ORIGINALISM IS A SUCCESSFUL THEORY (IN PART) BECAUSE OF ITS COMPLEXITY: A RESPONSE TO PROFESSOR TELMAN

ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION. By Lee J. Strang. New York, NY: Cambridge University Press. 2019. Pp. xiv + 326. $110 (hardcover); $34.99 (paperback)

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I. INTRODUCTION

Professor Telman's review of *Originalism's Promise: A Natural Law Account of the American Constitution*[1] is thoughtful—it identifies positive contributions made by *Originalism's Promise* and offers pointed criticisms where Professor Telman believes its arguments fall short. Professor Telman's review is also an excellent example of the genre because it goes further and argues that *Originalism's Promise* is itself a manifestation of originalism's dire predicament, in Professor Telman's view, its "crisis."[2] Professor Telman's review continues his scholarly engagement with originalism,[3] and originalism is the better for it.

Professor Telman's description of *Originalism's Promise*

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1. D.A. Jeremy Telman, *The Structure of Interpretive Revolutions*, 35 CONST. COMM. 109 (2020), 109–39.

2. *Id.* at 111.

3. *E.g.*, D.A. Jeremy Telman, *All That Is Liquidated Melts into Air: Five Meta-Interpretative Issues*, 24 BARRY L. REV. 1 (2019); D.A. Jeremy Telman, *Originalism and Second-Order Ipse Dixit Reasoning in* Chisholm v. Georgia, 67 CLEV. ST. L. REV. 559 (2019); D.A. Jeremy Telman, *Originalism as Fable* (reviewing ERIC SEGALL, ORIGINALISM AS FAITH), 47 HOFSTRA L. REV. 741 (2018); D.A. Jeremy Telman, *Explication Du Texte: "I'm an Originalist; I'm a Textualist; I'm not a Nut"*, 50 VAL. U. L. REV. 629 (2016); D.A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 OHIO N.U. L. REV. 529 (2016).

works hard to be fair. He accurately notes that *Originalism's Promise* is "carefully reasoned, with many interlocking parts."[4] Professor Telman's description is helpfully peppered with points of departure, as any good review should be. For example, as Professor Telman criticized my argument that American constitutional practice in the early Republic employed originalism to identify and follow the Constitution's fixed meaning.[5]

In addition to the many and variety of particular criticisms Professor Telman lodges against *Originalism's Promise*, three fundamental and interrelated critiques underlay much of his evaluation.[6] First, Professor Telman claims that my conception of originalism does not adequately acknowledge or deal with stubborn constitutional indeterminacy.[7] Second, he contends that the Constitutional Communication Model of originalism is too thin because it hews to a middle road among different conceptions of originalism and this opens it up to "ideologically driven and outcome-determinative" use.[8] Third, Professor Telman asserts that *Originalism's Promise* works so hard to force the theory to fit (a fundamentally nonoriginalist or eclectic) American constitutional practice that it exemplifies how originalism is fracturing under its complex intellectual "appendages."[9]

In this Response, I focus my remarks on these three

4. Telman, *supra* note 1, at 111.

5. Professor Telman accurately notes, Telman, *supra* note 1, at 111–12, that my brief narrative explicitly stated that it was "not a detailed review of the evidence . . . . Instead, this is a summary of the evidence with reference to the rich secondary literature" (p. 11 n.7).

Professor Telman faults my account because it is "difficult to know what [is] . . . originalist." Telman, *supra* note 1, at 112. The practice in the early Republic was originalist, I argued, because the stated purpose of interpretation and the tools employed by interpreters were both originalist, as that term is understood today to mean that constitutional meaning was fixed with Ratification and that that fixed meaning constrained officers. The Framers and Ratifiers did not employ contemporary meanings or more normatively attractive meanings, which are standard tools in today's living constitutionalist's toolkit (pp. 2–15).

6. Professor Telman identifies another argument, that *Originalism's Promise* fails to account for federal courts' special role protecting fundamental rights, especially the Fourteenth Amendment, Telman, *supra* note 1, at 110, 129–132, which is relatively unrelated to the three critiques I identified in the text. I address this criticism in Part IV.

7. Professor Telman spends an unrepresentative amount of time on the issue of constitutional construction, especially when compared to the less than two pages he devotes to the law-as-coordination account of originalism, *Originalism's Promise*'s most original contribution.

8. Telman, *supra* note 1, at 110.

9. *Id.* at 111.

fundamental contentions and argue that *Originalism's Promise* is an example of a complex theory successfully grappling with the complex phenomenon it is attempting to explain. Its embrace of constitutional construction (with its premise of constitutional underdeterminacy) is a powerful example of the theory better fitting constitutional practice while, at the same time, becoming more complex. *Originalism's Promise* navigates contemporary originalist scholarship and charts a path that incorporates (what is, to my lights) the best of the extant literature. This too, makes the theory more complex. I then argue that *Originalism's Promise* exemplifies the complexity that any successful intellectual account of a complex phenomenon, like American constitutional practice, must possess in order to be persuasive to educated audiences. After briefly addressing Professor Telman's post-originalist paradigm claim, in the last part, I address the most important of Professor Telman's particular criticisms.

II. ORIGINALISM IS A COMPLEX THEORY SUCCESSFULLY GRAPPLING WITH A COMPLEX PHENOMENON

A. INTRODUCTION

Originalism's Promise is an example of a complex theory successfully grappling with the complex phenomenon it is explaining. I support this thesis and respond to Professor Telman's three fundamental claims in this part.

B. ORIGINALISM IDENTIFIES THE MEANS TO ASCERTAIN DETERMINATE ANSWERS TO (NEARLY) ALL CONSTITUTIONAL QUESTIONS, MAKING IT A MORE COMPLEX THEORY

Professor Telman claims that *Originalism's Promise* does not adequately deal with constitutional indeterminacy,[10] and that I "seek[] . . to constrain constitutional construction" because I "clearly regard[] . . it as a threat to legal determinacy."[11]

10. Telman, *supra* note 1, at 110.

11. *Id.* at 124. That is not the case subjectively or objectively. Subjectively, my goal was to describe a phenomenon that I came to believe exists—constitutional construction caused by underdeterminacy (pp. 64–66). If my goal was to avoid indeterminacy, I would have arrived at a different belief. Moreover, if my goal was legal determinacy, I would not have proffered a middle-of-the-road position for nonoriginalist precedent. I argued in Section 2.4 that originalism requires preserving nonoriginalist precedent through a three-factor analysis, an analysis that causes legal underdeterminacy.

Professor Telman supports his claim with three primary reasons. First, Professor Telman asserts that I "never really addresse[ed] . . . Paul Brest's . . . level of generality problem."[12] Second, he claims that the original methods themselves cause underdeterminacy because they were a manifestation of contemporary "non-hierarchical methodological pluralism."[13] Third, Professor Telman identifies a lack of priority among closure rules as itself a cause of indeterminacy.[14]

Below, I first briefly summarize *Originalism's Promise*'s argument that originalism provides a decision tree to help officials perform their duties faithfully to the Constitution, and that originalism is sufficiently thick that it provides determinate answers to (almost) all constitutional questions. In short, either the original meaning itself, or a subsidiary mechanism of constitutional decision-making, will answer (nearly) all constitutional questions. Then, I directly respond to Professor Telman's criticisms.

