

Maurice A. Deane School of Law at Hofstra University

## Scholarship @ Hofstra Law

---

Hofstra Law Faculty Scholarship

---

2021

### Original(ism) Sin

G. Alex Sinha

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)



Part of the [Law Commons](#)

---

#### Recommended Citation

G. Alex Sinha, *Original(ism) Sin*, 95 ST. JOHN'S L. REV. 739 (2021)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/1381](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1381)

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact [lawscholarlycommons@hofstra.edu](mailto:lawscholarlycommons@hofstra.edu).

# ORIGINAL(ISM) SIN

G. ALEX SINHA<sup>†</sup>

## INTRODUCTION

During President Trump's term in office, the Senate confirmed nearly 250 of his federal judicial nominees, including 3 to the Supreme Court of the United States.<sup>1</sup> That number amounts to nearly a third of the federal judiciary's roughly 800 active members.<sup>2</sup> By and large, the judges nominated by President Trump purport to apply some form of originalist constitutional interpretation or construction,<sup>3</sup> though the subject of originalism featured perhaps most prominently at the confirmation hearings for Amy Coney Barrett, whom President Trump nominated in

---

<sup>†</sup> Associate Professor, Maurice A. Deane School of Law at Hofstra University. This Article benefited from exchanges with Amna Akbar, Sheila Hayre, Jennifer Herbst, Jeff Kahn, Andrew Koppelman, Stan Krauss, Angela Robinson, Sarah Russell, Shelly Sadin, Lawrence Solum, Lee Strang, and Janani Umamaheswar. I am also grateful to have had the opportunity to present this Article to audiences at the American Association of Law Schools, the Law and Society Association, and the Quinnipiac University School of Law. I owe special thanks to Stephanie Adams for her fantastic research assistance. All errors are my own.

<sup>1</sup> Harper Neidig, *Senate Confirms Two More Trump Judicial Nominees*, HILL (Dec. 16, 2020, 5:06 PM), <https://thehill.com/homenews/senate/530557-senate-confirms-two-more-trump-judicial-nominees> [<https://perma.cc/D7GT-98HY>]. The Senate confirmed another 54 of President Trump's nominees to seats on appellate courts. *Id.*

<sup>2</sup> See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/BC7Y-RPFL>] (tallying 816 active federal judges across district courts, appellate courts, and the Supreme Court in January of 2021).

<sup>3</sup> See Jeffrey F. Addicott, *Reshaping American Jurisprudence in the Trump Era – The Rise of “Originalist” Judges*, 55 CAL. W. L. REV. 341, 358–59 (2019) (reflecting on President Trump's judicial appointments midway through his term and noting that he “will surely continue to rack up more originalist jurists”); *id.* at 360 (observing that a “‘Trump judge’ will generally fall into the category of the originalist”); see also John O. McGinnis & Michael B. Rappaport, *Trump's Judges Will Bring America Together*, WALL ST. J. (Sept. 24, 2020, 7:09 PM), <https://www.wsj.com/articles/trumps-judges-will-bring-america-together-11600988950> [<https://perma.cc/PF55-873Z>] (observing, days after the death of Justice Ruth Bader Ginsburg, that “Mr. Trump will surely nominate the same kind of judges he has before—jurists who believe in following the original meaning of the Constitution” and that “Mr. Trump's judges are self-conscious originalists and textualists”).

October of 2020 to replace Justice Ruth Bader Ginsburg.<sup>4</sup> Whatever one thinks of the vast literature on the variants, merits, and demerits of originalism,<sup>5</sup> the Trump Presidency has ensured its long-term relevance—if not its ascendancy—in federal court.

The general thrust of originalism is that judges should interpret the U.S. Constitution—or construct its meaning, where necessary<sup>6</sup>—as if it possesses some sort of fixed meaning, a meaning typically anchored in the intentions or beliefs of those who drafted or ratified it, or in the original public meaning of the words and phrases it comprises.<sup>7</sup> It is no accident that a Republican President and Senate jointly prioritized the confirmation of originalist judges; there is a strong correlation between purportedly originalist approaches to constitutional interpretation and conservative policy preferences more

---

<sup>4</sup> See, e.g., Brian Naylor, *Barrett, an Originalist, Says Meaning of Constitution 'Doesn't Change Over Time,'* NPR (Oct. 13, 2020, 10:08 AM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time> [<https://perma.cc/J5L9-FEVM>] (reproducing one relevant exchange between Barrett and a senator during the hearings); Jonathan Allen et al., *Highlights of Amy Coney Barrett's Questioning at Supreme Court Confirmation Hearing,* NBC NEWS (Oct. 13, 2020, 8:31 PM), <https://www.nbcnews.com/politics/supreme-court/live-blog/live-updates-amy-coney-barrett-faces-questions-supreme-court-confirmation-n1243016/ncrd1243178#blogHeader> [<https://perma.cc/PT29-XYP9>] (reproducing another relevant moment from Barrett's confirmation).

