Critical Dialogue

The Political Constitution: The Case against Judicial Supremacy. By Greg Weiner. Lawrence, KS: University Press of Kansas, 2019. 224p. $29.95 cloth.
doi:10.1017/S1537592720000997

— Lee J. Strang, *University of Toledo*
Lee.Strang@utoledo.edu

Dr. Greg Weiner's newest book is a welcome intervention into the literature on constitutional interpretation. In it, he argues for taking seriously the role of community—especially as a political body deliberating about and deciding how to pursue the community's common good—and from that perspective critiques an important body of scholarship known as "judicial engagement."

The Political Constitution has three main components. First, it lays out the case for the political constitution and ties that political constitution to its framing and ratification. Second, chapter 4 critiques judicial engagement. Third, chapter 5 concludes with concrete cases that exemplify the differences between the political constitution and judicial engagement. It is a complex book that makes many moves.

Weiner's core goal is to provide an argument for the "political constitution": a conception of constitutional law and interpretation in which the "architecture of the Constitution" facilitates political institutions' exercise of primary authority to identify and act on the Constitution's meaning; he argues that this conception of politics is healthy for the polity and its members (pp. 2-4). Weiner's conception of politics is classical and Aristotelian, which he couples with a Burkean conception of rationality-as-tradition (p. 3.). For Weiner, the political community is most healthy when its members view themselves as sharing fundamental ends and civilly debating how to achieve those ends as a community. This community includes today's members, as well as those in the past and the future (p. 8).

The Political Constitution's conception of political authority—the politics of obligation—is both intergenerational and community-wide (p. 11). Political authority emanates from the political community's choices that bind not just those members of the community who were alive when the decision was made but also members of the community into the future (p. 17). This intergenerational conception of community is tied to an intergenerational conception of reason, understood in Burkean terms as the "storehouse of wisdom accumulated over time" by the community (p. 42).

Weiner believes that the political constitution is more normatively attractive than the "antipolitical constitution" of judicial engagement because it creates the environment in which the political community's members can flourish as political beings (p. 20). Politics is "noble," and members of political communities participate in that nobility and are better for it (pp. 36–38). *The Political Constitution* claims that the political constitution will lead to more human flourishing than judicial engagement (pp. 33–36), and it provides a variety of arguments for that claim. For instance, Weiner argues that the political constitution benefits from the "wisdom of crowds" (p. 37).

The Political Constitution argues that the US Constitution is an act of the US community that, though "rooted in the natural law," is an "act of positive law" (p. 10). Therefore, acts by government officials must be authorized by and consistent with the Constitution's fundamental positive law, and federal judges have only the authority to "reconcil[e]" nonfundamental positive law with the Constitution (p. 10).

Weiner argues that the political constitution better fits the framers' and ratifiers' conception of politics and judicial review (with an emphasis on James Madison's thought; pp. 3, 63–95). For example, he persuasively argues that his limited conception of judicial review fits *Federalist 78* (p. 10). *The Political Constitution* makes a number of nuanced arguments including, for instance, that judicial review was primarily a mechanism to stop government tyranny of majorities, not to protect minorities from majorities (pp. 67–70).

Weiner then employs this political constitution in the critical portion of *The Political Constitution* to criticize judicial engagement. Weiner's criticisms, although robust, are presented in a reasoned and reasonable manner. *The Political Constitution* provides an accurate description of judicial engagement (pp. 11–12.) Judges, on this view, should employ a "presumption of liberty" that requires the government to justify its rights-restrictions as reasonable and necessary (p. 12). According to Weiner, judicial engagement suffers from three related primary flaws: it is individualistic, present-focused, and authorizes judicial invalidation based on untethered individual reason.

