thomas Jefferson urged, "the earth belongs in usufruct to the living."[213] As Jefferson continued, in an important letter to Madison, the principle of the living owning the Earth was "fundamental" and "self evident."[214] He wished to lay out his view of the nature of man and society: the living, according to Jefferson, receive as of natural right and not in the form of inheritance, the right to governance of the world.[215] For Jefferson, the "dead have neither powers nor rights over" the world[216] and as such, any document such as the Constitution, which purports to bind into the future, is contrary to right and illegitimate.[217]

Jefferson, unlike many modern constitutional scholars, was explicitly consistent in his belief that no one can govern the living except the living. He argued that not just the Constitution, but all laws and restraints imposed by the past, were illegitimate.[218] As a result, Jefferson proposed his famous axiom that "[e]very constitution . . . and every law, naturally expires as the end of 19 years" which was Jefferson's computation based on mortality tables of the average life span and length of a generation.[219]

Jefferson based his famous dictum on the Enlightenment principle

---

vigore; and is unalterable, unless by the consent of the majority of the people, or at least of the qualified voters of the state, in the manner prescribed by the constitution.").

212. *Id.* § 352.

213. Letter from Thomas Jefferson to James Madison, Sept. 6, 1789, *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd ed., 1958). Jefferson's view of the nature of society is presentist.

214. *Id.* at 392.

215. *Id.*

216. *Id.*

217. Jefferson, an ardent Francophile, was also a follower of the French Enlightenment and especially Rousseau who had earlier stated the case similarly.

218. Letter from Thomas Jefferson to James Madison, Sept. 6, 1789, *supra* note 254, at 392–93.

218. *Id.* at 394–96.

219. *Id.* at 394–96.

of autonomy. Each individual, and no less, each generation of men, was his own "master[]."[220] Society was emphatically not transtemporal but was instead radically presentist. According to Jefferson, the present majority of the United States (in 1789) had no more relationship to future Americans than did that majority to the residents of Japan.[221] On the Enlightenment presumption that individual autonomy is the primary value and that society has no part in leading its members to their end, it follows that one individual is unconnected to any other by bonds of duty as is one generation to another or one nation to another.[222]

Jefferson and others like him recognized that adherence to the Enlightenment meant that one must oppose the strong bindingness that the Constitution embodied in Article V. The Enlightenment view of society, understood Jefferson, was presentist: the present majority ruling itself. The Constitution sought to illegitimately bind future individuals (and majorities) to standards the future individuals had not accepted thus wrongfully constricting their autonomy. To justify the Constitution, the tenets of another tradition was needed, one which Jefferson did not follow.

ii. A Major Mechanism Through Which Our Society Sought to Bind Itself was the Original Meaning of the Text of the Constitution

We have seen that the People's understanding of the ratification of the Constitution was consistent with the Aristotelian tradition. Just as important, however, is the fact that the original meaning of the text of the constitution is a necessary part of the document's bindingness. Both historical and prudential concerns support this position, as the most important authorities on the subject make clear.

Hamilton's argument regarding the meaning of Article III in *Federalist 78*, for example, was part and parcel of the larger claim made by contemporaries such as Madison that the meaning of the text of the Constitution is to be found in what the People understood the text to mean because it was the People who gave the document its authority. Madison wrote:

---

220. *Id.* at 396.

221. *Id.* at 395.

222. Paine, another major explicit follower of the Enlightenment among the founding generation, argued similarly that "[e]very age and generation must be as free to act for itself, in all cases, as the ages and generation which preceded it . . . . [A]s government is for the living, and not for the dead, it is the living only that has any right to it." THOMAS PAINE, THE RIGHTS OF MAN 41, 46 (Penguin Books 2001) (1791).

> As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character.[223] However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, and as a source, perhaps, of some lights on the science of Government, the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be, not in the opinions or intentions of the body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses.[224]

Madison argued that the meaning of the text of the Constitution was the meaning attributed to the text by the People which was, through ratification of the Constitution, ordering society toward the common good. The People was the key to Madison's understanding of the authoritative nature of the Constitution and its meaning:

> [A]fter all[,] whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.[225]

Madison further argued that society was wise in following the original meaning of the text of the Constitution because that original meaning provided stability of meaning which translated into a permanently restrained government: "I concur entirely in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than faithful, exercise of its powers."[226]

---

223. Madison does not seem to be saying that the debates in the Federal Convention have no relevance, only that the intentions and understandings of the Framers themselves are subordinate to that of the People. *See* Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228, 228 (1865) (stating that he would not release his notes of the Philadelphia Convention until after the meaning of the Constitution is settled and the intentions of the Framers would not be used authoritatively).

224. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *in* 3 FARRAND, RECORDS, *supra* note 147, at 447–48.

225. 5 ANNALS OF CONG. 776 (1796) (remarks of Rep. James Madison).

226. *Letter from James Madison to Henry Lee* (June 25, 1824), *in* 9 THE WRITINGS OF

Similarly, Joseph Story wrote that the Constitution's meaning is unchanging:

> Temporary delusions, prejudices, excitements, and objects have irresistible influence in mere questions of policy. And the policy of one age may ill suit the wishes or the policy of another. The constitution is not subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever.[227]

Story, following Madison's lead in *Federalist 10*, saw that one of the purposes of the Constitution was to restrain factions. And the Constitution accomplished this goal through a fixed, unchanging meaning.

One portion of the text of the Constitution often overlooked by scholars, when seeking to argue for or against the proposition that the Framers and Ratifiers believed that the original meaning of the text was authoritative, is "judicial power" in Article III.[228] Randy Barnett has argued persuasively that "judicial power" included the authority to nullify unconstitutional laws, concluding from a study of the original meaning of "judicial power" that "judicial nullification was taken as given by all members of the Constitutional Convention," and that the assumption of such a power was also commonplace in the ratification conventions.[229] Judicial review, as Hamilton argued in *Federalist 78*, was intended to keep the legislature and executive within the bounds of the Constitution which was itself the embodiment of a prior authoritative decision of the People. This rationale presupposes originalism: without a determinate meaning, within what was the judiciary keeping the legislature and executive in bounds? Further, what warrant did the judiciary have in overruling the legislature and executive if not done pursuant to the People's prior authoritative act which was embodied in a determinate text?

Chisholm v. Georgia provides further, counterintuitive, evidence that the Constitution bound society's future members to the text's original meaning.[230] The case involved a suit by a South Carolina citizen against

---

JAMES MADISON 190, 191 (G. Hunt ed. 1910).

227. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 193 (Carolina Academic Press 1987) (1833).

228. U.S. CONST. art. III, § 1.

229. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 134–35 (2004).

230. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

Georgia under Article III and the Supreme Court's original diversity jurisdiction.[231] The plaintiff would seem to have had a strong claim to federal court jurisdiction over the suit given the language of Article III, Section 2, which extended the federal judicial power to controversies "between a state and citizens of another state."[232] During the ratification conventions, the Anti-Federalists repeatedly, and for good reason, charged that the public conventional meaning of the text of Article III granted the Supreme Court jurisdiction over suits against states. The Federalists, as evidenced by Hamilton's claim in *Federalist 81* that Article III only granted jurisdiction to the Supreme Court over those states that consented to suit,[233] responded that the language of the Constitution, though susceptible of such a construction, according to the Federalists was meant to allow only for suits by a state against the citizens of another state. No one had dreamed, given the imbedded presumption of sovereign immunity, that the text would be understood as eroding the states' sovereign immunity.

The majority, in seriatim opinions, ruled that Georgia was amenable to suit.[234] The Court refused to follow anything other than the "plain" text of the Constitution and therefore rejected the strong historical evidence that the text, which by its literal reading would have warranted subjecting Georgia to suit, was understood in more limited form by the People during the ratification conventions in the states.[235]

Clearly, given the nearly uncontested negative reaction to *Chisholm* and the immediate ratification of the Eleventh Amendment, the American society firmly stood along the lines Hamilton set out. It understood the text of Article III to have, as its binding meaning, a meaning slightly different from the public conventional meaning such text would have normally had.[236] One way of looking at the events surrounding *Chisholm* is that our society agreed to Article III with the understanding that the meaning of its text included—that the text was bounded by—the traditional notion of state sovereign immunity which precluded suit against states without their consent. Society saw this understanding of the text as binding on itself and its agents—the

231. *Id.* at 419–21.