<sup>5</sup> It is impossible to identify the literature comprehensively here. For some key contributions to the debate, however, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–85 (1990); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 1–5 (2004); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 86 (2009).

<sup>6</sup> Some commentators distinguish between constitutional interpretation and constitutional construction. See BARNETT, *supra* note 5, at 123 (favorably quoting Keith Whittington's definition of the terms). That distinction is not especially important for present purposes, and, notably, it rarely carries over to "judicial opinions or public discourse." Greene, *supra* note 5, at 10.

<sup>7</sup> Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1660 (2013) (crediting Lawrence Solum with the view that the unifying feature of the disparate strands of originalism is that all strands "maintain . . . a fixed-in-time constitutional meaning that constrains modern interpretation"). Some commentators refer to the proposition that the Constitution carries a fixed meaning as the "[f]ixation [t]hesis." Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 381 n.6 (2018). My abbreviated description of originalism here obscures a great deal, of course. See *infra* Part I.A, for a more refined explanation of how I use the term.

generally.<sup>8</sup> Indeed, some scholars have argued that originalism, as the term is presently understood, derives at least in part from a political strategy adopted by the Reagan administration to advance particular policy preferences through the courts.<sup>9</sup>

But one criticism of President Trump's nominees—that they

<sup>8</sup> See Tsesis, *supra* note 7, at 1661 (“The ideology most originalists espouse is too closely related to the conservative political agenda to ignore the overlap between it and party partisanship.”). Others have made similar observations:

The originalism movement is connected to a set of political commitments. We need not guess at what those commitments are. The Reagan Justice Department’s Office of Legal Policy produced a document in 1988 entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*. The document proclaimed itself designed to identify the stakes of the “judicial philosophies” of the judges appointed to the Supreme Court. The claimed results dictated by an originalist view of the Constitution aligned nicely with the Republican political program of the 1980s: restrictions on abortion rights, gay rights, immigrant rights, and affirmative action, and protections for private discrimination, school prayer, state autonomy, and property rights. . . . Originalism does not obviously produce some of those positions—restrictions on affirmative action, for example—but originalism was a means of casting many of them in putatively neutral terms and therefore branding the agenda as a whole as consistent with constitutional fidelity.

Greene, *supra* note 5, at 86 (footnotes omitted); see also Tom McCarthy, *Amy Coney Barrett Is a Constitutional ‘Originalist’ – But What Does It Mean?*, GUARDIAN (Oct. 26, 2020, 8:15 PM), <https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-originalist-but-what-does-it-mean> [<https://perma.cc/2SY2-3NAX>] (quoting Aziz Huq as stating, “The political discourse of originalism is closely aligned with the policy preferences of the Republican party that has promoted judges who happen to take this perspective. It purports to be something that is moving outside politics, but it is . . . tightly linked to a particular partisan political orientation.”). By the same token, Democratic Presidents would tend to nominate judges who adhere to some form of “living constitutionalism,” which in practice is more conducive to *their* preferred policy outcomes. See Addicott, *supra* note 3, at 346 (describing originalists as “conservative” and living constitutionalists as “liberal”). But see Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 549 (2009) (arguing that “[o]riginal meaning originalism and living constitutionalism are compatible positions. In fact, they are two sides of the same coin. Although not all versions of these theories are compatible, the most intellectually sound versions of each theory are.”); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 3 (2020) (arguing that, under certain assumptions, “the ‘original’ Constitution is a flexible and pragmatic charter, not a fixed and immutable artifact”).

<sup>9</sup> See Greene, *supra* note 5, at 17 (arguing that “the originalism of today is the product of a political mobilization. It is . . . a movement that preceded the nominations of Justice Scalia and Justice Thomas and was deliberately designed to produce their jurisprudential approaches.”). As a result, a substantial swath of the lay public recognizes the term (or its general thrust). See *id.* (noting that originalism “is discussed on talk radio and in bestselling books; in blogs and in newspaper columns; in presidential campaigns and at water coolers”). But see Mulligan, *supra* note 7, at 390 (“However, despite its prominence in the Reagan administration, most originalists would be offended at the insinuation that their goals were to manipulate legal and popular discourse in order to unprincipledly advance a conservative policy agenda.”).

are overwhelmingly white and male<sup>10</sup>—mirrors a criticism of originalism itself: that prioritizing the original understanding of the Constitution, to the extent such a thing is discernible,<sup>11</sup> is to elevate the white, male, propertied voices of the Framers to the exclusion of essentially all others.<sup>12</sup> In doing so, originalism threatens to reify the significant racial, gender, class and intellectual prejudices of the Framers and ratifiers of the Constitution.<sup>13</sup> This point appears in various forms within the sweeping critiques of liberal legal ideology offered by certain feminist and critical race scholars,<sup>14</sup> and it has been translated

---

<sup>10</sup> See McCarthy, *supra* note 8 (reporting that “[e]lected officials and others who have noticed that 86% of Trump’s judicial appointees are white and 75% are men have begun to hear something else in the term [‘originalism’]: a nostalgic appeal to the exclusive hold on power by white men at the time the [C]onstitution was written”).