© American Political Science Association 2020

https://doi.org/10.1017/S1537592720000997 Published online by Cambridge University Press

The most fundamental criticism of judicial engagement in *The Political Constitution* is that it mischaracterizes the nature of the political community. Scholars of judicial engagement conceive of the political community as an accidental grouping of present-day individuals (pp. 9, 10, 100). On this view, the political community of which they are a part has no independent status, and past community decisions do not possess authority because of their status as decisions by the political community (pp. 11, 100). Weiner argues that, on the contrary, the political community is the fundamental mechanism by which members of the community work together in order to live together (pp. 13–14). It "has existential status and a good of its own that is *not* merely an aggregation of personal preferences" (p. 100). Judicial engagement's prioritizing of courts and legal reasoning over elected officials and politics unhealthily narrows the scope of the political constitution and of political communities (pp. 24–25).

One of Weiner's most interesting moves is what he calls the "paradox of engagement" (pp. 23–26). The proponents of judicial engagement argue that robust judicial review is necessitated by the likelihood that elected officials will abuse their power. Yet, judges who follow the theory of judicial engagement will exercise tremendous power to evaluate a challenged law's reasonableness of both means and ends. "Advocates of judicial engagement do not trust people with power… [b]ut the foundations of their theory are laid on a breathtaking faith in *judges'* ability to reason correctly" (p. 25).

The potentially most powerful aspect of *The Political Constitution* is its attempt to tie together strands of political philosophy, virtue ethics, law, and US history. The synthesis fits well together and provides a comprehensive alternative conception of the Constitution. It ties originalism to the nature of the political community, which, via politics, created and continues to implement the Constitution through the use of reason-as-tradition and is valuable because it facilitates the flourishing of the community's members. Judicial review protects the political community's political and constitutional commitments.

A key theme running through *The Political Constitution* is that a fundamental question in constitutional interpretation concerns *who* has authority to interpret the Constitution. Weiner argues that primary authority for the Constitution and constitutional interpretation is located in the political community and not the judiciary. Weiner argues that this both fits its framing and ratification, advances the goods of the political constitution, and avoids the harms of judicial engagement.

Weiner's position in debates over constitutional interpretation is nuanced. In the debate between natural law and legal positivism, *The Political Constitution* picks—both. Positive law is the political community's attempt to identify means to work together toward the common good, as required by the natural law. The political community uses the community's embodied reason to interpret and apply the Constitution.

Weiner relies on a robust conception of the political community to justify the community's and the Constitution's authority. For instance, he argues that the political community "exists ontologically as something that transcends individuals" (p. 17). Weiner argues that because "we are born in political communities and exist in political communities … we incur obligations to those in the past who built and defended these institutions and those in the future" (pp. 30, 33). This follows from humans' political nature (pp. 29–30).

These are vigorous claims that cut against the grain of most scholarship and form the basis of Weiner's critique of judicial engagement, and so therefore they should receive correspondingly robust support and elucidation. However, there are many points of potential reasonable disagreement with this line of argument for which further explanation and defense could be valuable. For instance, granting that humans are political animals who need to live in political communities that deliberate for the common good, additional argumentation would help explain why "we are obligated to our Constitution because it is ours, because our ancestors formulated it" (p. 33). Couldn't it be the case that the adopters of the Constitution are not one's ancestors in a meaningful sense? Or, why isn't it the case that one's membership in the political community is so thin, or maybe even a source of harm, such that the community's past commitments are not one's own?

Moreover, many of *The Political Constitution*'s arguments could have benefited from situating themselves in the existing literature and finding support from it. For instance, Weiner repeatedly invokes the community's common good (p. 100.) But there is a long-standing debate over the nature of the political community and the common good, and knowing where in these debates Weiner situates his conception would have further elucidated his arguments.

Weiner also argues against presentism and conceiving of obligation as a question of the present (pp. 46, 48). However, from a natural law perspective, the current citizens of a political community are entitled to and, as rational beings, should be presented with sound reasons that support the community's legal system. If not, then what basis do these practically reasonable citizens have to support that system? Weiner might argue that tradition and custom are repositories of reason developed over years (pp. 46–47), and that may be true—but the key point is that citizens are entitled to evaluate those reasons *now.* Weiner might also argue that the community's good is intergenerational (p. 49), and that may be true—but current citizens should evaluate those reasons *in the present.*

Weiner sets for himself the task of justifying originalism (p. 6), but originalism does not make appearances in the book where one might expect. For instance, Weiner's

https://doi.org/10.1017/S1537592720000997 Published online by Cambridge University Press

account of the *Slaughter-House Cases* (pp. 152–58) does not describe or fit his claim within the existing debates over those cases and the Privileges or Immunities Clause; Kurt Lash's scholarship may have assisted Weiner because it limits that Clause's meaning to enumerated rights.