Originalism's Promise's embrace of constitutional construction (with its premise of constitutional underdeterminacy) is a powerful example of the theory better fitting constitutional practice while, at the same time, becoming more complex. Like most originalists, I argued that the Constitution's original meaning underdetermines some constitutional cases, and I provided some of the reasons why that is the case (pp. 31–37, 64–66, 73–83). *Originalism's Promise* also argued that the Constitution provided a number of subsidiary mechanisms (in other words, in addition to the text's original meaning) to coordinate American national life, especially constitutional precedent and rules of interpretation (pp. 66–141). The rules of interpretation provide additional resources to assist the Constitution's original meaning to coordinate conduct. Precedent, both originalist and nonoriginalist, creates

Objectively and a priori, constitutional construction does not necessarily pose a threat to legal determinacy. For instance, if the construction zone contained a strong rule of judicial deference, similar to that identified by Professor Eric Segall, in *Originalism as Faith* 24 (2018), then the judicial construction zone would pose little threat. The deference conception of construction I defended in *Originalism's Promise* does limit judicial discretion, and I do view that as a feature and not a bug; but the mere fact that a conception of construction is more determinate than others cannot be a reason to reject it or to infer that it was adopted for ulterior motives.

12. Telman, *supra* note 1, at 122.

13. *Id.* at 122.

14. *Id.* at 124–27.

constitutional doctrine that implements the Constitution and provides clearer and more-fulsome guidance to Americans. Third, *Originalism's Promise* laid out a theory of judicial virtue that is needed to identify and train judges to be able to navigate the complex and challenging tasks that lie before them (pp. 142–157).

Collectively, these moves have the benefit of helping originalism paint a more accurate picture of our constitutional practice (one in which some original meaning is underdetermined), where there is a fundamental place for constitutional doctrine, and where the craft of judging is highlighted. At the same time, these moves make originalism significantly more complex.

This Constitutional Communication Model provides robust guidance to federal judges (and other officers). The following is a simplified summary of the Model's decision tree. The first step in any judge's analysis will be whether there is applicable constitutional precedent. If the precedent is originalist precedent,[15] then the judge should follow it. If the precedent is nonoriginalist, the judge must determine whether to follow it, limit it, or overrule it.[16] If there is no binding precedent, then the judge should determine whether there is determinate original meaning. If so, the judge should follow it. If there is underdetermined original meaning[17] and the case falls within the construction zone, then the judge should defer to elected branch constructions (pp. 83–90). This decision tree provides answers to (almost) all constitutional questions.

* * *

Professor Telman's first criticism, the level of generality problem, is originalism's purported inability to identify the Constitution's meaning in a principled manner because that meaning may, in principle, be stated at different and inconsistent levels of generality. *Originalism's Promise* did not spend much time focusing on the level of generality criticism because I do not see it as a powerful critique of originalism, and for two primary reasons.

15. Under the Originalism in Good Faith standard (pp. 93–97).
16. Using the three-factor analysis described (pp. 125–133).
17. After application of the originalist closure rules (pp. 66–73).

First, the Constitution's original meaning itself[18] determines the level of generality.[19] It is possible, prior to investigating the original meaning of a text, that the yet-uncovered original meaning might present itself at a variety of levels of generality. For instance, "cruel" in the Eighth Amendment could embody the abstract principle prohibiting what in fact is cruel,[20] or it could mean what practices the Framers and Ratifiers believed were cruel, or other meanings between these extremes. The relevant question, however, is whether, in fact, the text's original meaning determinatively identified the level of generality at which it is expressed. The answer, in practice, is regularly "yes."

I showed in *Originalism's Promise* that the Constitution's original meaning in fact occurs at different levels of generality for different texts (pp. 209–214). For instance, "cruel" has the relatively abstract original meaning of disproportionate to the crime.[21] What is typically not the case, however, is that the texts simultaneously have different meanings at different levels of generality. Cruel, for example, does not mean both disproportionate to the crime and what punishments were considered cruel in the eighteenth century.

Second, as Professor Telman acknowledges,[22] I argued that when—not if—the original meaning fails to provide a determinate resolution to a legal question, then constitutional construction occurs. Therefore, even if one was unable to identify the original meaning's level of generality, the result is only that the original meaning is underdetermined, hardly a criticism of a theory that accepts construction.

Professor Telman's second criticism is that "non-hierarchical methodological pluralism" at the Framing and Ratification prevent the original rules of interpretation from "yield[ing] the

18. To the extent it is determinate.

19. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 182–87 (1999); *see also, e.g.*, John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737 (arguing against the abstract meaning fallacy and, in doing so, supporting the conclusion that the original meaning determines the level of generality).

20. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 301 (1999).

21. To answer Professor Telman's question, Telman, *supra* note 1, at 122, this meaning does not "require an inquiry into what punishments were considered cruel in the eighteenth century."

22. *Id.* at 114–15.

legal determinacy that Strang seeks."[23] This criticism is inapplicable to *Originalism's Promise* because I expressly acknowledged that "the current evidence does not identify how widespread the use of interpretative rules was, the uniformity of the rules, their weight, nor the lexical ordering of the rules" (p. 79). Like Professor Telman, I cited a variety of historical evidence from the period to support this claim (pp. 80–82).[24]

There may be confusion over what I argued was the role of original interpretative methods. I argued that the original methods in principle had the potential to reduce and perhaps eliminate metaphysical underdeterminacy of the original meaning,[25] but that they did not eliminate epistemic underdeterminacy (pp. 77–82). In other words, I *agree* with Professor Telman (at least) that the original methods do not eliminate all forms of legal underdeterminacy.

Professor Telman's third argument against my Deference Conception of Construction is that I have not adequately defended the three interpretative closure rules I identified. Professor Telman furthermore claims that a lack of priority among the closure rules is itself a cause of indeterminacy.[26] Professor Telman's arguments suggest that he did not grasp the

23. *Id.* at 122. In addition to the argument I make in this Response, I also disagree with Professor Telman that non-hierarchical methodological pluralism is the best characterization of the interpretative context at the Framing and Ratification, because of the arguments put forward by scholars including Professors Wolfe, O'Neill, Powell, and Gillman, among others. JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A Constitutional History (2005); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191 (1997).

24. *See also* Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMM. 149 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013)) (arguing that the lack of consensus among the Framing generation on the nature of the Constitution, method of interpretation, and particular interpretations, precludes the existence of a supermajoritarian consensus of original interpretative methods).

25. Though, I stated repeatedly that there was insufficient evidence to conclude that the methods did eliminate metaphysical underdeterminacy.

26. Professor Telman also claims that at least one of the closure rules was also not accurate. He argues that my federal power burden of persuasion rule was in tension with recent scholarship on the principle of limited and enumerated powers, and with the "inherent and implied powers" of the Necessary and Property Clause, Telman, *supra* note 1, at 124. I will only say here that I presented arguments supporting the closure rule and that the recent scholarship is not the scholarly consensus.

structure of the analysis I proposed.

I argued that constitutional underdeterminacy exists and that, therefore, constitutional construction exists (pp. 63–66). I also argued that the scope of this underdeterminacy is limited by three closure rules (pp. 66–73).[27] These closure rules included a standard of proof and two burdens of proof. The standard of proof was the best available legal evidence, and it required that an interpreter pick that interpretation supported by the best available legal evidence (pp. 67–70).[28] The second closure rule was that the proponent of the exercise of federal power had the burden of proof under the best available legal evidence standard of proof (pp. 70–71). The third closure rule was that the proponent of a constitutional restriction on state power bore the burden of proof (pp. 72–73).