<sup>11</sup> See Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161, 1161 (2013) (arguing that historical sources may indicate different possible original meanings, and, therefore, pushing courts to consider original intentions); Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue’s Home in Originalism*, 80 FORDHAM L. REV. 1997, 2006 (2012) (noting that “nonoriginalists [have] argued that it [is] either impossible in principle to ascertain the original intent of a multi-member body . . . or [so] practically difficult . . . that the endeavor would regularly fail”).

<sup>12</sup> See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 583 (1990) (“Despite its claims, however, this voice [of ‘We the People’] does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silenced. . . . [T]he ‘we’ of ‘We the People[.]’ . . . depend[s] on the silence of others” and “has silenced them.”); see also Mulligan, *supra* note 7, at 380 (footnotes omitted) (“At the 2017 Originalism Works-in-Progress conference, non-originalist scholar Richard Primus tweeted before the first panel, ‘At a conference on originalism. Nice people here. I count 31 around the table. 29 men; 28 white men.’”); *id.* at 402 (“Originalist interpretation tends to be done by self-identified originalists—a group that tends to be highly educated, affluent, white, male, and tends to hold conservative, libertarian, or Republican views.”).

<sup>13</sup> See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999) (considering the view that a “generation that countenanced slave-holders has not the moral legitimacy to rule us from the grave or from anywhere else. Because their intentions were racist, sexist, and classist, far from being bound by them, we ought loudly to denounce and reject them. According to this view, not only was the Constitution not a product of the consent, it was a product of original sin.”). For a more extended articulation of this objection, see Michael S. Lewis, *Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation*, 18 U.N.H. L. REV. 261, 290–301 (2020).

<sup>14</sup> See generally, e.g., Harris, *supra* note 12 (noting the exclusion of women from the Framing, but arguing that the diverse experiences and viewpoints of women complicate the task of unpacking the implications of their exclusion); see also Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 581–82 (1986) (observing that “[b]ecause women have been excluded from the mainstream of legal authority and legal change, the legal system, like moral, political, and philosophical discourse, has become ‘a set of cultural and symbolic forms

into a variety of forms by constitutional scholars as well.<sup>15</sup> Although it increasingly invites originalist responses,<sup>16</sup> the problem of constitutional exclusion does not seem to engage directly with the premises often used to justify originalism,<sup>17</sup> and therefore the problem gets treated at times more as a symbolic or abstract concern, a source of rhetorical flourish rather than a theoretical threat.<sup>18</sup> Indeed, constitutional law scholars often focus on other critiques of originalism, such as the practical difficulty of discerning an original understanding of the Constitution, or the democratic barriers to enacting constitutional amendments.<sup>19</sup> Those constitutional theorists who contend with

---

that view human experience from the distorted and one-sided perspective of a single gender,'” ensuring that “our legal structure . . . reflects a distorted view of the tension between autonomy and connection and between the individual and society.”)

<sup>15</sup> See generally Mulligan, *supra* note 7, at 382–83, 398 (breaking down the possible concerns about constitutional exclusion into several categories, including different forms of concern about adverse consequences, a problem of dead-hand control, a challenge to the Constitution’s representational legitimacy, a more amorphous worry about a “[c]ontamination” of the Constitution, and a recognition that exclusion alienates present-day disadvantaged groups from the Constitution).

<sup>16</sup> See generally, e.g., Barnett, *supra* note 13; Mulligan, *supra* note 7; James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 679 (2016). For a list of further sources that give the matter “important, but brief treatment,” see Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 399 n.11 (2010).

<sup>17</sup> See, e.g., Stephen A. Siegel, *The Federal Government’s Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 483 (1998) (offering a “conventional and widely shared version” of an argument for originalism: “(1) the Constitution, which is the supreme law of the land, is a species of written law; (2) the meaning of a written law depends upon a consideration of the text read in light of the intent of the lawmaker; (3) the ratifiers of any constitutional provision are the lawmaker, i.e., the people who authoritatively establish it as the supreme law of the land; and (4) judges, especially in cases involving written law, are authorized only to apply principles or rules authoritatively established by others, i.e., the authorized lawmakers”). On Siegel’s model argument, the exclusivity of the voices relevant to determining the original understanding of the Constitution is not obviously relevant.