Chapter 3, *Madison's Judges*, has important implications for the original meaning of Article III, and the evidence presented there weighs in favor of the limited judicial review for which *The Political Constitution* argues. Nevertheless, the argument might have benefited from additional attention to the original meaning of "judicial power" and evidence of that meaning, including the following: the historical background of judicial power, a larger sample of the debates over the scope of judicial power during the framing and ratification, immediate post ratification practice, and then-contemporary interpretive rules.

Notwithstanding these critiques, *The Political Constitution* provides a valuable, complex, interwoven argument for limited judicial review based on politics as the primary forum for constitutional meaning and interpretation, as well as a corresponding critique of judicial engagement. It is an important contribution to the ongoing debates about how to interpret the US Constitution.

Response to Lee J. Strang's Review of *The Political Constitution: The Case against Judicial Supremacy*

doi:10.1017/S1537592720001000

— Greg Weiner

I appreciate Professor Strang's generous review as well as the incisive questions he raises. The questions cut to the heart of whether *The Political Constitution's* account of constitutional authority can stand. I believe it can, but Strang's questions require a reckoning first. These include the claim that we are obligated to our Constitution because it is the work of our political ancestors; the book's related critique of "presentism"; the emphasis on judging the Constitution according to its good in the here and now; and Strang's argument that *The Political Constitution* would have benefited from elaboration in certain areas, especially more extensive situation within long-running scholarly debates.

With respect to the Constitution's ancestral authority, Strang asks whether it is possible either "that the adopters of the Constitution are not one's ancestors in a meaningful sense" or that "one's membership in the political community is so thin, or may be even a source of harm, such that the community's past commitments are not one's own." This is a crucial critique, for much of *The Political Constitution's* justification of originalism would fall if it succeeds. It goes without saying that few of us claim literal descent from the ratifying conventions of 1787. But the book's claim is that our membership in this political community constitutes a sort of adoption into the generational constitutional family of the United States. It is true that our membership in the political community is thin—here I set aside the outlying case in which membership is positively harmful—but that is a case for a Tocquevillian federalism that makes it more meaningful. If our commitments are so thin, a common good is not possible.

Professor Strang also invokes natural law on a related note: "the current citizens of a political community are entitled to and, as rational beings, should be presented with sound reasons that support the community's legal system." Importantly, whatever these reasons may be, "citizens are entitled to evaluate those reasons *now.*"

Of course, citizens are undeniably free to question their Constitution at any discrete moment in time. I do not mean to call that into question. But a Constitution must enjoy what *Federalist 49* called "the prejudices of the community," seasoned with time, in order to endure. Edmund Burke was not an American, but Americans can nonetheless profit from his teaching, which located wisdom in the "collected reason of ages." As Strang notes, that reason is still to be judged in the present. But it should be judged in a spirit of prudent deference to one's political ancestors, not on an assumption that we, here and now, have all the answers to political questions. This speaks to the book's larger critique of presentism, which is the tendency of advocates of judicial engagement—though not them exclusively—not merely to judge intergenerational claims in the present but rather to do away with these claims altogether in favor of determining whether the Constitution serves us well right now.

Finally, I grant Strang's suggestion that *The Political Constitution* might have profited from more explicit engagement with literature on such topics as the common good. For purposes of this project, I felt the important claim to recover was less the precise nature of political community and the common good than the fact of their existence. But Strang is doubtless right to say a deeper discussion of these topics—and others, including broadening chapter 3 beyond Madison's views of judicial power—would have enriched the conversation.