I argued that these two burdens of proof were a minimum[29] entailment of the constitutional principles of limited and enumerated powers, and federalism. Professor Telman claims that the federal and state burdens of proof "reflect Strang's political preferences more than they do the Constitution[]," and one piece of evidence for that is my failure to "include . . . a closure rule in favor of individual rights . . ." or to explain "why no such rule is applicable."[30] That is a thin reed upon which to criticize the burdens of proof because, even if it was unreasonable to not include additional closure rules, that in no way undermines the arguments for the closure rules that were identified.

Second, Professor Telman claims that because a handful of scholars have recently disputed the existence of the principle of limited and enumerated powers, and because some early American legal actors rejected robust state sovereignty and accepted limits on state sovereignty, the principle of federalism did/does not exist.[31] Professor Telman's argument against my

27. I also argued that these closure rules operated in the realm of epistemic underdeterminacy, as is typical of closure rules in our legal system.

28. Professor Telman acknowledges that this "first rule is uncontroversial," Telman, *supra* note 1, at 125.

29. These are the minimum requirements because they do not relate to the substance of the constitutional question and instead go to the secondary issue of which party—which argument—bears the risk of epistemic underdeterminacy of constitutional meaning. For instance, the federal burden of proof rule puts the risk of epistemic underdeterminacy on the federal government to justify its exercise of its enumerated power.

30. Telman, *supra* note 1, at 125.

31. *Id.*

closure rules is in tension with our long-standing constitutional practice that includes the regular usage of these two closure rules. I summarized arguments from text, structure, history, and precedent to support both principles (pp. 70–73). These principles reflect the conventional view of our legal practice and most scholarship. As recently summarized by Professor Andrew Coan, "[t]here are good reasons that the enumeration principle is so familiar. It has deep roots in American constitutional history."[32] Likewise with the structural principle of federalism. "Federalism . . . is one of the most deeply rooted doctrines in American constitutional jurisprudence," concluded Professor Kurt Lash.[33]

Third, Professor Telman claims that the order of the application of the closure rules is outcome determinative, and that my presentation of the rules was not justified. Though I agree that order of operations rules is needed to provide determinacy,[34] Professor Telman's criticism misses the mark because of a key distinction between the closure rules and the requirement for judicial deference to elected-branch constructions. I argued that the originalist closure rules operate in the realm of constitutional *interpretation* to reduce epistemic underdeterminacy (pp. 66–73), and I argued that judicial deference operates in the realm of constitutional *construction* in zones of irreducible epistemic underdeterminacy (pp. 73–90). I gave reasons for these differing operations. For instance, I argued that federal judicial power authorized (and required) federal judges to follow the Constitution's original meaning (interpretation), but it did not authorize federal judges to construct constitutional law (contrary to elected-branch constructions) (pp. 84–87).

Let me close by emphasizing that, even if Professor Telman's criticisms of the originalist closure rules are accurate, and the construction zone is one of unconstrained interpreter discretion, the result is still not radical or even substantial indeterminacy. Instead, the result is that determinate original meaning governs. It is an empirical question the relative scope of this determinacy,

32. Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1988 (2016).

33. Kurt T. Lash, *The Sum of All Delegated Powers: A Response to Richard Primus, the Limits of Enumerations*, 124 YALE L. F. 180, 186 (2014).

34. *See generally* Larry Alexander, *Telepathic Law*, 27 CONST. COMM. 139, 146 (2010) (arguing that the multiple-modalities conception of constitutional interpretation "is a nest of confusions").

and my research has suggested that many of the most important constitutional questions are determinatively answered by the original meaning. I summarize this argument in Part III, below.

Professor Telman's Implausible View of Constitutional Indeterminacy

Professor Telman appears to employ an implausible view of constitutional indeterminacy, and this leads him to misunderstand my arguments. Professor Telman claims that "[o]nce one accepts that the Constitution articulates guidelines and principles, one can argue . . . that originalism supports" a variety of conclusions, including (as examples) a constitutional right to abortion, congressional Commerce Clause power to solve national problems, and a broad equal protection anti-discrimination principle.[35] Professor Telman's account of determinacy fails at two points.

First, his standard for determinacy is too lax. The fact that "one can argue" for an unconventional interpretation is not sufficient evidence that that text's original meaning is indeterminate. By that standard, (nearly) every aspect of the Constitution's text is deeply indeterminate. Scholars have asserted that even the presidential age requirement is indeterminate.[36] I argued that the appropriate standard to identify a text's original meaning is the best available legal evidence (p. 67). "[O]ne can argue" for many interpretations that are not supported by the best available legal evidence.

Second, it could be the case that some or many of the arguments supporting unconventional interpretations are not the best originalist arguments, or even originalist arguments at all. For example, Professor Telman cites to Professor Balkin as the example of an originalist scholar who has argued for unconventional interpretations.[37] However, Professor Balkin's conception of originalism, limited to the text's semantic meaning, is much thinner than the mine-run of originalist theories,[38] so it should not be surprising that Professor Balkin's interpretations

35. Telman, *supra* note 1, at 124.

36. *E.g.*, Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1174 (1985).

37. Telman, *supra* note 1, at 124.

38. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1282–84 (2019).

are likewise unconventional.

A more accurate picture of scholarship on the Constitution's original meaning would show that there are areas of consensus and disagreement: the scholarship would *agree* that some propositions are part of the original meaning and that some propositions are not part of the original meaning, and the scholarship would *disagree* about other propositions (pp. 199–201). For instance, the scholarship on the Privileges or Immunities Clause has relatively stable areas of agreement[39] and, thus far, continuing areas of disagreement.[40]

C. THE CONSTITUTIONAL COMMUNICATION MODEL INCORPORATES THE BEST OF EXISTING ORIGINALIST SCHOLARSHIP, MAKING IT A MORE COMPLEX THEORY

Professor Telman criticizes the Constitutional Communication Model of originalism for being too thin because it purportedly hews to a middle road among different conceptions of originalism. Professor Telman criticizes *Originalism's Promise* for taking a "Goldilocks approach to originalism,"[41] and "assuming an intermediate position,"[42] and "masterfully navigat[ing] the different strains of originalism without picking sides,"[43] and "compromis[ing] among competing views."[44] According to Professor Telman, this opens my conception of

39. For example, that the Clause incorporates the Bill of Rights against the states.

40. The most important disagreement is whether the Clause also incorporates unenumerated natural rights.

41. Telman, *supra* note 1, at 113.

42. *Id.* at 118.

43. *Id.* at 127.

44. *Id.* at 136. Because of space constraints, I will not fully address Professor Telman's description of the Constitutional Communication Model as occupying a Goldilocks position among the various conceptions of originalism. Whether Professor Telman's Goldilocks characterization is true depends on what the potential positions are regarding different facets of originalism and whether they are capable of being positioned as extremes and medians, and whether they are capable of compatibility with living constitutionalism. Thinking of the aspects of originalism about which originalists debate, there are some that seem capable of such relative comparisons, and others that do not. (I fleshed out this argument in Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253 (2011).) For example, one could say that my middle-of-the-road position regarding nonoriginalist precedent is in originalism's Goldilocks zone and that it makes originalism closer to living constitutionalism than the get-rid-of-it-all position. On the other hand, Professor Telman does not give a reason to think that my deference conception of construction is the median point within originalism, and he does not show that it is relatively more compatible with living constitutionalism than other versions.

originalism up to "ideologically driven and outcome-determinative" use,[45] and makes it "indistinguishable from various forms of 'non-originalism.'"[46]

Professor Telman is correct that the Constitutional Communication Model adopts aspects of various models of originalism, in addition to adding its own characteristics. For example, it employs constitutional construction and closure rules, both drawn from a variety of scholarship (pp. 63–91),[47] and it articulates a full theory of originalist precedent, a novel contribution to the literature (pp. 91–141).[48] This pattern of continuity coupled with novelty is the normal course of legal scholarship: later scholarship builds on what came before it by continuing some aspects, not following other aspects of the existing corpus, and adding novel contributions. For example, the rich scholarly debate on the original meaning of "executive Power" includes these facets. Professor Ilan Wurman's recent article, *In Search of Prerogative*, situates itself in the existing literature, accepts some existing claims, rejects others, and adds novel arguments.[49]

An implication of this process, both within originalist scholarship and without, is that the body of scholarship becomes more complex. It becomes more complex because each originalist scholar should explain where his theory fits in the existing literature, and this will entail accepting and rejecting some existing positions. Moreover, excellent originalist scholarship adds insights to the theory.