<sup>18</sup> See Stein, *supra* note 16, at 407 (quoting Michael McConnell’s view that “the oft-heard complaint that the Constitution has no legitimate claim of authority to bind us because blacks and women were excluded from the franchise in 1787, seems beside the point. No one now alive was represented in 1787.”). Stein properly points out the defect in this understanding of the objection. *Id.*; see also Mulligan, *supra* note 7, at 393–95 (quoting Randy Barnett’s articulation of a concern about prejudices among the Framers in which he declines to cite any sources that have raised that point as an objection). Barnett ultimately dismisses the objection as well. See Barnett, *supra* note 13, at 652. In fact, elsewhere he claims that “both constitutional legitimacy and the commitment to a written constitution necessitate reliance upon the original meaning of the text.” BARNETT, *supra* note 5, at 120.

<sup>19</sup> See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 665 (2009) (“The two most effective theoretical deficiencies of originalism relate in varying degrees to the difficulty that *time* poses for historicist constitutional methodologies.”); *id.* at 666

constitutional exclusion<sup>20</sup>—or the related issues of the Framers' biases—generally understand it as a criticism of the purportedly democratic underpinnings of the Constitution, and therefore as a challenge to the document's political legitimacy.<sup>21</sup> Some have also understood it to suggest that the Constitution is tainted—and thus illegitimate—or that its history alienates disadvantaged groups.<sup>22</sup>

This Article articulates a novel, powerful, and broad form of the objection from constitutional exclusion that is neither contingent for its force on the exclusion of any specific group<sup>23</sup> nor focused per se on the political legitimacy of the Constitution. The Article thus demonstrates that the objection is not merely symbolic, rhetorical, or hypothetical. The form of the objection articulated below also persists despite subsequent amendments to the Constitution approved under less exclusionary circumstances.<sup>24</sup> Fundamentally, constitutional exclusion

---

(“[First, i]t is difficult enough for a judge to divine the *original* ratifying generation's collective understanding of an ambiguous constitutional provision. The Constitution was a negotiated compromise. Those who drafted the document are not the same as those who ratified it, those who ratified it are not the same as the population at large, and the various agendas and understandings of its provisions were wide-ranging and at times contradictory.”); *id.* at 668 (“A second and perhaps more significant objection to the form of originalism I have described derives from its implication that the Constitution itself, through Article V, prescribes the sole method of peaceful amendment. This is quite unlike most ordinary contracts, which customarily may be amended by consent of the parties, and indeed distinguishes the Constitution from most statutes, wills, judicial opinions, and other documents to which constitutions have been too casually compared.”). Indeed, scholars engaging with, or itemizing criticisms of originalism often focus elsewhere. *See* Strang, *supra* note 11, at 2006–07 (summarizing four key objections to early originalism that led to its revision, but omitting constitutional exclusion from that list).

<sup>20</sup> Other scholars use slightly different names for the problem. Mark Stein uses the term “original exclusions.” Stein, *supra* note 16, at 410. James Fox Jr. refers more generally to “the exclusionary critique.” Fox, *supra* note 16, at 679. I use these terms interchangeably throughout.

<sup>21</sup> Stein, *supra* note 16, at 410 (arguing that “we can . . . deny that the purported work of the People has the moral legitimacy to bind subsequent generations, merely from the processes that produced it, if it is not the work of the People at all, but only the product of a small privileged minority”); *see also* Mulligan, *supra* note 7, at 396 (identifying this version of the objection).

<sup>22</sup> *See* Mulligan, *supra* note 7, at 398–400.

<sup>23</sup> The form of the objection offered here therefore contrasts with the version one may find in feminist jurisprudence, for example. *See* Sherry, *supra* note 14, at 582 (suggesting that the exclusion of women in particular—not just from the framing of the Constitution, but from the legal system more generally—produces “a distorted view of the tension between autonomy and connection and between the individual and society”).

<sup>24</sup> *Cf.* Stein, *supra* note 16, at 408 (footnote omitted) (“[D]efects of the antebellum Constitution have been remedied (by the Civil War, various constitutional amendments, state-law expansion of the franchise, and Supreme Court decisions), so

implicates *persistent inequality*. In a salient and unavoidable sense, the Constitution enacts a principle of moral and substantive inequality for different groups of the American populace—the very groups that remain systemically disadvantaged today.

The equality of persons is a fundamental and uncontroversial moral principle.<sup>25</sup> But equality confers special force on the problem of constitutional exclusion when paired with one further assumption: that the law should positively influence our moral development. As I argue below, that assumption is particularly plausible in the context of the Constitution. It is also surprisingly common, albeit under-recognized as such, and I argue that its wide acceptance helps explain the persistence of the objection from constitutional exclusion.