I am grateful to Professor Strang for raising these questions and for the opportunity to amplify these points. The book would have been richer for having had the benefit of his insight into these issues. Regardless, I certainly am now.

Originalism's Promise: A Natural Law Account of the American Constitution. By Lee J. Strang. New York: Cambridge University Press, 2019. 326p. $110.00 cloth, $34.99 paper.

doi:10.1017/S1537592720001310

— Greg Weiner, *Assumption College*
gs.weiner@assumption.edu

Lee J. Strang has produced a lucid and landmark case for originalism for which constitutional theorists, regardless of

https://doi.org/10.1017/S1537592720000997 Published online by Cambridge University Press

whether they agree, are in his debt. The case rests on two interlocking models of originalism: constitutional communication and law-as-coordination. These work together insofar as the constitutional framers used the medium of a written constitution to communicate to each other, the document's ratifiers, and future generations of Americans how to overcome the coordination problems endemic to any society of more than minuscule size.

Undergirding this analysis is perhaps Strang's most important and welcome innovation: the introduction of Aristotelian virtue ethics into constitutional theory. This plays out in several ways, most especially in the basic notion that originalism is the best means of executing the law's function of coordinating activity that facilitates a common good and provides for human flourishing. This intriguing fusion of political and legal philosophy opens several avenues of insight, including the personal virtue of the judge whose originalism embodies the virtues of both justice-as-lawfulness (p. 131) and promise-keeping (p. 302).

Drawing on Aquinas's explication of the Aristotelian tradition, Strang persuasively notes that the Constitution reflects its framers' and ratifiers' best prudential judgment as to how to overcome the coordination problems that emerged under the Articles of Confederation and that are inherent in a complex society. Strang draws the reader's attention to the importance of positive law in fostering social coordination. His constitutional theory, in turn, fulfills natural law "because it best secures the background conditions under which Americans can pursue their own individual human flourishing" (p. 221).

Strang's argument is innovative, persuasive, and written with masterful clarity. For purposes of fostering a conversation, I raise a handful of points on which we may disagree, none of which impair his underlying thesis.

Strang offers a deliberately "thin" model of the common good that is "agnostic about many important though controversial issues" and that "does not require one to accept more controversial claims about human nature and metaphysical propositions" (p. 225). Instead, it consists of establishing conditions in which people can pursue Aristotelian happiness, or *eudaimonia.* This is thinner than Aristotle's account, which is not agnostic as to the content of the happy life. Strang's account might be said to be closer to the public-square neutrality of John Rawls than to the robust theories of the good that characterize the ancients. That, of course, may be the best a sprawling and pluralistic society can do, but one wonders to what extent it is entitled to the label "Aristotelian."

A thicker Aristotelianism consisting of shared goals and a genuinely common good—which *The Politics* describes in terms of what is truly common, rather than as what enables everyone to flourish individually—need not be wholly dismissed. A free society cannot impose a thick conception of the good, but it can set conditions that are more than agnostic about it. For example, blue laws aim to coordinate social activity but do so with a substantive view toward the good life. So do moral laws in general. Indeed, on Aristotelian terms, the political activity involved in constitutional interpretation is itself ennobling.

Whereas my own analysis emphasizes the primacy of politics, nobly understood, in determining constitutional meaning, Strang supplies a standard for allocating this interpretive authority. Originalism provides what he calls "closure rules" that reduce "underdeterminacy" in constitutional meaning (p. 64). Strang assesses the extent of the determinacy of constitutional meaning on both metaphysical and epistemic grounds. He argues that interpretive tools used at the founding render the Constitution metaphysically determinate. In other words, it has a single meaning, and questions about it have right answers. However, this meaning may not be epistemically accessible; that is, given the limits of human knowledge, we may not be able to determine with certainty what the metaphysical meaning is, as was the case in the controversy over the National Bank in the first Congress (pp. 77–82, ff.). In cases in which epistemic determinacy can be achieved using the tools of legal reasoning, judges establish its meaning. In the "Construction Zone," when closure rules cannot reasonably establish constitutional meaning, Strang would defer to Congress.

