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Book Reviews

Lee J. Strang: *Originalism's Promise: A Natural Law Account of the American Constitution*. (New York: Cambridge University Press, 2019. Pp. 326.)

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If we say a judge ought to remain faithful to the original meaning of the constitutional text, what accounts for this *ought*—from whence comes this judicial duty? In *Natural Law for Lawyers*, J. Budziszewski recounts a seminar discussion in which Justice Antonin Scalia ultimately conceded that his obligation of fidelity to the original meaning of the Constitution was grounded in the natural law precept that one should keep one's promises—in this case his judicial oath. Beyond grounding his judicial duty, however, Scalia frequently and adamantly denied any role for natural law in originalist jurisprudence. In Scalia's prominent and influential formulation, originalism and natural law were largely irrelevant to each other if not frequently at odds. From the perspective of many originalists—Scalia included—natural law jurisprudence dangerously licenses judges to impose their own moral values on society while disregarding the jurisdictional limits of the judicial office. Friendly natural law critics of originalism, by contrast, allege that originalists have adopted the premises of amoral legal positivism and put themselves at odds with the original jurisprudence of the Constitution's framers through their blithe neglect of natural justice.

Lee J. Strang, John W. Stoepler Professor of Law & Values at the University of Toledo College of Law, steps into this fray by offering a natural law defense of originalism. In *Originalism's Promise: A Natural Law Account of the American Constitution*, Strang argues that the purpose of the Constitution is "to secure the United States' national common good and to enable individual Americans to achieve their own human flourishing" (1–2). Originalism, as a method of constitutional interpretation, is justified by its ability to secure the common good and promote human well-being; indeed, it is "the most normatively attractive theory of constitutional interpretation because it is the one most likely to secure the common good of American society and individual Americans' human flourishing" (3). Writing in the tradition of the New Natural Law Theory made prominent by John Finnis's classic work of jurisprudence *Natural Law and Natural Rights*, Strang's normative account of the Constitution presupposes the existence of basic human goods rooted in human nature that depend on established legal authority for their realization. An amoral legal positivist, Strang is not.

Originalism's Promise proceeds partly through a narrative history of originalism, partly through exercises in constitutional theory and normative political philosophy, and partly through empirical descriptions of constitutional practice. In his narrative history (chapter 1), Strang presents originalism as the default method of interpretation in American history up until the Progressive Era, when various alternatives to originalism took root. Originalism's resurgence came in the 1970s as a self-conscious, scholarly enterprise, and it has grown more sophisticated over the last half century. Putting forward his own theory of originalism (chapter 2), Strang argues for what he calls the Constitutional Communication Model of originalism, which seeks to integrate insights from the original intent, original meaning, and original methods theories of originalism that developed in the last quarter of the twentieth century. According to Strang, the *intent* of the framers and ratifiers was for the Constitution to be interpreted according to its *original public meaning* using original *methods* of legal and constitutional interpretation. These elements can be integrated together into one theory, Strang insists. Empirically (chapter 3), Strang argues, originalism best explains our constitutional practice and the core features of our constitutional order, including reliance on precedent and the use of legal doctrine to guide judicial interpretation. Normatively (chapter 4), originalism best advances Americans' flourishing and is therefore justified by its ability to realize the core purpose of the Constitution.

Writing as a law professor for law professors, Strang does not engage the voluminous debate among political theorists about whether the Constitution actually is designed to secure the common good and promote human flourishing in the Aristotelian sense. Going back to Frank Coleman's *Hobbes and America*, there has for the last half century been a significant vein of scholarship that sees the Constitution as fundamentally Hobbesian in that it allegedly eschews reliance on contested notions of the good, dispenses with any talk of a higher law, discards Aristotelian metaphysics, and sets about the practical task of sustaining a political community among people with fundamentally different, and ultimately subjective, conceptions of justice. Strang, in contrast to those who cast the Constitution as Hobbesian, begins with a natural law account of the US Constitution's purpose and offers a natural law defense of constitutional originalism. Strang's case rests on the contested premise that the Constitution's purpose is to secure the common good and promote human flourishing, but that premise is supported by a wealth of scholarship in political theory, including Paul DeHart's *Uncovering the Constitution's Moral Design* (University of Missouri Press, 2007).

What role natural law should play in constitutional interpretation, Strang argues, is contingent on what the legal system identifies as the proper role of natural law in that system (233–36, 251–52; 266–78). In the American legal system, natural law is appropriately brought to bear when the original meaning itself calls for the application of a natural law norm (213–14); when

primarily nonjudicial constitutional interpreters must engage in constitutional construction to fill in the meaning of an underdetermined constitutional provision (84–90); and when judges are called to overrule, limit, or follow nonoriginalist precedent (130–33). In Strang's account, natural law does far more work than merely providing a normative basis for the judges' duty to follow the original meaning of the Constitution. Originalism is itself justified by the Constitution's purpose to secure the common good and promote human flourishing, and natural law has a direct, albeit modest, role in constitutional interpretation, especially constitutional construction by the legislative branch. Strang's normative case for the Constitution's original meaning rests explicitly on an Aristotelian conception of human nature, basic human goods, and the virtues necessary for a well-lived life.

Parts of *Originalism's Promise* were written originally as law review articles, and they reflect the virtues and vices of that medium. Heavily footnoted and attentive to obscure debates among originalist scholars, the work proceeds by numbered sections and subsections and frequently employs the jargon of legal academia. There is the Communication Model of Originalism, Abduced-Principle Originalism, the Deference Conception of Construction, Rule of Law values, judging-as-craft, and law-as-coordination. These kinds of technical terms and concepts can be helpful analytically, and they often are, but Strang responds to so many objections and introduces so many terms and concepts that reading his account of originalism feels a bit like studying a Rube Goldberg machine. It is a complex piece of machinery that does a relatively simple task. That relatively simple task, as it is worded in the judicial oath of office (28 U.S.C., Sec. 453), is to "administer justice" and to "faithfully and impartially discharge and perform all the duties incumbent upon" the judicial office "under the Constitution and laws of the United States." As Budziszewski in *Natural Law for Lawyers* observes of the oath: "The meaning could hardly be more clear. Enacted law does not regulate the meaning of justice; rather justice regulates the meaning of enacted law. So the natural law tradition has always held."

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