Notably, the notion that the law should guide us toward the proper moral orientation is central to a theoretical framework known as virtue jurisprudence.<sup>26</sup> Virtue jurisprudence analyzes the law in terms of its relationship to the individual virtues of its subjects.<sup>27</sup> Many adherents of virtue jurisprudence believe the law should function to facilitate the virtue-centered flourishing of its subjects, channeling arguments for that conclusion through Aristotle and Aquinas.<sup>28</sup> Virtue jurisprudence is growing rapidly in popularity, especially within conservative circles most likely to endorse originalism.<sup>29</sup> It should not be surprising, therefore, that

---

they do not suggest that the current Constitution is morally illegitimate.”) Note, however, that Stein regards this constitutional remediation to be evidence that the “original ratification cannot alone provide moral legitimacy.” *Id.*

<sup>25</sup> See *infra* Part III.A.

<sup>26</sup> Timothy Cantu, Note, *Virtue Jurisprudence and the American Constitution*, 88 NOTRE DAME L. REV. 1521, 1524 (2013).

<sup>27</sup> *Id.* at 1527–28.

<sup>28</sup> *Id.* at 1524–25.

<sup>29</sup> See G. Alex Sinha, *Virtuous Law-Breaking*, 13 WASH. U. JURIS. REV. 199, 207–09 (2021); see also, e.g., Strang, *supra* note 11, at 2000 (arguing that the virtues and originalism go hand-in-hand); Lawrence B. Solum, *Op-Ed: Judge Barrett Is an Originalist. Should We Be Afraid?*, L.A. TIMES (Oct. 14, 2020, 1:31 PM), <https://www.latimes.com/opinion/story/2020-10-14/amy-coney-barrett-supreme-court-originalism-conservative> (offering Solum’s view that “[t]he core of originalism is the rule of law. And that is not something we should fear.”); Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in VIRTUE JURISPRUDENCE 1, 1–3 (Colin Farrelly & Lawrence B. Solum eds., 2008) (expressing Solum’s support for strong virtue jurisprudence); ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 1–2 (1993) (presenting George’s argument in favor of “morals legislation” because it would promote the virtues of members of society); Robert P. George, *Antonin Scalia: An American Originalist*, PUB. DISCOURSE (Feb. 16, 2016), <https://www.thepublicdiscourse.com/2016/02/16478/> [<https://perma.cc/P8X2->



scholars have already begun to offer virtue-based arguments for originalism.<sup>30</sup>

This Article confronts and rejects those arguments, ultimately contending that constitutional exclusion, as a manifestation of inequality, affirmatively undermines the virtue-centered flourishing of the populace. Thus, those who feel the force of the objection from constitutional exclusion may possess an unnoticed affinity for virtue jurisprudence, and those drawn to virtue jurisprudence may struggle to reconcile those inclinations with originalism.

Part I of the Article explains the terms “originalism” and “virtue jurisprudence” as I use them here. Part II presents and rebuts the three virtue-based arguments for originalism that have been offered to date. Finally, Part III explores the normative implications of exclusion-as-inequality, arguing that it kneecaps our constitutional system as a source of virtue-centered flourishing—*especially* if we adopt originalism.

## I. SETTING THE TABLE

### A. *Originalism*

The abundant literature on originalism reflects its prominence as an interpretive methodology,<sup>31</sup> and I do not reproduce that literature here. Although I endeavor to use the term “originalism” in an uncontroversial sense, defining it properly takes care. For one, self-identified originalists are hardly monolithic.<sup>32</sup> Moreover, some scholars contend that “all constitutional interpretation is originalist” in the sense that maintaining even minimal fidelity to any constitution requires carving out some role for its original meaning.<sup>33</sup>

Let us begin by rejecting the latter point, or at least minimizing it. The term “originalist” clearly connotes a specific approach to adjudicating constitutional questions—an approach

---

99LV] (eulogizing Justice Scalia upon his death and speaking favorably of his originalist approach to adjudication).

<sup>30</sup> See *infra* Part II.

<sup>31</sup> See *supra* note 5 (offering some prominent sources on originalism). This Part cites many more sources throughout.

<sup>32</sup> See Siegel, *supra* note 17, at 482 (observing that “it is difficult to describe originalism in a manner that satisfies all who claim its aegis, which is one reason originalists justly complain that their critics frequently tilt at a caricature of their jurisprudence”).

<sup>33</sup> Greene, *supra* note 5, at 8.

with certain expected results.<sup>34</sup> When federal judicial nominees identify as originalist at their confirmation hearings, they do not mean to adopt—and their audiences do not hear—an empty descriptor that applies equally to everyone. Most generally, judges who adopt the label imply, roughly, that they will “apply the Constitution according to the principles intended by those who ratified the document,” even if they diverge on the sources that inform such an exercise.<sup>35</sup> I nevertheless accept the possibility that the distinction between some originalists and some nonoriginalists is not a difference in kind but rather a difference in their degree of deference to a fixed-in-time meaning.<sup>36</sup> That proposition has implications I address below.<sup>37</sup>

Commentators routinely distinguish between early strands of originalism that prioritized the intentions of the Framers or ratifiers, and newer strands that prioritize the original public meaning of the words and phrases that constitute the Constitution.<sup>38</sup> According to “original intent” originalism, judges adjudicating constitutional questions should attribute meaning to relevant constitutional provisions in accordance with their understanding of what the “provision’s framers intended [them] to mean.”<sup>39</sup> Scholars often attribute a version of this view to early originalists, such as Raoul Berger and Robert Bork.<sup>40</sup>

Various criticisms of this view spurred an evolution toward “original meaning” originalism,<sup>41</sup> which prioritizes “the

<sup>34</sup> See Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 477–78 (1997).