One can get a feel for originalist theory's increased complexity and for this complexity's value by reading some of the early originalist literature and comparing it to today's best work. For instance, then-Professor Robert Bork's 1971 *Neutral Principles and Some First Amendment Problems*, expressly called

45. Telman, *supra* note 1, at 110.

46. *Id.* at 127; *see also* SEGALL, *supra* note 11, at 83 (arguing that New Originalism is "largely indistinguishable from the type of pluralistic judicial review practice by the Warren and early Burger Courts and advocated by non-originalist scholars").

47. The text there cites a variety of scholars, including Professor Solum, and Professors McGinnis and Rapport.

48. Professor Telman seems to suggest that *Originalism's Promise*'s theory of precedent is drawn from Professor McGinnis and Rappaport's work. Telman, *supra* note 1, at 116, but it originated in my own earlier work, upon which others have drawn. Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006).

49. Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2019).

for increased theoritization, and contributed to that goal but, as Bork himself acknowledged, his contributions were "ranging shots" "to take the argument . . . a step or two further."[50] Professor Lawrence Solum's recent essay, *Originalism v. Living Constitutionalism: The Conceptual Structure of the Great Debate*, exemplifies the moves of current excellent originalist scholarship.[51] He created a taxonomy of existing originalist and living constitutionalist theories, and identified hybrid theories, and in doing so, proposed the defining characteristics of the respective theories. Professor Steven D. Smith's pithy phrase captures the difference: "Older originalist heroes . . . can look like conceptual neophytes, klutzing around among concepts and distinctions they do not quite grasp."[52]

Originalism's Promise contributes to originalist theory's complexity by offering a new conception of originalism with its own unique "mix" of characteristics. That "mixing," by itself, does not open up the Constitutional Communication Model to "ideolog[y]," nor does the Model itself do so secretly. Instead, the Constitutional Communication Model expressly identifies aspects of originalism where the law does not provide significant guidance. For example, its originalist theory of precedent includes an analysis to evaluate whether to overrule a nonoriginalist precedent, an analysis that is complex and value-laden so that "reasonable people may have legitimate differences on the conclusion of this complex process" (p. 134). Indeed, it was because of the existence of this (acknowledged) interpreter discretion that I included a theory of the judicial virtues! (pp. 142–157).

Despite this acknowledgment of discretion and contrary to Professor Telman's claim, the Constitutional Communication Model remains analytically distinct from living constitutionalism. The picture painted by *Originalism's Promise* is one in which the Constitution's original meaning is *always* given pride-of-place—to it do officers swear their oaths and only it may they follow. Living constitutionalism's core commitment, by contrast, is to changing constitutional meanings, and it therefore rejects either

50. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

51. Solum, *supra* note 38.

52. Steven D. Smith, *That Old-Time Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 223, 227 (2011).

originalism's fixation thesis or its constraint principle.[53] Indeed, other reviewers have taken issue with what they characterize as *Originalism's Promise*'s "uncompromising defense" of originalism.[54]

One can see the differences between the Constitutional Communication Model and living constitutionalism by comparing it to Professor Segall's characterization of originalism. Professor Segall argued that a robust construction zone, retention of nonoriginalist precedent, and judicial discretion rendered originalism indistinguishable from living constitutionalism.[55] That is not the Constitutional Communication Model, which has a modest construction zone,[56] it guides judicial evaluation of nonoriginalist precedent, and it harnesses interpreter discretion via the judicial virtues.

My own view is that the Constitutional Communication Model of originalism is robust and not thin; in fact, I worry that it places *too* great of demands on judges and other officials. It takes a person with a relatively rare combination of both the character and skills to implement the Constitution's original meaning. This is a person with extensive legal training whose fundamental disposition is to follow the law, but who also has the prudential wisdom to navigate areas of open texture within the law.

D. ORIGINALISM'S COMPLEXITY IS THE HEALTHY PRODUCT OF ITS ATTEMPT TO ACCURATELY ACCOUNT FOR THE COMPLEXITIES OF AMERICAN CONSTITUTIONAL PRACTICE

One of the most interesting parts of Professor Telman's thoughtful analysis comes near the end where he argues that "the originalist paradigm is in crisis" because it is "becom[ing] increasingly complex in order to accommodate the theor[y] to the data."[57] I agree with Professor Telman that originalism's complexity[58] presents challenges to originalism. However, I

53. Solum, *supra* note 38, at 1276.

54. Whitley Kaufman, *Originalism's Promise: A Natural Law Account of The American Constitution*, (reviewing LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019), 30 LAW & POL. BOOK REV. 34 (2020).

55. SEGALL, *supra* note 11, at 89–98, 104–15.

56. One for which Professor Telman strongly criticizes it. Telman, *supra* note 1, at 124–27.

57. *Id.* at 111; *see also* Smith, *supra* note 52, at 223 (making a similar claim).

58. Professor Telman appears to employ "complexity" and "sophistication" as synonyms, as will I. Telman, *supra* note 1, at 136.

believe the challenges are different than he does, and I do not think originalism is in "crisis" and trending toward "collapse under the weight of [its] own appendages."

In most areas of human theoretical endeavor—indeed, in legal scholarship itself!—the label "sophisticated" is positive. A "sophisticated" account of the meaning of a scriptural narrative,[59] a sophisticated explanation of good-faith performance of contracts,[60] or a sophisticated theory of the scientific method[61] are, all else being equal, better theories than unsophisticated ones.

Theories operate at a variety of different levels, and at some levels, complexity is problematic, while at others, it is crucial. At least two variables affect whether sophistication is appropriate or not. The first is the theory's audience and the second is the subject for which the theory accounts.

Originalism and originalists have a variety of audiences. Originalism has and should operate *simultaneously* at multiple levels of sophistication. It must, at one and the same time, be able to communicate its claims in sophisticated form to constitutional interpretation scholars and in simpler form to average Americans.

Legal academics engage in a complex level of legal argumentation to support and criticize claims. The debate over constitutional interpretation is crowded with scholars and arguments that have gained complexity as the debate has progressed. There are now moves (constitutional construction helps originalism fit legal practice), counter-moves (indeterminacy erodes originalism's distinctiveness), counter-counter-moves (rules of interpretation reduce the construction zone), and Professor Telman's own counter-counter-counter move (the rules of interpretation themselves create discretion).

At the same time as originalists create a sophisticated theory of constitutional interpretation capable of accounting for American constitutional law and practice, and having the capacity to engage dialectically with legal scholars, originalism must also operate in simpler modes. American constitutional practice includes many participants in a variety of roles. American citizens

59. *See, e.g.*, St. Thomas Aquinas, *Super epistolam ad Galatos lectura*, c. 4, lect. 7, *in* 1 SUPER EPISTOLAS S. PAULI LECTURA at 621(R. Cai ed., Turin: Marietti, 1953) (describing different "senses" of "Let there be light").