These categories of metaphysical and epistemic determinacy are an important and new contribution to constitutional theory. But the work needed to get from metaphysical to epistemic clarity may involve more than the tools of legal reasoning; conversely, limiting epistemic determination to those tools makes constitutional interpretation the work of lawyers and not citizens. This assumes a complexity of both constitutional meaning and the process of determining it of which I am not wholly persuaded, as much as I like Strang's categories. Two points help illustrate this doubt. One is that if the Constitution's meaning even on many seemingly basic questions is so obscure as to require the intervention of legal theorists, one must doubt the authority of the popular process of ratification on the grounds that the ratifiers could not have fully understood the document. Second, Strang correctly cites Madison's *Federalist* 37 as the focal case of epistemic undeterminacy (p. 116). But when Madison calls for constitutional meaning to be "liquidated and ascertained through a series of discussions and adjudications," he does not refer solely to judicial authority, as Strang seems to suggest. Madison's later writings, most especially his concession of the constitutionality of the National Bank during his presidency, indicate he refers to political authority as well.

On a related note, Strang says a great deal about how Aristotelian judges would act. This account of virtue ethics in jurisprudence is persuasive, but it would be helpful to hear more about how we are to cultivate and find these judges. Otherwise, as in the old story about the economists

https://doi.org/10.1017/S1537592720000997 Published online by Cambridge University Press

stuck in a hole who assume a ladder to escape, the argument risks taking on an "assume an Aristotelian" character. If we could assume Aristotelians, there would be fewer questions about judicial authority. But the opposite is closer to the case: judges are human beings with power, and although it would be preferable to render them Aristotelian so that they abide by the law and their oaths, the constitutional order is unwilling to assume they will do so. How might Strang encourage good judicial behavior and, crucially, correct abuses of judicial authority? These questions, to be fair, may lie outside the scope of his study, which aims to set a normative standard rather than to specify the conditions of its attainment. But a regime based on how human beings with power actually behave must, at some point, grapple with them.

This becomes especially important given Strang's otherwise persuasive account of how to deal with nonoriginalist precedents. Strang calls for preserving "some nonoriginalist precedents" not only because of the importance of stare decisis to "rule of law values" but also because some of these precedents are "substantively just" (p. 125, ff.). This latter point—substantive justice achieved despite and not because of original meaning—leaves enormous discretion for judges to import their personal preferences into case law. An accompanying account of why we should be confident in judges' ability to do so is therefore important.

With respect to originalism generally, Strang's related accounts of communication and coordination compellingly justify constitutionalism. The question is whether they can provide an account of *our* Constitution. Put otherwise: If a different constitution could be said to coordinate social activities and encourage human flourishing better, do we bear any obligation to the Constitution of 1787? This is an important question in times in which the Left calls for abolition of the Electoral College and the Right seeks an Article V convention for purposes of constitutional revision. On Strang's account, these efforts may be imprudent, given his convincing argument that the Constitution of 1787 was the product of careful deliberation, compromise, and public approval. But just as Strang's judges bear an obligation of promise-keeping rooted in their oaths of office, does any moral standard bind citizens to our Constitution?

In one sense, Strang's communicative constitutionalism could provide a transgenerational account of constitutional obligation. So could his observation that "authority is pervasive in human life; it is natural" (p. 249). The question is whether that authority can transcend generations, as in James Madison's observation that the efforts of past generations impose "a charge against the living." By contrast, Strang's argument for originalism appears to be rooted in utility in the here and now: the Constitution does not bind us to tradition, an account that could be anchored, say, in the "mystic chords of memory" of Lincoln's First Inaugural or in the transgenerational social contract of Burke's *Reflections*. Instead, this Constitution should be interpreted according to its original meaning because that best conduces to social coordination—a precondition for human flourishing—today (p. 278).