<sup>35</sup> Siegel, *supra* note 17, at 482–83.

<sup>36</sup> See Stein, *supra* note 16, at 399 (“Nonoriginalism is a matter of occasion and a matter of degree. . . . Nonoriginalists need not deny. . . that courts should be constrained, to some extent, by the language and original meaning of the Constitution.”).

<sup>37</sup> See *infra* Part III.

<sup>38</sup> See Strang, *supra* note 11, at 2007 (noting that “originalists moved away from original intent by adopting an original meaning focus for originalism”); Greene, *supra* note 5, at 9 (“There has been a gradual but dramatic shift in preference among academic originalists in favor of original meaning rather than original intent.”). Others divide up originalism somewhat differently. See, e.g., Stein, *supra* note 16, at 400 (footnotes omitted) (arguing that “[s]ome [originalists] would enforce the original intent of the [F]ramers, others the original understanding of the ratifiers, and still others—now probably the dominant group—the original ‘public meaning.’”).

<sup>39</sup> Strang, *supra* note 11, at 2005.

<sup>40</sup> See, e.g., *id.* at 2003–04 (briefly describing the views of Berger and Bork).

<sup>41</sup> See *id.* at 2006–07 (footnotes omitted) (listing four key criticisms that motivated the reformulation of originalism, which included shifting the focus from original intent to original meaning. These objections include “that it was either impossible in principle to ascertain the original intent of a multi-member body, such as the

conventional meaning of the Constitution's text at the time of adoption."<sup>42</sup> This shift—from original intent to original meaning—reinforces a strong connection between originalism and textualism; for many, originalism is a form of textualism, according to which the primary source for resolving constitutional questions falls on the constitutional text.<sup>43</sup>

Although “original meaning” originalism appears to be more popular presently, both views have their defenders.<sup>44</sup> I follow Jamal Greene in using the term “original understanding” to encompass both “original intent” and “original meaning.”<sup>45</sup> According to Greene, originalism, in either form, “privilege[s] the original understanding of the document as against organic alterations to that understanding brought about through social change and judicial innovation[, and] consider[s] the original understanding dispositive or at least presumptively correct in matters of first impression.”<sup>46</sup> Similarly, Lawrence Solum claims that, properly understood, academic debates about “originalism” address those “constitutional theories that affirm both the Fixation Thesis (the meaning of the constitutional text is fixed at the time each provision is drafted) and the Constraint Principle (constitutional practice should, at a minimum, be consistent with the original meaning . . .).”<sup>47</sup>

By contrast, nonoriginalist approaches might accept original understanding as relevant but not dispositive, giving greater weight than originalist approaches do to other factors, such as “precedent, unwritten implications from constitutional structure,

---

Philadelphia Convention or state ratification conventions; or, if possible, it was practically difficult such that the endeavor would regularly fail”; that “even when one could reliably ascertain the Constitution’s original intent, it frequently ‘ran out[ ]’ . . . [leaving] judges adrift”; that originalism, as formulated, evinced “[a] commitment to overrule all or almost all nonoriginalist precedent . . . [and] was [therefore] deeply inconsistent with existing legal practice”; and “that originalism was unacceptable because of the bad consequences to which its adoption would lead.”)

<sup>42</sup> *Id.* at 2007–08.

<sup>43</sup> See Siegel, *supra* note 17, at 485–86 (explaining the correlation between originalism and textualism, but noting some exceptions).

<sup>44</sup> Strang, *supra* note 11, at 2010–11.

<sup>45</sup> Greene, *supra* note 5, at 9.