232. U.S. CONST. art. III, § 2.

233. THE FEDERALIST NO. 81 (Alexander Hamilton).

234. *Chisholm*, 2 U.S. (2. Dall.) at 464, 466–68, 470–72.

235. *Id.*

236. Alden v. Maine, 527 U.S. 706 (1999) (giving a similar rendition of the history of the Eleventh Amendment).

Supreme Court Justices—and the *Chisholm* Court's contrary ruling therefore violated that understanding and necessitated swift correction.

Scholarship on the issue of the contemporary view on how and in what manner the Constitution was to be interpreted supports my argument that our society, in 1787-1789, understood that the original meaning of the Constitution would remain binding on society.[237]

Discussion of this subject must begin with Professor H. Jefferson Powell's famous article entitled *The Original Understanding of Original Intent*, that is often cited as evidence that our society did not intend that the Constitution be interpreted in accord with its original meaning.[238] Fortunately, Powell's piece did not itself make any such claim and instead sought to argue for the much narrower proposition that there was no "expectation that future interpreters would seek the instrument's meaning in the *intentions* of the delegates to the 1787 Constitutional Convention."[239] Powell relied on what he saw as two traditions of interpretation regarding writing. The first was a tradition that purported to believe that all "interpretation" was a corruption of the text, a view that originated in the Enlightenment and British Protestantism.[240] The second such tradition was contrary to the first and came from the common law practice of interpreting texts and affirmed the possibility of textual interpretation.[241] Powell concluded that the Republican, Jeffersonian victory in 1800 precipitated a form of original intention interpretation with the source of interpretative values being the states to the constitutional compact.[242] It was only following "the breakdown of the Republican consensus" that legal thinkers turned to the "personal intentions of individual actors."[243]

Powell contended that the Framers of the Constitution expected the

237. *See e.g.*, BARNETT, *supra* note 229, 89–117 (arguing that the Founders and Ratifiers held the view that the original meaning of the text of the Constitution was binding).

238. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). Such a reading of the beliefs of the Founders and Ratifiers is problematic for the historical claim that our society bound itself to the social ordering embodied in the Constitution. My claim is that society, with the ratification of the Constitution, sought to bind itself to a particular social ordering. This binding would entail all members of the society, including judges, interpreting the Constitution to abide by that original social ordering, which requires original meaning interpretation.

239. *Id.* at 886 (emphasis added).

240. *Id.* at 887.

241. *Id.*

242. *Id.* at 887–88.

243. *Id.* at 888.

Constitution to be interpreted like other legal documents under the common law.[244] "The framers," according to Powell, "shared the traditional common law view . . . that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words . . . ."[245] They believed that "future interpreters would adhere to then-prevalent methods of statutory interpretation."[246] Powell rightly noted that Madison rejected an original intention interpretive methodology in favor of one that "rested primarily on the distinction he drew between the public meaning or intent of a state paper, a law, or a constitution, and the personal opinions of the individuals who had written or adopted it."[247] Powell also quoted Hamilton from *The Federalist* for the proposition that the text of the Constitution would receive an interpretation in line with the text's objective, that is public, meaning.[248]

Powell, properly understood, defended the proposition that society at the time of the ratification believed that the original meaning of the text of the Constitution was binding. That meaning was the meaning attributed to the text by the Ratifiers of the Constitution: those who gave it authority. "When a consensus eventually emerged on a proper theory of constitutional interpretation, it indeed centered on 'original intent.' But at the time, that term referred to the 'intentions' of the sovereign parties to the constitutional compact, as evidenced in the Constitution's language and discerned through structural methods of interpretation."[249] Powell's basic proposition supports my claim that society wanted to achieve certain ends through a binding, written Constitution that required original meaning interpretation to achieve. As Randy Barnett concludes, after reviewing Powell's article: "Contrary, then, to how it is commonly used, the historical evidence presented in Professor Powell's path-breaking article supports, rather

244. *Id.* at 903.

245. *Id.* at 903–04.

246. *Id.* at 904.

247. *Id.* at 935.

248. *Id.* at 911 (referring to THE FEDERALIST NO. 83 (Alexander Hamilton)). *See also* Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (1791), *in* 8 PAPERS OF ALEXANDER HAMILTON 111 (H. Syrett ed. 1965) ("The Secretary of State will not deny, that whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction.").

249. Powell, *supra* note 246 , at 948. *See also id.* at 931 ("One construed a contract's 'intent' not by embarking on a historical inquiry into what the parties actually wished to accomplish, but by applying legal norms to the contract's terms—that is, by construing the contract in accordance with the common understanding of its terms.").

than undermines, an adherence to original meaning originalism."[250]

Many scholars have been critical of Powell's analysis.[251] Professor Robert Clinton, for example, has argued that Powell, in part, (and unintentionally) misconstrued the historical evidence.[252] Professor Clinton conducted an exhaustive survey of the historical material and concluded that the Founders emphasized originalist interpretative methodologies.[253] Some Founders, such as Washington, leaned more heavily to an intentionalist methodology concentrating on the Framers while others, such as Madison, followed a more objective original understanding method.[254] Thus, according to Clinton, the main difference among the Founders was which historical materials to consult to determine, supplement, or explain the meaning of the text of the Constitution.[255] Professor Clinton concluded that, "quite contrary to Professor Powell's thesis, originalism with varying methodologies was employed by the President, in Congress, and in other commentaries seeking to interpret the Constitution during the formative period of the [nation]."[256]

Given the ample scholarship on the issue of the Founders' and Ratifiers' beliefs regarding originalism, it is unnecessary to rehearse the arguments in greater detail in this Article. It is sufficient to remark that the scholarly consensus is that our society, in 1787-1789,

---

250. BARNETT, *supra* note 245, at 97.

251. *See, e.g.*, Randy E. Barnett, *An Originalism for Non-originalists*, 45 LOY. L. REV. 611, 625–29 (1999). *See also* WHITTINGTON, *supra* note 74 , at 180 ("The first difficulty with [Powell's] argument is that it is in all likelihood historically inaccurate.").

252. Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 IOWA L. REV. 1177 (1987).

One such instance involves the resolution of the Federal Convention to preserve the records of the Convention. *Id.* at 1195. At the end of the Convention Rufus King moved that the records be destroyed or entrusted to Washington's keeping. The Convention voted to preserve the records and deposit them with Washington if and until the Congress under the new Constitution should direct him. The stated reason was given by James Wilson who "favored preservation since 'as false suggestions may be propagated it should not be made impossible to contradict them.'" *Id.* (quoting 2 FARRAND, RECORDS, supra note 147, at 648). As Clinton suggests, "the principle reason the delegates preserved the Journals and certain other papers from the Constitutional Convention was to facilitate their use in rebutting false suggestions propagated about the document." *Id.*

253. *Id.* at 1206.

254. *Id.* at 1206–07.

255. *Id.* at 1207.

256. *Id.* at 1213. Professor Clinton goes on to argue that originalism was not the predominant mode of constitutional interpretation but, rather, was one of many modes. *Id.* at 1220. I agree but I believe that most of the modes of interpretation current following the Founding sought to elicit from the Constitution its meaning as understood by the People, whether through the text or original understanding or original meaning. This can be seen, for instance, from the events surrounding *Chisholm* and the ratification of the Eleventh Amendment.

understood that the original meaning of the Constitution was the binding meaning of the Constitution.[257]

In addition to the direct historical evidence that our society actually held a view of the Constitution that comported with the Aristotelian tradition—that society through ratification was strongly binding itself, including future members, to a particular social ordering—one can also think of numerous *a priori* reasons why a society such as our own—with its experiences, goals, and fears—would desire a binding written constitution and original meaning interpretation. Our nation, on the eve of ratification, had recently fought a revolution against what was perceived to be a tyrannical government. The People was suspicious of any governmental authority. This led to the adoption, following the Declaration of Independence, of state constitutions where the people retained tight control over the government through frequent reelection, short terms of office, and the lodging of most power in the legislature. The greatest opposition to the new Constitution was in the form of fears that a strong central government, electorally distant from the People, would become tyrannical. In other words, the People of the United States had a great fear of government getting out of control and suppressing citizens.