60. *E.g.*, Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

61. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

participate through their various political actions that bear on the Constitution's meaning. Federal and state officers strive to act faithfully to the Constitution. And, of course, nearly all judges and many lawyers participate directly in constitutional practice.

These innumerable participants do not regularly attend annual conferences on originalism,[62] nor do they typically read the most recent article on pairwise comparisons between originalism and living constitutionalism.[63] Yet, they will participate in constitutional practice and need information to perform their roles well. Originalism must package its claims in ways accessible to these various constitutional participants.

For citizens, originalists will explain (among other propositions) how originalism follows the Constitution's fixed meaning, and that judges and other officers have no power to change the Constitution's meaning. Citizens need this knowledge to exercise their franchise and to participate in the political process more broadly. The 2016 Republican Party Platform explained that Party's approach to voting Americans this way: "The rule of law is the foundation of our Republic. A critical threat to our country's constitutional order is an activist judiciary that usurps powers properly reserved to the people through other branches of government. Only a Republican president will appoint judges who respect the rule of law expressed within the Constitution and Declaration of Independence, including the inalienable right to life and the laws of nature and nature's God, as did the late Justice Antonin Scalia."[64] The Heritage Foundation provided a more nuanced explanation of originalism aimed at educated non-experts: "Written constitutionalism implies that those who make, interpret, and enforce the law ought to be guided by the meaning of the United States Constitution—the supreme law of the land—as it was originally written. This view came to be seriously eroded over the course of the last century with the rise of the theory of the Constitution as a 'living document' with no

62. *E.g.*, Georgetown Center for the Constitution, Symposia & Colloquia, https://www.law.georgetown.edu/constitution-center/chase-lecture-and-colloquium/; Center for the Study of Constitutional Originalism, Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference, https://www.sandiego.edu/law/centers/csco/programs.php.

63. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215.

64. *Republican Party Platform 2016*, at 10, https://prod-cdn-static.gop.com/static/home/data/platform.pdf.

fixed meaning, subject to changing interpretations according to the spirit of the times."[65]

Officers need sufficient guidance to perform their duties consistent with their oaths, and that is going to vary dramatically with the office. The "beat cop" needs plain and focused guidance about the constitutional rules governing criminal procedure, while the President needs nuanced explanation in nearly all areas of constitutional law. Our constitutional system has many ways to provide this guidance, and originalism's reliance on precedent is one and perhaps the most important mechanism (pp. 91–141, 180–194).

Some lawyers and judges read, participate in, and contribute to originalist scholarly discourse. Stephen P. Holbrook is an attorney who participated in originalist scholarly discourse and employed that knowledge in a variety of arenas including the courts, legislatures, and public debates.[66] Many judges (both federal and state) have participated in originalist scholarly discourse and have employed that knowledge in their opinions, non-judicial writings, and public debates. Sixth Circuit Judge Amul Thapar, for instance, has been active with originalist scholarship.[67]

Scholarly investigations of originalism, like *Originalism's Promise*, are not primarily aimed at citizens, officers, or many lawyers. Instead, *Originalism's Promise* was aimed primarily at legal scholars and educated participants in our constitutional practice. Therefore, even assuming "books like Strang's cannot appeal" to average citizens, that is not an argument that originalism is collapsing "under the weight of [its] own appendages" or that originalism is moving away from popular appeal. Instead, scholarly originalism, of which *Originalism's Promise* is an example, is only evidence that originalism is working to adequately explain constitutional practice and persuade legal scholars that such is the case. Critic of originalism, Calvin TerBeek, recognized this division of labor in his recent reviews of *A Republic, If You Can Keep It* and *Originalism's*

65. David Forte, *The Originalist Perspective*, https://www.heritage.org/the-constitution/report/the-originalist-perspective.

66. Stephen P. Halbrook, Ph.D., Attorney at Law—Specializing in Constitutional Cases, https://www.stephenhalbrook.com.

67. *E.g.*, Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 774 (2020).

Promise: "Strang's book, promising a natural law account of originalism, aims to provide theoretical substance to Gorsuch's popular argument."[68]

Originalism's increasing sophistication over the past decades is not a reason for criticism, because it is the natural product of the theory attempting to explain the complex phenomenon of constitutional law to legal academics and political theorists. Indeed, one of the reasonable criticisms of early versions of originalism by nonoriginalist scholars was that it failed to account for many important aspects of our legal system.[69] The system of American constitutional law is complex.[70] Fundamentally, it involves humans and institutions engaged in a normative system of authority, guidance, and cooperation, that employ a wide variety of tasks in order to function well, including numerous legal techniques, rhetoric, ethics, and practical reasoning. It is also complex because of its own unusual characteristics. The American constitutional system is relatively old and it has changed in many ways over the centuries. The system is multifaceted with federal and state divisions, branches of federal and state governments, and many and many-different types of officers wielding different types of power.

Indeed, critics of originalism criticized it precisely because it failed to account for important aspects of American constitutional practice. What about nonoriginalist precedent? How can one sum group intended meanings? What if/when the original meaning runs out? These and other (reasonable) criticisms pushed originalists to make the theory better—more accurate. It is an odd sort of Catch-22 that criticizes originalism for not accounting for important aspects of the legal system and for being too complex when it does so.

Originalists have many sound reasons to make sure their theory fits our complex constitutional practice (pp. 161–164). But, to do so adequately—to capture our complex system of

68. Calvin TerBeek, *Originalist Scholarship and Conservative Politics*, THE NEW RAMBLER (Oct. 9, 2019), https://newramblerreview.com/book-reviews/law/originalist-scholarship-and-conservative-politics.

69. *See also* SEGALL, *supra* note 11, at 82–83 ("The Original Originalists criticized liberal decisions for straying too far from text and original meaning, but did not provide sophisticated theoretical alternatives.").

70. *See* Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113, 133 (1988) ("[T]he complicated and at times almost Byzantine structure of government set up by the Constitution . . . ").

constitutional law—originalism itself must be complex. Originalism as described in *Originalism's Promise* is complex because American constitutional practice is complex: originalism has to describe how interpretation works. It must account for precedent. It has to explain what to do with mistaken precedent. And so much more.

An instructive example of the necessity of theoretical complexity is religious traditions, and I will focus on the Christian tradition because I am most familiar with it. Professor Telman claims that "theories collapse under the weight of their own appendages."[71] I do not know if that is true generally, but in the case of Christianity, those aspects of the tradition that are "complex . . . and sophisticat[ed]," like Scholasticism, are *not* causes of its collapse. Critics of Christianity today,[72] like those in ancient times,[73] have provided sophisticated arguments against it, and adequate responses must likewise be sophisticated. Scholasticism was one such response, which I describe below.

The Christian tradition has operated at a variety of levels of complexity. At one end of the spectrum are texts designed to teach ordinary people. For instance, the *Catechism of the Catholic Church*[74] is an accessible, thorough, and clear presentation of Christianity's teachings, but one would not label it sophisticated theology.[75] Or earlier, simple—not simplistic—preachers taught ordinary people. Thomas à Kempis' *The Imitation of Christ*,[76] first published in the early fifteenth century, was and remains a widely read guide for average Christians.