<sup>46</sup> *Id.*

<sup>47</sup> Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1245 (2019). Solum adds one further necessary feature of originalist theories, beyond acceptance of the Fixation Thesis and Constraint Principle: such theories must also offer a “reasonable account of original meaning and of the extent of constitutional underdeterminacy.” *Id.* at 1246 (footnote omitted).

contemporary public understanding, and political consequences.”<sup>48</sup> One prominent version of nonoriginalism is “living constitutionalism,” which more specifically accepts that “constitutional practice can and should change in response to changing circumstances and values.”<sup>49</sup>

I address the substantive implications of originalism below,<sup>50</sup> but it should be apparent at this stage why originalism implicates the objection from constitutional exclusion: prioritizing some sort of original understanding of constitutional provisions both symbolically embraces whatever unknown textual implications follow from the exclusion of diverse voices at the Framing, and unavoidably incorporates whatever prejudices are embedded in that understanding into modern-day constitutional jurisprudence. It is also worth noting that most of the arguments advanced by proponents of originalism<sup>51</sup>—and most of the objections offered by critics<sup>52</sup>—are beyond the scope of this Article. But I explore the relationship between the objection from constitutional exclusion and certain purported advantages of originalism after explaining exclusion-as-inequality.<sup>53</sup>

### B. *Virtue Jurisprudence*

Although contemporary virtue jurisprudence is only a couple decades old, literature adopting its methodology has proliferated rapidly in that short time.<sup>54</sup> Scholars have applied virtue-based analysis to myriad substantive areas of the law, including contracts, criminal law, property law, bankruptcy law, and many others.<sup>55</sup> Some have also used the virtues to analyze the professional duties of judges and attorneys.<sup>56</sup> Fundamentally,

<sup>48</sup> Greene, *supra* note 5, at 9.

<sup>49</sup> Solum, *supra* note 47, at 1246.

<sup>50</sup> See *infra* Parts II.A, III.A.3.

<sup>51</sup> See, e.g., Siegel, *supra* note 17, at 483 (noting that originalists often purport to derive support for their views based on “the concern for constitutional law’s legitimacy, stability and certainty; the role of the judiciary in a democratic state; the warrant for judicial review; and the conception of law”).

<sup>52</sup> See *supra* note 19 (citing Strang’s list of four major objections to early formulations of originalism); see also Greene, *supra* note 19, at 670 (arguing that originalism struggles with indeterminacy and “fails to resolve the counter-majoritarian difficulty”).

<sup>53</sup> See *infra* Part III.

<sup>54</sup> For a more detailed history of the arc of virtue jurisprudence, see Sinha, *supra* note 29, at 212–18.

<sup>55</sup> See *id.* at 207–09 (providing numerous citations to these—and other—applications of the methodology).

<sup>56</sup> See *id.* at 207 (offering relevant citations).

virtue jurisprudence derives from theoretical developments in analytic moral philosophy in the 1950s, when scholars began to revive virtue-based analysis, or “virtue ethics,”—an approach often attributed to certain ancient philosophers like Aristotle.<sup>57</sup> At the most general level, for virtue ethicists, the task of moral deliberation amounts to an inquiry into what a virtuous person would do.<sup>58</sup> This conception of moral deliberation contrasts, at least traditionally, with consequentialist or utilitarian inquiries into which course of action would promote optimal consequences, as well as with deontological inquiries into which course of action an agent is duty-bound to pursue.<sup>59</sup>

For most scholars working in the area, the virtues are relatively stable character traits—such as honesty, fortitude, or wisdom—that predict and explain how agents will respond under different circumstances.<sup>60</sup> These traits may be difficult to acquire; for instance, they might require social conditioning and moral education.<sup>61</sup> The list of virtues can vary,<sup>62</sup> but a common view holds that to possess them in abundance is to function well as a human, to warrant praise, and perhaps to succeed at the highest end one can pursue.<sup>63</sup> Some theorists maintain that the virtues are interdependent in a strong sense—that to possess one of the virtues is to possess them all in some reasonable measure.<sup>64</sup>

<sup>57</sup> See Amalia Amaya & Ho Hock Lai, *Of Law, Virtue and Justice—An Introduction*, in LAW, VIRTUE & JUSTICE 1, 1 (Amalia Amaya & Ho Hock Lai eds., 2013) (“Virtue ethics re-emerged in the late 1950s, with Elizabeth Anscombe’s important article ‘Modern Moral Philosophy.’”); Farrelly & Solum, *supra* note 29, at 3–4 (also treating Anscombe’s paper as the main influence behind the contemporary shift toward virtue-based moral philosophy). Some scholars refer to this shift as the “aretaic turn.” See Sinha, *supra* note 29, at 205–06 (describing the aretaic turn in moral philosophy, and the parallel, subsequent turn in legal theory). For a modern exploration of virtue ethics derived from Aristotelian ethics, see generally ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999).

<sup>58</sup> See Nafsika Athanassoulis, *Virtue Ethics*, INTERNET ENCYC. PHILA., <https://iep.utm.edu/virtue/> [<https://perma.cc/P8EZ-4QAV>] (last visited Feb. 8, 2022).

<sup>59</sup> HURSTHOUSE, *supra* note 57, at 1–2.

<sup>60</sup> See *id.* at 11 (describing honesty as a virtuous character trait).

<sup>61</sup> See *id.* at 113–19 (providing an example of the process of inculcating virtue by training one’s emotional responses).