One logical response to this fear is a written, binding constitution. To prevent one's government from becoming tyrannical, one could institute a rule binding one's agents—the government officials—to a relatively determinate set of instructions authorizing them to act on one's behalf.[258] These instructions would limit the authority of the officials and it would be possible to readily identify when the officials act beyond their authority because they would act outside of the instructions. Stated differently, instead of giving the government officials discretion to try to govern the society as they think best or how they think the current majority would like (even if, in fact, they are correct in their thinking), the officials are limited by written instructions to prevent the officials from using their discretion to overstep their authority.

One can view the Constitution as a set of written instructions made by a distrustful People defining for government officials the limits of their authority. The People recalled bad experiences with past

257. *See also* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77 (1989) (criticizing Powell).

258. This idea is explained, in a similar context, by Professor Gardner. *See* James Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 28 (1991).

governments, was mistrustful of a strong central government, and wanted to use the writtenness of the Constitution to contain the government.[259] As Chief Justice Marshall noted, "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written."[260] The People could have intended to give government officials the discretion to do what they thought best for the polity (in constitutional matters), but it did not. Instead, the Constitution placed off limits from official discretion the extent of the officials' authority.[261]

The fact of a written Constitution therefore served a number of purposes. It served to express a relatively definite set of limitations on government officials. Relatedly, it served to make those limitations public and the extent of the limitations a matter of public knowledge. The writtenness limited the discretion of government officials to determine the direction of the polity in line with the officials' view of the good contra the view of society expressed in the Constitution.

Another reason the People would have wanted to express certain restrictions on the government in a binding, written document is similar to those listed above. The People would have wanted to enshrine certain rights protections in a manner that could prevent government officials from eroding them.[262] The extent of rights protection afforded by the document would be publicly accessible and the public would notice erosion of those protections.

The writtenness of the Constitution serves the further purpose of securing certain protections against future generations that may be less inclined to civilization and more inclined to brutality.[263] There

---

259. *See* St. George Tucker, *Appendix* at 154–55, *in* 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (Philadelphia 1803) ("The advantages of a written constitution, considered as the original contract of society must immediately strike every reflecting mind; power, when undefined, soon becomes unlimited; and the disquisition of social rights where there is no text to resort to, for their explanation, is a task, equally above ordinary capacities, and incompatible with the ordinary pursuits, of the body of the people.").

260. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

261. This was Madison's view:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be *no security for a consistent and stable, more than for a faithful, exercise of its powers*.

Letter from James Madison to Henry Lee (June 25, 1824) (emphasis added).

262. This argument has been utilized by many originalists, most notably Justice Scalia. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 43–44, 148–49 (1997).

263. Justice Scalia also advances this argument. *See id.* at 145–46.

was no guarantee, to the Founders, that future generations would be as enlightened. Numerous contingencies could occur making a future generation less zealous to protect individual rights or a limited central government. The writtenness of the Constitution served as a shield against that generation to be used by the legislatures, courts, or concerned citizens. Many, from many different perspectives, have argued that the Constitution served just that purpose on numerous occasions.[264]

Another reason why a rational society may want to bind itself with a written binding Constitution is the inherent danger associated with the occasions when the People fundamentally order or reorder society. Chief Justice Marshall expressed this reasoning in *Marbury*: "The exercise of this original right [to order society] is a very great exertion; nor can it or ought it to be frequently repeated. The principles . . . are designed to be permanent."[265] When the fundamental ordering of society is placed in question, any manner of things may happen, some of which would be harmful. For example, the People may be led astray by a demagogue to order society to give the demagogue power. And, if the fundamental ordering of society is constantly placed in question, people lose respect for the law and the fundamental ordering. Because of these and similar reasons societies will reasonably want to establish a more permanent social order.

Professor Barnett has argued persuasively that the "writtenness" of the Constitution—its formality—serves evidentiary, cautionary, channeling, and clarifying purposes.[266] Any society wanting to order itself towards the common good would have good reason to fundamentally order itself through a permanent written document. The writing would serve as evidence of the fundamental and binding ordering. Making the writing itself would caution the society to give much thought to the process of ordering and how and whether it wished to make such a decisive choice for its future. The requirement of a writing to amend the social ordering provides guidance to those who would wish to alter the ordering for the common good. They would have one process through which they knew they could alter the ordering and accordingly direct their energies. Finally, by reducing

264. It has also failed to serve that purpose. During the New Deal the will of the populace was so overwhelming, and the determination of President Franklin to not pursue a constitutional amendment so intense, that the writtenness of the Constitution could hold back the tide only for so long.

265. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

266. BARNETT, *supra* note 229, at 100-17.

the ordering to writing the society is forced to think through all of the aspects of the ordering and clearly delineate the details of the ordering. The benefits of the writtenness of the Constitution are only realized, however, if the original meaning of the text is authoritative: if the text has a determinate, unchanging meaning.

Requiring that any changes to the social ordering imposed on the polity through the Constitution come in the form of Article V written amendments to the Constitution serves all of the purposes listed above, but enforcement of written amendments also suit the institutional capabilities of the courts.[267] Federal courts, as has often been repeated (and sometimes exaggerated) are relatively more insulated from temporary popular pressure than are legislators. Courts and lawyers are trained to work with written language. Of course, so are most legislators (the vast majority of whom are lawyers), but legislators do not have the other institutional capabilities of courts. Legislatures are the governmental body most likely to be subject to an excited majority willing to act against the dictates of the Constitution. Looking for reelection, caught up in the passion of the moment (and knowing that courts will undo any constitutional harm) legislators are institutionally more likely to disregard the commands of the Constitution.

The converse is also true. Courts are not institutionally adept at discerning when the People of the society wish to alter the fundamental social ordering of the society in the Constitution. How can an isolated court know when a popular movement has sufficient authority to speak for the People and amend the Constitution?[268] Courts need the triggering mechanism of a written amendment to inform them when the fundamental ordering of society has changed. This is a clear signal to the courts to enforce this change.

Keith Whittington has also cogently argued that the fact we have a "written Constitution requires an originalist interpretation."[269] First, Whittington established that the difficulties caused by Great Britain's constitution—its ambiguity, its malleability, and its susceptibility to manipulation and subversion by the government—caused the newly

267. As opposed to the unwritten constitutional amendments posited by Bruce Ackerman.

268. For a view that isolated courts composed of social elites can do just that see Professor Bruce Ackerman's powerful books. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); ACKERMAN, TRANSFORMATIONS, *supra* note 171.