On the other end of the spectrum, the tradition has also created dense, closely argued tomes designed to persuade thoughtful readers. Christians during the period known as Scholasticism[77] in the thirteenth and fourteenth centuries

71. Telman, *supra* note 1, at 111.

72. *E.g.*, the New Atheists, typically said to include Sam Harris, Richard Dawkins, Daniel Dennett, and Christopher Hitchens.

73. *E.g.*, Porphyry of Tyre, *Against the Christians* (c. 270); Julian the Apostate, *Against the Galialaeans* (c. 362).

74. ROMAN CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH (1993).

75. *See* Fr. John Hardon, *Understanding the Catechism of the Catholic Church* ("The Catechism is not simple reading. But neither is it sophisticated and out-of-touch with the vocabulary of the people."), https://www.ewtn.com/catholicism/library/understanding-the-catechism-of-the-catholic-1288.

76. THOMAS À KEMPIS, THE IMITATION OF CHRIST (c. 1418).

77. *See, e.g.*, JOSEF PIEPER, SCHOLASTICISM: PERSONALITIES AND PROBLEMS IN MEDIEVAL PHILOSOPHY (Richard & Clara Winston trans., St. Augustine's Press 2001)

produced incredibly detailed, complex, elegant—in a word, sophisticated—works on philosophy and theology. Thomas Aquinas' work, especially his *Summa Theologica* and *Summa Contra Gentiles*, is a well-known example of the genre. The Scholastics debated questions of metaphysics, logic, ethics, and theology so thoroughly and systematically that today "scholastic" is a pejorative term, one used by Professor Telman himself.[78] This sophisticated approach to philosophy and theology thrived for centuries, and it had echoes in later eras, including in the sixteenth and seventeenth centuries,[79] and in the late nineteenth and early twentieth centuries.[80] Scholasticism—because of, not despite its complexity—made great advances in and for the tradition. Scholasticism's sophistication was a necessary condition for it to grapple with Aristotle's thought and to reasonably explain important parts of the tradition's metaphysics,[81] epistemology,[82] and ethics.[83]

Scholasticism's sophistication was made necessary by its audiences and the subject matters it addressed. Scholasticism's audiences included Christian scholars who were debating a variety of aspects of Christianity, along with non-Christians whom the Scholastics were seeking to persuade. Scholastic scholars, such as Aquinas, debated many aspects of Christianity among themselves and for the literate public. For instance, Aquinas integrated virtue ethics and natural law to provide a comprehensive scheme of ethics, one that fit together many aspects of the tradition up to his time, including Aristotle, St. Augustine, and Roman thinkers and jurists.[84] Aquinas also wrote a treatise to the audience of non-Christians, with the goal to explain and justify Christianity, and he did so primarily by

(1960) (describing the Scholastic period); William Turner, *Scholasticism*, *in* 13 THE CATHOLIC ENCYCLOPEDIA (1912), https://www.newadvent.org/cathen/13548a.htm (describing Scholasticism, but extending its chronological extent).

78. Telman, *supra* note 1, at 135.

79. *See, e.g.*, Thomas Izbicki & Matthias Kaufman, *School of Salamanca*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2019), https://plato.stanford.edu/entries/school-salamanca/ (describing scholasticism during this period).

80. GERALD A. MCCOOL, THE NEO-THOMISTS (1994).

81. Including potency and act, form and matter, and substance and accident.

82. Including a moderate realism, the relationship between natural knowledge ("reason") and supernatural knowledge ("faith").

83. Including virtue ethics, natural law, and God's providential governance of the universe.

84. I–II ST. THOMAS AQUINAS, SUMMA THEOLOGICA, q. 49, intro. (Fathers of the English Dominican Province trans., Benziger Bros. ed., 1947).

evaluating other religious beliefs and comparing them to Christian tenets in the light of "natural reason."[85]

Second, Scholasticism's sophistication was a product of the phenomena it was attempting to adequately explain. Christianity claims to have an account of God, human beings, the material world, and the proper relationships of all of them—in a word, everything! One can get a sample of this capacious scope by looking at Aquinas' structure of his *Summa Theologica*. It has four main parts,[86] 614 questions (or lines of inquiry), and 3,125 articles that address discrete facets of each question, all for the purpose "to treat of whatever belongs to the Christian religion."[87]

Like the Christian tradition, originalism has many manifestations, some simple and some sophisticated, and this is the natural and healthy product of its goal to explain and account for the complex American constitutional practice to a wide variety of audiences.

Originalist theory's increasing complexity *is* a challenge, though, and for many reasons. It is a challenge because originalists have to be able to preserve originalism's integrity, maintain and increase its complexity, and continue to explain originalism to new and existing lawyers of all stripes. I have suggested elsewhere that originalism has the resources to meet them.[88] These are challenges that intellectual movements of all stripes face as they mature. The sophistication within the Christian tradition had its costs, but the ubiquity of theological sophistication within the tradition suggests that those were costs that could be mitigated or borne.[89] Originalism should continue to chart the same path.

85. I ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES, ch. 2 (Anton C. Pegis trans., University of Notre Dame Press reprint edit., 1975).

86. To be clear, this includes the two subparts of the Second Part.

87. I–I ST. THOMAS AQUINAS, SUMMA THEOLOGICA, *supra* note 86, at intro; *see also* I–III The Way of the Lord Jesus (Germain Grisez *et al*., 1983–1997) (providing analyses of numerous difficult and common ethical situations), http://www.twotlj.org/index.html.

88. Lee J. Strang, *The Challenge of, and Challenges to, Originalism* (reviewing GRANT HUSCROFT & BRADLEY W. MILLER, THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION), 29 CONST. COMM. 111, 116–19, 125–26 (2013).

89. Some descendants of the Radical Reformation constitute rare exceptions. KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIANITY 788–90 (1953).

III. AN ORIGINALIST PARADIGM

Professor Telman ends his review with a brief roadmap for an "emerging post-originalist paradigm" based on "three, simple, descriptive claims."[90] These three claims are: (1) the Constitution's meaning is abstract and indeterminate in "the vast majority of constitutional disputes"; (2) the Framers intended the Constitution to be indeterminate; and (3) today's United States is "nothing like the society that gave us our Constitution."[91]

Professor Telman is mostly correct, as an abstract matter, that the law-as-coordination account would apply differently to a world that fit his claims than the Constitutional Communication Model applies to our Constitution.[92] The law-as-coordination account argues that the Constitution's original meaning is the Constitution's primary mechanism to overcome coordination problems and secure the common good. The original meaning was and is employed by the Framers, Ratifiers, and officers to (re)coordinate their actions to secure the Rule of Law and justice through authority-wielding offices. This law-as-coordination account will apply differently to different "facts on the ground," so if the original meaning is largely indeterminate, it would coordinate less, and officers exercising discretion would coordinate more. These different outcomes should not be surprising, because the law-as-coordination account applies to many different types of legal systems, including the common law system and the civil law system.[93] That's one of its virtues!

Each of Professor Telman's three particular claims are empirical. They may or may not accord with reality. *Originalism's Promise* argued (at varying lengths) that the Constitution had the resources to eliminate most underdeterminacy (pp. 48–61, 63, 157), that the Framers and Ratifiers did not intentionally build-in significant indeterminacy (in fact, they built-in tools to reduce underdeterminacy) (p. 13), and that changed conditions do not necessitate abandoning the original meaning (pp. 205–220, 297–299).

90. Telman, *supra* note 1, at 138.

91. *Id.* at 138.

92. It is not clear to me why Professor Telman's second claim is necessary for his conclusion to follow. If the Constitution in fact is indeterminate then, regardless of what the Framers and Ratifiers wished, today's interpreters (federal and state officers) would have sound reasons to construct constitutional meaning that advances the common good. *Originalism's Promise* acknowledged these reasons (p. 209).