Again, this importation of Aristotelian philosophy into constitutional theory is innovative and useful. But can any Constitution endure if the reason for hewing to its original meaning is that it is good for us today? Aristotle suggests not: in *The Politics*, he warns against even salutary changes in the law that yield marginal improvements because they undermine the habituation on which the more fundamental attribute of obedience is based.

It is unlikely that the framers conceived of the perfect Constitution; on the contrary, one of Strang's more important and convincing points is that the Constitution is "the result of prudential determinations about how American society could best pursue human flourishing, under the circumstances. For all or nearly all of the fundamental coordination problems faced by the Framers, there was not a uniquely correct resolution to the problem" (p. 282). Given the possibility, perhaps even likelihood, that new conditions could warrant new prudential determinations, what if anything obligates us to this Constitution? This is a separate question from whether whatever constitution prudentially settles coordination questions should be interpreted according to its original meaning, a point on which Strang's analysis is impeccable.

The same may be said of Strang's analysis generally. The points of conversation I raise here should not detract from his achievement, which is considerable. One suspects that whatever divergence there may be between our views is the result of undertaking different projects: one on constitutional meaning (Strang's) and another on constitutional authority (mine). Points of convergence are likely far more extensive. It is a privilege to be placed in Strang's company for a conversation about them.

Response to Greg Weiner's Review of *Originalism's Promise: A Natural Law Account of the American Constitution*

doi:10.1017/S1537592720001322

— Lee J. Strang

Dr. Greg Weiner's review of *Originalism's Promise* offers thoughtful questions and powerful potential criticisms from a scholar with the same basic approach to the Constitution. My brief response focuses on what I think is Weiner's most fundamental criticism. He asks whether my law-as-coordination account can provide "any obligation to the Constitution of 1787" as opposed to another constitution that Americans might propose. "Can any Constitution endure if the reason for hewing to its original meaning is that it is good for us today?" My answer is yes!

https://doi.org/10.1017/S1537592720000997 Published online by Cambridge University Press

All Americans today have sounds reasons—"in the here and now"—to follow the Constitution's original meaning.

My key move in *Originalism's Promise* was to employ the focal case of a practically reasonable citizen. Does this citizen have reason(s) to follow the Constitution's original meaning? I argued that following the original meaning is supported by two classes of reasons. First, the benefits to this citizen and to the citizen's community from the coordination effected by following the original meaning is a reason for citizen faithfulness. There are many sorts of coordination benefits, and let me mention one: citizens who follow the original meaning contribute to the tremendous good brought to all Americans by the rule of law. Second, following the original meaning conduces to one's character, and building one's character is a reason for action. For instance, citizens who follow the Constitution's original meaning practice the virtue of civic friendship because they will the good of their fellow citizens by supporting the Constitution's coordination.

Moreover, law's subjects *must* have sound reasons *today* for their faithfulness to the legal system to be practically reasonable. If a legal system did not provide sound reasons for its subjects to follow its laws, then on what basis should rational subjects follow them? For instance, if a legal system was in a state of decay and no longer coordinated its subjects' actions—think of the Anglo-Saxon monarchy after London's surrender to William—a practically reasonable subject should not be faithful to that failing legal system. Also, if a legal system effectively coordinated its subjects, but did so for wicked purposes or to wicked ends—think of Stalinist Russia—those subjects have sound reasons to (at least) not follow and (perhaps) to resist the legal system's coordination.

Americans should follow the Constitution only if they have sound reasons to do so today. If the Constitution at one time provided American citizens with sound reasons to follow it, but ceased doing so at some point—either because it no longer coordinated or because its coordination became unjust—why would a practically reasonable American follow this failed or wicked Constitution? The fact that it was authored by "past generations" or that it was anchored "in the 'mystic chords of memory'" or that it was part of a "transgenerational social contract," do not individually or collectively provide a reason to follow it today if it does not effectively coordinate for the common good. Moreover, citizens are entitled to evaluate such arguments about past generations and tradition *today* to see if they provide reasons to follow the Constitution.

https://doi.org/10.1017/S1537592720000997 Published online by Cambridge University Press