269. WHITTINGTON, *supra* note 74 , at 50.

independent Americans to turn to a written Constitution.[270] Second, Whittington showed that, for the Constitution to be judicially enforceable *law*, it must be a text with a fixed meaning that can provide a warrant for judicial limitation of legislative aggrandizement.[271] Relatedly, only a text with a fixed meaning can provide an adequate vehicle for society to order itself and its agents.[272] Lastly, Whittington wrote that only a text with a fixed meaning could convey meaning, as the Framers and Ratifiers sought to do through the Constitution.[273] For these reasons, the fact of the writtenness of our Constitution leads to an originalist methodology. These reasons also point to the reasonableness of our society's use of originalism as part of the prudential judgment through which it ordered our society toward the effective pursuit of the common good.

c. Summary

In sum, I have argued in this subsection that our society ordered itself in a permanent manner through the Constitution. Our society understood the act of ratification of the Constitution as a social ordering for the common good of the society that was strongly binding (because of Article V and the original meaning) on the society, its members, and government agents (including federal judges). The American People, following ratification of the Constitution met Maritain's definition of a full society:

> [T]he people are the multitude of human persons who, united under just laws, by mutual friendship, and for the common good of their human existence, constitute a political society or a body politic . . . . The notion of the people means the members organically united who compose the body politic.[274]

7. Conclusion

Thirteen formerly independent colonies became one society—a group of people together pursuing the common good—through the Articles of Confederation. This was achieved through political and legal union, the only ingredient missing from the otherwise very similar but separate colonial societies. The Articles failed miserably

---

270. *Id.* at 50–53.
271. *Id.* at 53–59.
272. *Id.*
273. *Id.* at 59–61.
274. MARITAIN, MAN AND THE STATE, *supra* note 3, at 26.

achieve the common good and was, in fact, on the verge of causing the new national society to collapse. Society recognized the threat posed by the Articles and sought to reorder itself. The men in attendance at the Philadelphia convention, with great insight, offered our society a reordered polity capable of effectively pursuing the common good. Our society accepted the Constitution and the social ordering it embodied and determined that the Constitution's ordering would be binding on it and its members into the future absent the large consensus necessary under Article V to alter the ordering. Essential to the social reordering embodied by the Constitution was the determination that the original meaning of the Constitution would bind members of society.

C. *But Why Originalism?: Why Judges (and the Rest of Us) are Bound by the Original Meaning*

1. Introduction

Relying on the basic characteristics of the Aristotelian tradition, in the preceding sections I labored to establish that a society can bind itself to a written document, and that our society did just that when it ratified the Constitution. An essential part of that binding social ordering was that the original meaning of the Constitution would remain binding on members of society.

But, a critic might ask, why is it necessary that an *individual alive today* be bound to the original meaning of the Constitution? Why not the contemporary meaning of the society at any given time?[275] In this section of the Article I will attempt to answer that question.

There are three reasons, derived from the Aristotelian tradition, that establish the bindingness of the original meaning. Admittedly, my arguments may not persuade those who do not accept the Aristotelian tradition—the arguments below assume that you accept my premises. But this concession follows from the nature of my larger project: one's prior philosophical commitments drive one's understanding of the Constitution, and one must first alter those commitments before a change in understanding the Constitution will occur. The reasons the original meaning is binding on today's members of our society are based on the essential premises of the Aristotelian tradition about the nature of man, society, and the law;

275. Or, what about use of contemporary notions of justice and fairness as opposed to the original meaning?

what it means to be a judge and his competence to frame positive law as compared to a legislator or legislative body.

2. *The Aristotelian Tradition and Originalism*

a. *Prerogative of Authority*

I believe the strongest argument for the proposition that today's judges are bound by the original meaning of the Constitution stems from the Aristotelian tradition and its understanding of authority.[276] I have argued that the People of the United States, when it ratified the Constitution, both reaffirmed the existence of our national society and made the original meaning of the Constitution binding on it and future generations. I will now argue that the People's authoritative prudential decision on how to order society into the future is binding on *all* members of our society, including those alive today.

According to the Aristotelian tradition, authority and some form of authority structure is necessary for every society to achieve its end. John Finnis has argued that "[t]here are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy."[277] If society's purpose is to pursue the common good which enables its members to perfect themselves, society *must* make a decision at some early point on how, exactly, it will be ordered. The society must determine what sorts of institutions it will have to advance society to the common good. It must establish a state to direct the overall functioning of all subsidiary institutions. It must establish laws to regulate and guide institutions and individuals in their relationships with each other and the state.[278]

The common good, at its most basic, is all members of society working together—both in their particular and public capacities—for the benefit of and by everyone in the society. It is truly a common enterprise and each person takes ownership of the enterprise to benefit all. Like members of an orchestra, members of society cooperate with all the other members in order to achieve the common goals of the entire group – not as isolated individuals, but as integral parts of the

276. The foundation for this argument is taken from SIMON, AUTHORITY, *supra* note 34.

277. FINNIS, NATURAL LAW, *supra* note 6, at 3.

278. Without a just internal order (and external defense) common action would be impossible. If theft is rampant because there is no internal order, few can pursue goods that are constitutive of them as humans.

whole.

However, for society to effectively pursue the common good, there must be unity of action. Without some manner of coordination, there could be no common enterprise, because each person or subsidiary organization would seek what it views as its good (which may or may not be correct) and disputes would arise as individuals and organizations in honest pursuit of their goods collide. For example, without a single decision regarding how many resources to allocate to defense, different members of society may propose conflicting—but reasonable—solutions. The result would be no effective defense.

Unity of action, in turn, is dependent on unity of judgment regarding what common action is required—in these particular circumstances—for effective pursuit of the common good. As discussed by Yves Simon, an authority—an authoritative structure, group, or person—and not a spontaneous unity of judgment *must* make the binding, prudential, social ordering decision. There are four interrelated reasons why popular consensus will not work to create unity of judgment.[279]

First, the reasons for the choice of which path to take, as a society, are not readily *rationally communicable.* [280] For one thing, the kind of knowledge required to determine the best path to follow, practical wisdom, is difficult to communicate. The people to whom one wishes to communicate the result of the process of practical deliberation may be neither virtuous nor possess practical wisdom, and may therefore be unable to see why the result is correct, may challenge the result as originating from someone without the wisdom to make the correct determination, or may, because vice has corrupted them, reject what they know to be a correct result for a base reason (*e.g.*, pride). Further, the process of practical wisdom, whereby one recognizes the reality of a situation and determines the correct course of action in contingent matters, by its nature, does not lend itself well to communication. In the Aristotelian tradition, as one becomes virtuous

279. These reasons are taken from SIMON, AUTHORITY, *supra* note 34, and YVES R. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT (1951).

280. SIMON, AUTHORITY, *supra* note 34 at 33–39. According to the Aristotelian tradition, there are two means to ethical knowledge: cognition and inclination. *Id.* at 34. Cognition is the intellect's grasp of the essential nature of a universal ethical truth and then the process of deduction. *Id.* Inclination is the process by which a virtuous will—a will inclined toward the truth—will desire the truth. *Id.* In contingent circumstances, cognition will not provide an answer to what the correct course of action is, leaving only inclination. *Id.* at 35–37. "[T]he way of inclination alone can procure an answer when a question of human conduct involves contingency." *Id.* at 37.

and acquires practical wisdom, one is better able to grasp reality and truth than previously (and than others who lack practical wisdom). This perception of the truth of a situation is lacking in others who do not possess practical wisdom, and the truth can only be vaguely described to and accepted by the others on the authority of the man with special insight. Thus, when an authoritative decision is made, most will agree on the initial premises grounding the decision—for example, there must be a speed limit and other highway regulations—but there is no mode by which the concrete application of these agreed upon premises can be communicated.

An analogy to the inability of persons to rationally communicate the reasons for a course of action is the knowledge possessed by an artist (or any craftsman, for that matter).[281] When a person seeks to become an artist he will study under a master of the craft. Initially, the apprentice's judgment regarding the excellence (or lack thereof) of art is limited. Only with the judgment obtained through years of study and practice under the guidance of the master artist will the apprentice gain the judgment to correctly evaluate the excellence of art. Prior to that point, a master could attempt to explain to the apprentice whether a particular piece of art is excellent or not, and why, but because of the apprentice's lack of trained judgment, he would not fully understand the master's explanation: there would be an *inability to rationally communicate* between the master and apprentice. As MacIntyre argues more broadly regarding the craft analogy in the Aristotelian tradition, the apprentice must "initially accept [the master's judgments] on the basis of his or her authority."[282] Similarly, societies facing contingent matters are often unable to rationally communicate the reasons why a particular course of action is most appropriate.

In sum, if society is to secure the common good it *must* make a social ordering decision that brings about common action, but such a decision cannot be reached by a natural consensus bubbling up from the populace because of the inability to rationally communicate the result of practical deliberation, so there must be an authoritative mechanism to decide how to order the society to enable society to effectively pursue the common good.