93. *E.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 231–90 (1980); *see generally* YVES SIMON, A GENERAL THEORY OF AUTHORITY (1962).

From an originalist perspective, Professor Telman's claim that the Constitution's original meaning is abstract and indeterminate in "the vast majority of constitutional disputes" is an empirical one.[94] To fully critique Professor Telman's claim, one would have to identify determinate original meaning for a substantial number of constitutional disputes, which is beyond the scope of this Response. But a test case is the Commerce Clause and the large, important body of law that has arisen from it.[95] My (current) judgment is that Professor Randy Barnett's statement of that meaning[96] is the most accurate. That original meaning is largely determinate, and it would determinatively resolve most of the cases that have come before the Supreme Court during and since the New Deal, including the key cases of *United States v. E.C. Knight*,[97] *Wickard v. Filburn*,[98] and *NFIB v. Sebelius*.[99] That is a lot of important determinate constitutional disputes. This is only one data point, of course, and Professor Telman could reject Barnett's interpretation of the Clause, but it shows that Professor Telman's claim (at minimum) needs vastly more support.

Professor Telman's second claim is likewise an empirical one. I will note only that *Originalism's Promise* briefly summarized the robust literature describing the purposes and goals of the Framers who carefully crafted the Constitution in order to communicate with the Ratifiers and officers to re-coordinate society to secure the common good. "[T]he Framers took great care to craft the Constitution's structure, text, grammar, and even punctuation; they did so to communicate as clearly as possible the meaning they wished to convey to the Ratifiers, government officials, and Americans generally" (p. 13).

Professor Telman's third claim, as stated, is empirically false. There *are* many ways in which "the United States of today is . . . like the society that that gave us our Constitution."[100] To take an important continuity, the late-eighteenth century United States

94. Professor Telman provided insufficient evidence to support it, though that does not appear to be Professor Telman's purpose, which rather was to make the abstract point I described earlier.

95. It is also one of the areas where I have read most of the literature on its original meaning.

96. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 278–97 (2004).

97. United States v. E.C. Knight, 156 U.S. 1 (1895).

98. Wickard v. Filburn, 317 U.S. 111 (1942).

99. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

100. Telman, *supra* note 1, at 138.

had robust religious pluralism, like America today, and this pluralism was a key motivating factor for the Religion Clauses (pp. 207–208).

Accepting a more modest version of Professor Telman's claim—that the United States today is different in relevant ways from the United States of 1791—the fact that the United States today is different may or may not be a *reason* for a lawmaker to change the law [101] but standing alone it does not provide *authorization* for an officer to change the law. The officer would have to possess the authority to do so, in light of changed circumstances, and that is an inquiry separate from the existence of change simpliciter.

IV. A RESPONSE TO PARTICULAR CRITICISMS

In this Part, I address the most important of Professor Telman's discrete criticisms.

* * *

The most important contribution by *Originalism's Promise* is its natural law account of the Constitution and how originalism is the method of interpretation that follows from that account. Professor Telman barely over one page on it,[102] and briefly criticizes the account "because Strang avoids giving any substantive content to his theory's key objectives, 'human flourishing' and the 'common good.'"[103] Professor Telman mistakes a brief and "thin" account of a concept from any account of the concept.

Originalism's Promise clearly explained its account of human flourishing (pp. 228–238). The account is conventional and taken from Aristotle, Aquinas, and Finnis, among others. It described human flourishing abstractly, and then detailed various components of the tradition's conception of human flourishing: the basic human goods, natural law, and virtue ethics. My account was brief because it was drawing on a preexisting body of thought that had articulated the concept. As I explained, "This subsection

101. *If* the change is such that it requires a different legal ordering to secure the common good.

102. Telman, *supra* note 1, at 119–20.

103. *Id.* at 119.

summarizes for readers the Aristotelian tradition's conception" (p. 228). I cited to a variety of sources to which readers may go to gain a more fulsome account. "My goal here is to introduce readers to the key facets of the Aristotelian philosophical tradition" (p. 230). My account was also "thin" because it did not delve into more controversial claims regarding human flourishing. It did not, for instance, detail the role of religion in a flourishing life. However, brief and thin are not synonyms for substance-free.

I intentionally and expressly employed a "thin" conception of the common good. This conception holds that the common good is the coordination of activity by members of a community to pursue both private and public ends (pp. 239–265). For instance, traffic laws coordinate Americans' use of the highways so they may go about their lives pursuing their goods. I focused on three aspects of the common good: the rule of law, justice, and public offices. This conception is widely shared, both because it requires few controversial commitments, and because it fits many (I argued, nearly all) aspects of legal systems. Our constitutional system strives for the rule of law and justice, and a key mechanism by which they are pursued is through public offices that superintend the legal system.

My law-as-coordination conception of the common good is not my full understanding of the common good, but it is at least a component of any plausible conception. (I do not understand Professor Telman to argue otherwise.) For instance, without distributive or commutative justice, a legal system will not secure just coordination and the society's members will lack justice. Justice and the rule of law are great goods that provide the background and structure necessary for individuals to pursue their human flourishing.[104]

I employed this account of the common good to make my arguments as accessible and acceptable as possible to Americans of widely divergent substantive commitments. Typically in legal scholarship, this move is lauded as a way to build agreement in areas where agreement is possible.

104. I then coupled that argument to the claim that originalism is a necessary mechanism for the U.S. Constitution to pursue justice and the rule of law through public offices.

* * *

Professor Telman claims that my "Constitution is a majoritarian Constitution, with the courts having almost no role in protecting either minority groups or fundamental rights from the majoritarian consensus as to what promotes human flourishing and the common good."[105] On the contrary, the Constitutional Communication Model requires federal (and state) judges to enforce the Constitution's original meaning, including the constitutional protections for individual liberty—no more and no less. It is certainly the case that judges should enforce (to take just three non-random examples) the free speech rights, the religious liberty rights, and the gun rights of individual Americans against federal and state majoritarian infringement. That is clearly more than "almost no role." *Originalism's Promise* made no global claims about how robust individual rights protections are because it did not delve into the original meaning of the rights-protecting provisions, so the judicial role may range from significant to very significant, depending on the original meaning of those provisions. For instance, if Professor Barnett's interpretation of the Privileges or Immunities Clause is accurate, then the judicial role would be robust indeed. Professor Telman has not shown otherwise.

Second, Professor Telman's claim presumes that "majoritarian" institutions will not protect individual rights as well or better than the judiciary, about which the evidence is decidedly mixed. In the American context, many scholars of all stripes have argued that majoritarian institutions are better at protecting individual rights.[106] And internationally, the evidence suggests that parliamentary systems do as well or better protecting individual rights.[107]

* * *

Professor Telman finds fault with my use of Supreme Court opinions as exemplars of originalist or nonoriginalist decisions

105. Telman, *supra* note 1, at 130.

106. *E.g.*, REBECCA ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 1 (2006); *see also* SEGALL, *supra* note 11 (advocating for robust judicial deference to elected branches).

107. GREGOIRE WEBBER ET AL., LEGISLATIVE RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION (2018).

because I did not "explain . . . the criteria that justify the nomenclature and without acknowledging disputes."[108] I had explained my criteria in Chapter 2, where I described my conception of originalism (pp. 92–97). My goal was to use cases as examples that, based on my then-current research, suggested they were originalist or nonoriginalist. I did not have the space to identify all the relevant literature for each example or to recount all the bases for my judgments, so I typically provided a brief summary. For instance, as part of my argument that the amendment process showed that originalism is the correct means to interpret the Constitution, I used the example of *Chisholm v. Georgia*[109] and the Eleventh Amendment. I argued that the Eleventh Amendment—both its quick adoption and its language—was evidence that *Chisholm* was incorrect.