A second, related reason for the necessity of a binding prudential

281. My understanding of the craft analogy is taken from MACINTYRE, THREE RIVAL VERSIONS, *supra* note 26, at 61–64.

282. *Id.* at 63.

judgment in the social ordering of a society, is the existence of any number of *equally* rational *means* towards an agreed upon end. Each society has a number of immediate ends that are a part of the overall common good of a society. Here, an analogy to Finnis's and George's discussion regarding the basic human goods is in order.[283] There are seven basic human goods that are analytically distinct portions of the whole of human flourishing. How an individual seeks human flourishing, that is, the combination of the goods he seeks, is rationally underdetermined. This means that the individual can rationally pursue, within broad bounds set by the first principle of morality and subsidiary moral principles, any combination he pleases.

Likewise, the common good of a society has numerous components: external defense, internal order (laws, legal institutions, enforcement mechanisms), material necessities, spiritual necessities, education, culture, public areas, etc. Each of these portions of the common good is interrelated to the others through a complex web. By choosing to pursue one portion more than another the ability of the society to pursue the other portions of the common good is affected in complex ways. How a particular society chooses to pursue the common good—what portions it pursues with greater vigor—is rationally underdetermined. Keith Whittington has made a similar point:

> Constitutional requirements are ultimately a matter of choice and will. Although reason, at least, has much to say as to the correct form a constitution should take, it is not conclusive in and of itself. The rights due to individuals, the goods to be achieved for them through government, and the instruments of government necessary to both are subject to disagreement and controversy. In part, such controversy arises from the fact that there are multiple correct answers; there are multiple ways to formulate individual rights and several reasonable responses to the inherent trade-offs of politics. And disagreements arise in part as a result of the limitations of reason.[284]

For example, a particular society can choose, within broad bounds, to pursue more education for its populace and pursue external defense less vigorously. The society is still pursuing the common good, and it may be doing so in a manner different than another society, but given the diversity of goods within the common good, the society's greater

283. FINNIS, NATURAL LAW, *supra* note 6, at 33–34, 59–127; ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 13–16 (1993).

284. WHITTINGTON, *supra* note 74 , at 139.

relative emphasis on education is rational. But, *for a society to secure the common good, it must make a choice of social ordering.* If there are numerous rational means to any end there will be no unity of judgment to guide the society on a choice of means. Instead, the only manner by which a society can achieve the common good is for an authority to choose the means the society will pursue.

A third reason for the necessity of an authoritative judgment in each society is the problem of *coordination*. Each society *must*, if it is to secure the common good, choose a life-plan that will coordinate the pursuit of the common good by members and subsidiary entities. In the analogous situation of the individual, Finnis has argued that "[i]mplicitly or explicitly one must have a harmonious set of purposes and orientation, not as the 'plans' or 'blueprints' of a pipe-dream, but as effective commitments."[285] Society cannot simply allow people to act however they think best. The choice of social ordering designed to enable the society, under the circumstances it finds itself, to achieve the common good is a prudential judgment. It is prudential because it involves how the society, a moral entity, will act in contingent circumstances. There is no means by which one can deduce from principles of justice to a correct ordering of society in contingent circumstances. Consequently, no social consensus or unity of judgment will arise, making social decisions on common action without authority impossible, and causing conflict as members and subsidiary entities pursue their goods and the common good in the (conflicting) manner they deem best.

Specifically, without coordination by an authority, different government agencies and subsidiary entities that have specific *functions* in the overall plan of pursuit of the common good, would continually clash. For example, the Department of Defense and Department of State each have specific functions, but they often clash in pursuit of their respective goals. Therefore, an authority is necessary to coordinate these agencies to prevent them from clashing. In addition, the authority who has care of the entire common good would ensure that each agency is performing its function in the manner best suited to the common good. This oversight is necessary because the agencies are pursuing specific aspects of the common good and do not have the ability to value their respective functions in proper proportion to the rest of the common good.

What would happen if society forsook its duty to regulate and

285. FINNIS, NATURAL LAW, *supra* note 6, at 103–04.

coordinate social life? Think of the impact on highways, one small area of social life with which we are all familiar. There are a number of rational variations on how a society could regulate highway usage. The speed limits, vehicle safety regulations, vehicle environmental regulations, and the countless other aspects of highway usage and the larger social impact of such usage are variable within broad limits and related to many other areas of social life. One person could rationally believe that one particular combination of regulations would best advance the common good—sixty miles per hour speed limit, higher fuel efficiency requirements, stricter licensing requirements—while another person could conclude that a different combination would be more effective. So, different individuals could each rationally choose to live under a different regime of their own creation. The result would be anarchy.

Therefore, the prudential judgment of a society is necessary to coordinate the action of members of society to achieve the common good because without coordination the members would rationally pursue conflicting paths.

A fourth reason, related to the third, why one must obey the prudential ordering decision of one's society is the issue of *capacity*. By this I mean the capacity in which one acts in one's society. The common good of a society would suffer if everyone simply acted virtuously in his own private or particular capacity.[286] A society must have officials who are entrusted with the overall supervision of the society and pursuit of the common good. These officials' official capacity is the care of the entire community. These officials have, what one could call, the broader view in mind.

Even if an individual acts virtuously in his private capacity, his actions could harm the common good and there is then the need for officials entrusted with the security of the common good with the authority to overrule such privately virtuous actions. An example, taken from St. Thomas, is of the judge justly sentencing a man to die for a capital crime. The criminal's actions warranted the sentence to preserve the common good, but the criminal's wife and son are also warranted in desiring a different or no sentence. Their virtuous actions of love and fidelity to the criminal are at odds with the needs of the common good. Each society must have officers with the

286. *See* SIMON, AUTHORITY, *supra* note 34, at 50–56 (discussing the distinctions between public and private, common and particular, and form and matter of the common good).

authority to override such individually virtuous actions for the sake of the common good. These officers act in an official capacity of care for the common good and their authority to act in such a manner comes from the society itself.

I have given four interrelated reasons for the necessity of authoritative social ordering decisions. Each one is premised on the Aristotelian understanding of the nature of society, what it seeks and why men enter it. Society seeks the common good, a portion of which is individuals working together to secure the particular goods of each individual. Men are in society to pursue their individual goods: to seek their perfection. If the *only* way for a society to achieve the common good is for it to make authoritative, binding, decisions, then men in the society, if they are to rationally pursue their individual goods, must follow those decisions – otherwise, one is irrationally thwarting the very reason one is a member of the society. Simon has stated similarly that:

> Th[e] rule of common action may coincide with my own preference, but this is of no significance, for the common rule might just as well be at variance with my liking, and I would be equally bound to follow it out of dedication to the common good, which cannot be obtained except through united action. The power in charge of unifying common action through rules binding for all is what everyone calls authority.[287]

Since the individuals in the society entered and remain part of a society to fulfill their individual goods, and their individual goods can only be fulfilled if the society reasonably pursues the common good, each individual must—if he is to be rational—follow the decision of the authority.

I argued earlier that our society made a prudential, social ordering decision through the adoption of the Constitution. Part of that decision was the determination that the judiciary was bound by the original meaning of the Constitution. In this subsection I have summarized the reasons offered by the Aristotelian tradition for why such decisions are binding on those who are members of the society regardless of their own assent to the ordering and the limitations placed by that ordering on their autonomy. At its most basic, one is bound by the prudential ordering decision of one's society because of the reasons one is a member of that society.

Our Constitution is essentially a prudential, social ordering

287. *Id.* at 48–49 (emphasis added).

decision. Recognizing its need to replace the Articles of Confederation, our society turned to a group of men with generally broad views. As we have seen, these men keenly perceived both the threat to the continued viability of the national society and the great benefits to the common good that would be brought about by a legal and social reordering of the society. As Madison argued in *Federalist 43* the violation of the Articles' amendment procedures was justified by "recurring to the absolute necessity of the case . . . to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed."[288] What was clear to Madison and those around him was that the United States of America was faced with a choice between continuing on its path, and becoming at best a conglomeration of thirteen bickering, independent, states, or becoming a truly national society with a state apparatus that could effectively pursue the common good.

Our society chose the latter course. The complete failure of the Articles made its abrogation not a cause for regret, but for rejoicing – it was that abrogation that enabled our society to effectively pursue what it had previously been unable to do. The national government under the Articles was so ineffectual that its continued existence made the Articles' social ordering immoral and *required* change. The common good was not being served; the purpose of the society was not being met.

The social ordering established by the Framers at Philadelphia was and is not perfect. But perfection is not the measure of a certain ordering of a particular society. The correct measure of the Constitution's social ordering is this: under the circumstances facing the society at the time of the social ordering did the social ordering enable the society to effectively pursue the common good? The Constitution met and exceeded that standard, as evidenced by a reading of the history of the Articles of Confederation, the Framing and Ratification of the Constitution, and our subsequent constitutional practice.

Because the social ordering put in place by the Constitution secured the ability of the national society to pursue the common good, it commanded and still commands the adherence of members of the society. "If," argues Maritain,

288. THE FEDERALIST NO. 43 (James Madison).

> in the cosmos, a nature, such as human nature, can be preserved and developed only in a state of culture, and if the state of culture necessarily entails the existence in the social group of a function of commandment and government directed to the common good, then this function is demanded by Natural Law, and implies a right to command and govern.[289]

Thus, one who is a member of a society for the purpose of securing his individual good can only irrationally reject a social ordering that does, in fact, secure the common good. And such a person would generally be acting unjustly if they act outside the norms established by that society for the pursuit of the common good. The only question a reasonable being will ask is whether or not one is rationally pursuing one's end.

In addition, as I have argued above, part of the social ordering instituted by the Constitution was the bindingness of its determinations. Members of our society are not only bound by the weaker bindingness of statutes, but also by the strong bindingness of Article V. Our society had good reason to make some norms, some portions of the social ordering, off limits to the decisions of a simple majority.[290]

Finally, a fundamental part of the prudential judgment made by society was to adhere to the original meaning of the text of the Constitution. This was a rational path to take to enable society to effectively pursue the common good. I discussed these reasons above.[291] The same reasons by which members of society contemporary to ratification were bound to the social ordering of the Constitution regardless of consent—it enabled society and them to achieve their end—applies to members of society today. The obligations of individuals in society today arise from the transtemporal nature of the common good and of society. As Simon explained:

---

289. MARITAIN, MAN AND THE STATE, *supra* note 3, at 126 (emphasis omitted).

290. However, since the purpose of strong bindingness is to better secure the common good it is, ultimately, defeasible if it makes the pursuit of the common good impossible. This is what happened with the Articles of Confederation. The national government was unable to effectively pursue the common good and the cohesiveness of our society was fraying because of the inability to comply with the strict amendment requirements set forth by the Articles. It is because of the grave threat posed to the common good by the very strong bindingness of the Articles that the Framers and Ratifiers were justified in re-ordering our society through the Constitution. The lesson to be taken is this: a society can strongly bind itself to a particular social ordering but it cannot bind itself so strongly that the strong bindingness prevents the society from effectively pursuing the common good.

291. *See supra* notes 223–270 (discussing the actual reasons held by our society for abiding by the original meaning and other reasons that such a decision is reasonable).

> Human communities are the highest attainments of nature, for they are virtually unlimited with regard to diversity of perfections, and virtually immortal. Beyond the satisfaction of individual needs the association of men serves a good unique in plenitude and duration, the common good of the human community.[292]

Members of today's society have their individual ends to pursue. To achieve their ends requires living in a society that effectively pursues the common good. To achieve the common good, a society must make a prudential ordering decision that members of the society must adhere to for the society to effectively pursue the common good. Today's members, if they wish to achieve their end, must abide by the ordering decision made by our society in 1787-1789, and in the amendments thereafter, regardless of consent. An essential element of the Constitution's social ordering was the bindingness of the original meaning of the Constitution. Consequently, members of society today must abide by the original meaning of the Constitution.

b. Jurisdiction

A basic tenet of the Aristotelian tradition is the existence of the natural law. A society, to be just, must make the natural law effective. Making the natural law effective is, in most societies, the process through which the moral norms of the natural law are instantiated in the society and the common good is pursued. [293]

In the world of contingent affairs, virtuous men of practical wisdom are the measure of how best to apply and make effective the principles of the natural law in a society. As George has noted on this subject: "[The] natural law itself does not settle the question of whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conform to natural law and respect natural rights."[294] In other words, the natural law itself does not settle, *a priori*, how a given society shall make the natural law effective; it depends on the circumstances how a society is going to make the natural law effective.

---

292. SIMON, AUTHORITY, *supra* note 34, at 28–29.

293. I am indebted for the clear explanation of this argument about jurisdictional authority to Russell Hittinger and his new book. *See* HITTINGER, THE FIRST GRACE, *supra* note 27, at chs. 3–4. Robert P. George has also offered a valuable contribution to this area of the law. *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL Law ch. 5 (1999). My hope is that I have offered a further explication of these arguments and the necessary background for them.

294. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2279 (2001).

In our society, we have primarily made the natural law effective through positive laws (both statutory and judicial) and a written Constitution. Both are binding on the members of the society for a number of reasons (but sometimes in different ways). When are positive laws (and positive laws with the special bindingness of the Constitution) not binding? They are not binding when: (1) their content is against the natural law;[295] and (2) when they were created by a person or body who did not have the authority to create such laws. The second criterion is directly pertinent to the thesis of this Article.

Aquinas defined the proper lawgiver as the person or body entrusted with the care of the community pursuing the common good.[296] If a person or body who was not entrusted with the care of the community creates what purports to be a law, the purported law is not binding because that person or body did not have the authority to decide the question the purported law purported to decide. For example, if one's neighbor drafts a code of conduct for one's neighborhood and posts it on the utility poles in the neighborhood—even if it is a good and just code of conduct—one is not obligated to abide by the neighbor's code of conduct. This does not answer the question of who, in our society, has the authority to make positive law but shows that only certain authorized people or institutions can do so.

The answer to the question of who in our society has the authority to make binding law, according to the Aristotelian tradition, is one of *positive* law or convention, and not natural law. By this I mean that each society may determine for itself how it will allocate law-making authority because there is no principle of natural law itself declaring that either the legislature, executive, or judiciary—a specific person or body—must have the authority.

Our society determined that legislative bodies will be the primary vehicles through which the natural law would be made effective and that this would be done, primarily, through positive law. Judge Lemuel Shaw confirmed this determination when he faced the

---

295. But do not jump to the conclusion that because the content of a particular positive law is unjust and not binding *because of* its justness, that one is not bound to follow that law. One must follow even unjust laws to the extent that one's disobedience to that law would cause greater harm to the just order of the society than the unjust law itself (coupled with the chance that the unjust law will be repealed). For example, if the society is corrupt and does not contain a just order then disobedience to a particular unjust law will not greatly impede the maintenance of the order.

296. AQUINAS, SUMMA, *supra* note 41 at I–II, q. 90, a. 4.

obvious conflict between positive and natural law presented by enforcement of the Fugitive Slave Act, and wrote that "he probably felt as much sympathy for the person in custody as others, but this was a case in which an appeal to natural rights and to the paramount law of liberty was not pertinent! It was to be decided by the Constitution . . . and by the Law of Congress . . . ."[297] Our society viewed judges as servants of the People, which was the ultimate sovereign in the society. The judge's duty was to implement law as expressed in the Constitution or in statutes. The judiciary was not authorized by the social ordering embodied in the Constitution to directly make the natural law effective (except interstitially, during the application of laws made by the People or its representatives).[298] Justice McLean, also in a fugitive slave case, noted the limited authority of the office of judge: "It is for the people . . . in making constitutions and in the enactment of laws, to consider the laws of nature . . . . This is a field which judges cannot explore . . . . They look to the law, and to the law only."[299]

The most famous quotation embodying this view of the nature of the judiciary and the extent of its authority is Hamilton's defense of judicial review in *Federalist 78*, relied upon by Chief Justice Marshall in *Marbury v. Madison*: "The courts must declare the sense of the law; and if they should be disposed to exercise *Will* instead of *Judgement*, the consequence would be the substitution of their pleasure to that of the legislative body."[300] The judiciary had no authority to rule against the will of the legislature except when doing so pursuant to the will of the sovereign, the People expressed in the Constitution. "[I]n other words, the Constitution ought to be preferred

297. Account in *The Liberator*, Nov. 4, 1842, at 3, *reprinted in* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 169 (1975). *See also* COVER, *supra*, at 116 ("The judiciary was superbly consistent in a wide variety of contexts in [a] positivist approach.").