* * *

It is not clear to me why my identification of *Dred Scott* and *The Legal Tender Cases* as "errors" detracts from my claim that originalism was the standard way American legal practice interpreted the Constitution in the nineteenth century.[110] My claim was not that early legal practice was error free or uniformly originalist. Indeed, if one's historical account of American constitutional practice in the early-to-mid-nineteenth century can account for all the data without identifying any errors, *that* would be surprising for a human practice prone to mistakes.

* * *

Professor Telman accuses me of silently shifting between original-intended applications originalism and Balkinian semantic originalism.[111] Professor Telman gives two examples of my intentionalist sins; neither provides any evidence of my culpability. First regarding *Brown v. Board of Education*, I expressly made no claim about whether *Brown* was originalist and instead dropped a lengthy footnote describing the scholarly debate (pp. 132–133). Second, Professor Telman points to *The*

108. Telman, *supra* note 1, at 128.
109. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
110. Telman, *supra* note 1, at 112.
111. *Id.* at 123–24.

Legal Tender Cases, but I again only referred to scholarship: "There is scholarship showing that Congress was not authorized by this provision to issue paper money" (p. 128).

* * *

Professor Telman repeatedly makes the following move: Strang's argument is an example or product of "politics" or "ideolog[y]."[112] If, in Professor Telman's judgment, an argument was not fulsomely or satisfactorily explained, then the argument *must* be the product of "ideolog[y]." For instance, after noting my explanation of different levels of generality for original meaning, Professor Telman alleges the use of "ideologically tinged closure rules."[113] This move mars Professor Telman's review for a number of reasons.

First, it violates the rule of charitable interpretation. The rule of charitable interpretation requires one to paint others' arguments in their own best lights and then engage with the argument. This ensures that the scholarly debate is the best it can be. For example, Professor Telman criticizes my characterization of *The Legal Tender Cases* (p. 128) as nonoriginalist because of unprincipled reliance on original intended applications.[114] That was not a charitable interpretation, because I used *The Legal Tender Cases* solely as an example of harm to Rule of Law values that may be caused by overruling nonoriginalist cases, and I stated that "[t]here is scholarship showing that Congress was not authorized by this provision to issue paper money" and cited two articles to support that claim and one article that challenged that claim (p. 128 n. 195). I did not use intended applications—though I believe that intended applications may be evidence of original meaning—and I made the standard scholarly move of citing supporting and contradictory scholarship.

Second, Professor Telman's ideology charge short-circuits fulsome engagement with my arguments and therefore deprives readers of the benefit of Professor Telman's critiques. Professor Telman, *in one clause in one sentence*, claims that my argument that *Roe v. Wade* is a nonoriginalist opinion is flawed because "that evidence draws on the original expected application

112. *Id.* at 110, 124–125, 135.
113. *Id.* at 124.
114. *Id.* at 124.

originalism that Strang rejects in other contexts," and Professor Telman formulates the conclusion that "politics drives his theory."[115] Professor Telman's critique would have been significantly more beneficial to readers if it would have engaged with my (necessarily brief) summary of why *Roe* is a nonoriginalist opinion (pp. 135–136), a summary that included citations to a number of sources.

Third, it prevents Professor Telman from seeing plausible explanations for (what he perceives to be) unpersuasive arguments. For instance, Professor Telman claims that the proposed closure rules[116] "reflect Strang's political preferences more than they do the Constitution's determinate meaning."[117] A cleaner criticism would have been that, despite the textual, historical, and precedential arguments in favor of each of the rules, Strang was wrong on the merits because he missed counter-arguments A, B, C, etc.

Let me close this section by noting that Professor Telman's charge of "ideology" is a double-edged sword. I could lodge that same charge against Professor Telman for rhetorical excesses,[118] his unconventional claims,[119] his weak claims,[120] and his *mis*readings of my arguments.[121]

* * *

There are a number of instances when Professor Telman's rhetoric outruns his arguments, and they lead him to mischaracterize my arguments. After reviewing my evaluation of *Brown* and before proceeding to review my evaluation of *Roe*, for

115. *Id.* at 135.

116. These are the federal power burden of proof and the state power burden of proof (pp. 70–73).

117. Telman, *supra* note 1, at 125.

118. *See id.* at 132 ("No serious scholar should pretend . . . ").

119. *See id.* at 115 (asserting that *Griswold v. Connecticut*'s "penumbral approach" may have been "a good faith attempt to give effect" to the original meaning).

120. *See id*. at 131 (claiming precedential support for *Roe* because it "followed a line of Supreme Court precedents going back at least to *Griswold*"); *id*. at 135 ("One could just as easily conclude that both *Brown* and *Roe* are originalist precedents . . . ").

121. *Compare, e.g*., *id.* at 119 ("Strang avoids giving any content to his theory's key objectives"), *with* pp. 230–246; Telman, *supra* note 1, at 121 ("Strang . . . would read the Necessary and Proper Clause and implied congressional powers out of the Constitution"), *with* p. 88; Telman, *supra* note 1, at 130 ("[H]e rejects . . . the mechanism whereby the Bill of Rights became applicable against the states"), *and* p. 291 (noting that the law-as-coordination account includes individual constitutional rights).

instance, Professor Telman begins: "[n]o serious scholar should pretend either that the Constitution provides clear answers about how to treat abortion as a legal matter or that the ethical questions raised by unwanted pregnancies can be easily resolved."[122] Of course, many serious scholars, of all political stripes, have in fact concluded that the Constitution clearly does not protect a constitutional right to abortion. Recently, Professor Eric Segall stated that "there can be little debate that a woman's choice to terminate her pregnancy was not part of the original public meaning of the word *liberty* in the Fourteenth Amendment."[123] A generation earlier, John Hart Ely lamented the lack of constitutional grounding for the right to abortion.[124]

Moreover, I did not contend that "the ethical questions raise by unwanted pregnancies can be easily resolved." I expressly cautioned that my evaluations of *Brown* and *Roe* as nonoriginalist precedents did not purport to fully and definitively settle their legal or (in the case of *Roe*) ethical status. "The following applications are preliminary in nature. Of course, reasonable people may have legitimate differences on the conclusion of this complex process" (p. 134). In fact, one of the points *Originalism's Promise* stressed is that originalism's acceptance of the continued viability of some nonoriginalist precedent creates situations of judicial discretion. "Originalism is not a machine or algorithm . . . Instead, it is a theory that requires humans to engage in sometimes-demanding research and make sometimes-challenging judgments" (pp. 142–143). Hence, I argued for the necessity of supplementing originalism with a theory of judicial virtues to enable originalism to best maintain its commitment to the original meaning while navigating through judicial discretion.

V. CONCLUSION

Professor Telman's review thoughtfully described and criticized *Originalism's Promise.* Professor Telman's review also provided an opportunity to evaluate originalism's current state and future. I argued in this Response that originalism is a flourishing theory engaging with constructive criticism and grappling with the complexities of American constitutional

122. Telman, *supra* note 1, at 132 .

123. SEGALL, *supra* note 11, at 88.

124. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

practice. *Originalism's Promise* does both, and in doing so restates originalism with a new level of sophistication needed to accomplish the tasks.