298. Ely came to the same conclusion during his discussion of the use of natural law to justify the direct judicial application of fundamental values: "It [natural law] was thought to be invocable interstitially, when no aspect of positive law provided an applicable rule for the case at hand. But it was subordinate to applicable statutes and well-settled precedent as well as constitutional provisions, and not perceived as a source of values on whose basis positive law could be constitutionally upset." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 50 (1980).

299. Miller v. McQuerry, 17 F. Cas. 335, 339 (C.C.D. Ohio, 1853) (No. 9583).

300. THE FEDERALIST NO. 78 (Alexander Hamilton). *See also id.* ("It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."). For a general discussion of the relationship between the People and their agents, the courts and legislatures, see *id.*

to the statute, the intention of the people to the intention of their agents."[301]

Our society did not *have to* adopt the jurisdictional model we have; it could have given judges broad authority to make the natural law effective directly through adjudication. This type of commitment can be found in the common law in both England and the United States, which can be seen as a mode of making the norms of the natural law effective in society at a time when the legislatures were as yet unable or unwilling to do so.[302]

The natural law does not mandate one type of allocation of law-making jurisdiction. What the natural law does require is that a society make the natural law effective. How this is best done, the *determinatio*, is ultimately dependent on the circumstances of a society. However, like any *determinatio*, since our society has chosen one path of social ordering, and that path reasonably well achieves the common good, then members of our society, and especially judges, are bound by that prudential social ordering. As Russell Hittinger has summarized, "the political common good depends on no branch of government taking more than its share of authority."[303] Stated differently, for a society to achieve the common good the members of the society must abide by the law.

Our Constitution provided for a certain allocation of legislative jurisdiction between the different branches of government. The primary authority to make law was lodged, by Article I, with the legislature, while the judiciary, as found in Article III[304] and *Federalist 78*, had the authority to "make law" only incidentally to its duty to apply previously made law to concrete situations.[305] That jurisdictional allocation is part of the fundamental ordering of our society. It is part of the fundamental norms governing our polity. It is part of the prudential social ordering that makes the language of the Constitution binding on members of our society today. Therefore, judges are bound by the original meaning of the Constitution and may

---

301. *Id.*

302. *See e.g.*, Herbert W. Titus, *God's Revelation: Foundation for the Common Law*, 4 REGENT U. L. REV. 1 (1994); John C. H. Wu, *The Natural Law and our Common Law*, 23 FORDHAM L. REV. 13 (1954).

303. Russell Hittinger, *A Crisis of Legitimacy*, FIRST THINGS, Nov. 1996, at 25–29.

304. *See* BARNETT, *supra* note 245, at ch. 4. (establishing that the "judicial power" includes the power of judicial nullification).

305. In a future article I will flesh out an original meaning jurisprudence based on the tenets of the Aristotelian tradition. That article will examine the scope of judges' interstitial law-making authority.

not, in the name of justice or the common good, exceed those bonds.

Positive law (or custom and tradition) determines the jurisdictional sway of the *office* of the judge. The judge's office gives him the care of the common good in a specific—and limited—manner. A judge is not like a private individual whose ability to reason from natural law principles suffices for his own actions. A private individual[306] has no authority from the natural law to impose his own judgment as to what the natural law requires on another private individual. I cannot, *qua* individual, enforce my judgment as to my neighbor's infractions. Only those vested with the authority of a public office (from the sovereign) that has the authority to render judgments binding on citizens of the polity, have such authority. A judge is someone who owes his authority to render judgment over the disputes between citizens of the society entirely to his office and to the positive law. His authority is defined by positive law, which was part of the broader social ordering embedded in the Constitution. He has no authority from the natural law to issue edicts regarding what the common good requires outside of the bounds of his positive law-defined office. Story followed this line of thinking: "When [the Constitution] is constitutionally altered, then *and not until then*, are the judges at liberty to disregard its original injunctions."[307]

The judge must use the positive law as the standard for his judgment because it is the positive law of the polity that has made the natural law effective in the society and contains both the mandates of the natural law and the relevant prudential extensions from the natural law. George has contended, along these lines, that "the natural law requires of judges and other officials of a basically just regime that they respect the limits of their own authority under the Constitution, whatever those limits are, and avoid usurping authority settled by the Constitution on others."[308] A judge who rules contrary to the positive law acts contrary to the authority of his office, which is traceable solely to the positive law.[309] He also acts contrary to the natural law

306. Actually, Jesus Christ is the one exception to this rule because of His divinity.

307. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §836 (Carolina Academic Press reprint ed., 1833) (emphasis added).

308. Robert P. George, *The Natural Law Due Process Philosophy*, 69 FORDHAM L. REV. 2301, 2304 (2001).

309. This does not mean that the view of judging held by the Aristotelian tradition is wooden and rigid. It is not. As Aquinas explained and I discussed earlier, since the purpose of the judge is to implement the legislator's intended material purpose (which is always more broadly to advance the common good), if, through poor draftsmanship, the statute does not achieve what is obviously the legislator's intended purpose, the judge *must* follow the purpose of the law to achieve the common good and not the mistaken letter of

made effective through the positive law. Lastly, he acts contrary to the determinations made in the positive law (not determined by the natural law) designed to lead the society to the common good.

Russell Hittinger has summarized the harm caused by judges exceeding the bounds of their office's authority:

> The injury is threefold. First, by taking more than one's fair share of authority (even when that share was determined by positive law), usurpation is an offense against natural justice. Because usurpation is an offense against the common good, it will never do to cite the common good as the reason for usurping the authority. Second, the judge deflects that part of the natural law that the legislator was trying to make effective in the positive law. Third, he almost inevitably fails to produce a command that can function in the manner of a law.[310]

Our society prudentially determined, through the adoption of the Constitution and its social ordering, that primary law-making responsibility would lie with the legislature. This prudential ordering decision was necessary to enable society to pursue the common good. Members of society must abide by that prudential ordering decision if society is to effectively pursue the common good. Judges are under an even higher obligation because of their office; they are not merely lawyers in robes. The nature and scope of authority of the judicial office is part of the *determinatio* made by our society. Thus, when a judge accepts his office he also accepts that his authority to impose legal judgments on others is circumscribed by the authority of the office.

---

the law. *See* AQUINAS, SUMMA, *supra* note 41, at II–II, q. 120, a. 1.

Because the judge must sometimes, and for the sake of justice, disregard a literal reading of the text of a statute promulgated by a legislator to achieve the legislator's intent (because of a failure of the art of writing down that intent) Justice Scalia's argument about the case *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), is erroneous. *See* SCALIA, INTERPRETATION, *supra* note 270, at 18–23. Justice Scalia argued that the Supreme Court in *Holy Trinity* wrongly looked to the purpose and intent of Congress when it ruled that a statute which forbid the importation of aliens "to perform labor or service of any kind in the United States" did not forbid an Episcopal parish from contracting for the services of a British priest. The Court ruled that although the literal text forbade the parish's actions, Congress's purpose did not cover this situation and ruled for the parish. Justice Scalia argued that "the act was within the letter of the statute, and was therefore within the statute: end of case." *Id.* at 20. On the view of legislation offered by the Aristotelian tradition, Justice Scalia missed the point. The Congress had the broader end of the common good in mind and it had the particular end of limiting the supply of excess labor in mind when it enacted the relevant statute. If the Supreme Court would not have disregarded the error of expression of that intent in the statute (the statute was overbroad), it would have prevented Congress from achieving its end and harmed society's pursuit of the common good.

I will take up this subject in a forthcoming article.

310. HITTINGER, FIRST GRACE, *supra* note 27, at 103.

c. Competence

The last reason why judges should limit themselves to applying positive law to concrete cases rather than legislating for the common good of the entire society is that judges are not as competent to do so as are legislators.[311]

Law is "an ordinance of reason for the common good, made by him who has care of the community and promulgated."[312] Law is both a rule and measure with the rule and measure being reason.[313] For a positive law, on this account, the rule or measure of the law lies in the mind of the lawmaker. The ultimate lawmaker is God whose eternal law is His unchanging laws of self-governance. The human legislator, through his reason, participates in the eternal law and then in turn creates positive law to govern society. The mind or intellect of the human legislator, through his reason, is a measured (by the eternal law) measure (of the rest of society through the laws he promulgates). But every person, because every person possesses reason, can participate in the natural law and judge accordingly. So how can we determine who shall make the natural law effective in society?

Legislative prudence (*prudentia regnativa*) is the species of prudence that allows the legislator to *make law*: to make the natural law effective for an entire society through positive law. This is the highest form of practical wisdom because its purpose is to direct the whole of society to the common good. As Hittinger puts it: "Having received law he [the legislator] makes more law. Legislation is the epitome of participation in the eternal law, for it is in issuing the ordering-judgment that we are most imitative of God."[314] The legislator, like God who is the *principatus regalis*, guides the individuals under his authority to their end and thus participates most fully in the law-giving function of God. He has the care of the entire community entrusted to him and he must fashion laws of sufficient generality to render justice within the community. Only where these general laws would work an injustice or where the legislator has not made the natural law effective can the judge "create" law. But here, the law made will be specific and concrete and so the judge will not have need of the unique legislative prudence.

---

311. *See* HITTINGER, FIRST GRACE, *supra* note 27 , at 103 (giving a cogent argument on this point).

312. AQUINAS, SUMMA *supra* note 41, at I–II, q. 90, a. 4.

313. *Id.* at I–II, q. 90, a 1.

314. HITTINGER, FIRST GRACE, *supra* note 27, at 100.

The rest of society (and the legislators themselves in their subordination to God's eternal law) whose duty it is to *obey law* best does its duty if it possesses political prudence (*prudentia politica*). Those who must obey law, either human or Divine, must rightly order themselves to that law and follow it freely. The judge whose duty it is to execute the legal commands of the legislator is in this position, but his duty is different from that of the legislator. The legislator must obey the eternal law, but he is also the most perfect participant in it because he, in turn, creates law, while the judge must obey both the natural law and positive law. The judge, therefore, has a less perfect share of the type of prudence necessary—legislative prudence—to make the natural law effective in the polity. Instead, the judge is best at ordering his judgments according to legislative determinations of how the natural law is best made effective.

The jurisdictional allocation made by our society makes sense, and was based on a sound prudential judgment on the relative competence of the legislature and judiciary to make the natural law effective for a large and complex society. The distinction between the competence of these two branches results from the nature of the process of making the natural law effective. Natural law is made effective as positive law in two ways: (1) direct translation of natural law principles into positive law duties; and (2) *determinatio*. The first is straightforward and involves such laws as those prohibiting the taking of innocent human life, and prohibiting theft. Both the legislature and judiciary can effectively make these natural law principles effective through positive law pronouncements.

The second category is different.[315] Recall that *determinatio* refers to those innumerable cases where what form the positive law will take to make the natural law effective is rationally underdetermined. There is a great amount of room for experimentation in the implementation of the natural law in these areas. For instance, no one system of traffic regulation is required by the natural law for all time. Instead, under the circumstances and bearing in mind the numerous variables relating the area of traffic regulation to other areas of the common good, the lawgiver must create, like an architect, the best system under the circumstances.

Contingent situations make up the bulk of the business of government. They are also the most difficult area of social life to

315. For an enlightening discussion on the distinction between the relative abilities of the legislature and courts see LON FULLER, ANATOMY OF THE LAW (1968).

discern clear rules of how a society should regulate. The ideal would involve the dispensation of what was known to Aristotle as animate justice: where a judge—a man of virtue and practical wisdom able to discern the requirements of justice in a particular situation—would dispense justice as occasions arose. But, for a number of reasons I will list shortly, Aquinas argued, as a prudential matter, that a society is better off utilizing written rules to the maximum extent possible thereby limiting direct human action in any one case to the application of previously written laws. Aquinas claimed that society could more easily find a sufficient number of men with practical wisdom to frame laws for the entire polity than it could find the large number of wise men necessary to continually judge cases as they arise; he argued that legislators writing laws beforehand could take into account all social factors when making their prudential decision, unlike judges who face a limited range of facts in one case; and finally he asserted that legislators' judgments would not be "perverted" by the facts of an individual case, because they were judging the whole of society from the abstract.[316]

Aquinas further built on the notion that at relatively general levels of abstraction, most men can correctly see the correct course of conduct: most agree that society must support a defense establishment for external defense, but would most agree that our society must employ the number of soldiers we have in the proportion of the branches of the armed forces they are located? What about a question concerning external defense that is very specific: what, if anything should the United States have done in the Vietnam conflict to stop the alleged spread of communism? As we move from general to specific concrete questions of action the ability of men to utilize their practical reason lessens, and only those with the best use of practical wisdom can correctly discern a course of conduct.

Different forms of prudence—that is, different abilities to do certain human actions well—are needed and held by different

316. AQUINAS , SUMMA, *supra* note 41 , I–II, q. 95, a. 1. Russell Hittinger states the inherent difficulty of having the judiciary make the natural law effective through adjudication in this manner:

> [L]itigation is not the best context for taking stock of what the natural law requires: (1) litigation gives the judge little time for reflection; (2) it moves along according to adversarial procedures, which are not the best way to develop a systematic position on the moral quality of laws; and (3) the interests of the various parties are usually narrowed so drastically that it is difficult to find generalizable principles for the common good.

HITTINGER, FIRST GRACE, *supra* note 27, at 83.

officials in government. Legislators have legislative prudence, which enables them to best make the natural law effective for an entire society. Judges, at least in our polity, have political prudence, which enables them to effectively obey the law. All members of society want the common good to be effectively pursued, and by performing their respective roles and utilizing their respective abilities members of society can aid the process. Judges can aid the pursuit of the common good by using their ability and not attempting to play the role of legislator, for which they are ill equipped.

IV. CONCLUSION

In this series of articles I seek to advance three goals. First, to establish that there are, broadly speaking, two rival and incompatible philosophical traditions within the modern West. Secondly, I have claimed that constitutional scholars have been arguing from within these two traditions without recognizing that such was the case. Originalists and nonoriginalists disagreed over the nature of democracy because they began from different philosophical traditions. Lastly, in this Article, I have provided a defense of originalism grounded in the Aristotelian tradition. These arguments were three in number and dependent on the central propositions held true by the tradition. The primary argument rested on the proposition that society is an entity, existing through time, for the purpose of securing the common good of its members. To do so society must order itself. But how a society orders itself is a prudential decision dependent on a host of contingent circumstances. Our society ordered itself through the Constitution and intended the meaning of the text of the document to bind itself (including future members) and its agents. Man is naturally social and exists in society to become fully human. To achieve his end—his very purpose for existing in society—one must abide by the prudential social ordering chosen by society. Consequently, every member of society is bound by the original meaning of the Constitution.

There is no guarantee that the result is correct. I believe, however, that the conclusion of this series of articles is a considered judgment and that one who accepts the Aristotelian tradition also implicitly accepts a jurisprudence of originalism (at least, given our history, in our society). Even if one does not accept the Aristotelian tradition, one will hopefully be better able to see how almost all scholars have, for over thirty years, labored under an incomplete picture of the nature of constitutional adjudication.