<sup>62</sup> See Sinha, *supra* note 29, at 213 (comparing Plato’s short list of cardinal virtues with Aristotle’s longer taxonomy of virtues).

<sup>63</sup> HURSTHOUSE, *supra* note 57, at 20–21; Richard Kraut, *Aristotle’s Ethics*, STAN. ENCYC. PHIL. (June 15, 2018), <https://plato.stanford.edu/entries/aristotle-ethics/#InteVirt> [<https://perma.cc/7SGY-PGRS>].

<sup>64</sup> See John Finnis, *Aquinas’ Moral, Political, and Legal Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Mar. 16, 2021), <https://plato.stanford.edu/entries/aquinas-moral-political/#VirtAlsoSourRathThanConcMoraJudg> [<https://perma.cc/893U-5LP9>].

Whether or not the virtues are interconnected, they suggest a textured account of moral deliberation that may include balancing of the competing demands of various virtues even in relatively quotidian situations.<sup>65</sup>

A common understanding of virtue ethics incorporates a distinctly human form of thriving, expressed by the ancient Greek word “*eudaimonia*.”<sup>66</sup> It is typical to translate “*eudaimonia*” to “happiness,” “flourishing,” or even “well-being,” but those English words gesture only imperfectly at “*eudaimonia*.”<sup>67</sup> I use “flourishing,” its limitations notwithstanding, but on no conception of the virtues would vacuous happiness alone—however enduring—constitute human flourishing. More traditionally, possession of the virtues is *essential* to human flourishing.<sup>68</sup> To flourish in this sense is to manifest the virtues in proper balance, and to live a good and happy life accordingly.<sup>69</sup> This feature of virtue ethics—the link it posits between virtue and flourishing—helps to distinguish it from run-of-the-mill utilitarianism or deontology.

There are two major forms of virtue jurisprudence, which we might label “strong” and “weak.”<sup>70</sup> Strong virtue jurisprudence centers the notion of virtue-centered human flourishing, adopting that end as the lodestar for the legal regulation of human conduct.<sup>71</sup> Rather than promoting a broad conception of social welfare, or equality, or even rights, theorists adopting strong virtue jurisprudence believe the law should function to facilitate its subjects’ acquisition and manifestation of the virtues.<sup>72</sup> By contrast, weak virtue jurisprudence deploys the virtues for some limited heuristic purpose in contemplating questions about the law, but it does not necessarily accept—or may even affirmatively reject—the notion that the law should conduce to virtue-based

---

(attributing this view to Aquinas, who derived it from Platonic and Aristotelian ethics).

<sup>65</sup> See HURSTHOUSE, *supra* note 57, at 12–13 (articulating some of these complexities through the example of the virtue of generosity).

<sup>66</sup> *Id.* at 20.

<sup>67</sup> *Id.* at 9–10.

<sup>68</sup> *Id.* at 20.

<sup>69</sup> *Id.*

<sup>70</sup> See Sinha, *supra* note 29, at 215–16 (making and defining this distinction).

<sup>71</sup> *Id.* at 215.

<sup>72</sup> Farrelly & Solum, *supra* note 29, at 2 (“For virtue jurisprudence, the final end of the law is not to maximize preference satisfaction or to protect some set of rights and privileges: the final end of law is to promote human flourishing—to enable humans to lead excellent lives.”).

flourishing.<sup>73</sup> In this Article, I focus on strong virtue jurisprudence, and I often use the term “virtue jurisprudence” to refer specifically to its strong variant. Although weak virtue jurisprudence is receptive to certain insights from virtue theory, it generates too few theoretical commitments to be much use in informing the selection of a preferred mode of constitutional interpretation.<sup>74</sup>

## II. VIRTUE-BASED ARGUMENTS FOR ORIGINALISM

Although some have advocated for injecting virtue analysis into constitutional theory,<sup>75</sup> originalism and virtue jurisprudence do not obviously address the same questions.<sup>76</sup> Competing modes of constitutional interpretation could conceivably shape the excellence or flourishing of the public in a variety of ways, although the most prominent arguments in favor of originalism do not overtly draw on the propensity for an original understanding of the Constitution to facilitate virtue-centered flourishing among the populace.<sup>77</sup> Nevertheless, given their shared popularity in conservative circles, it was only a matter of time before scholars would begin to link the two. This Part considers the arguments that scholars have offered to date to justify originalism by appealing to the virtues.

---

<sup>73</sup> See, e.g., Amaya & Lai, *supra* note 57, at 5 (footnote omitted) (“Just as it is possible for a philosopher to give an account of virtue without being a virtue ethicist, it is possible for a lawyer to offer a study of virtue in the legal context without rooting it in virtue ethics.”).

<sup>74</sup> An originalist scholar with weak virtue jurisprudential commitments and a living constitutionalist with weak virtue jurisprudential commitments will likely argue past each other on the level of virtue.

<sup>75</sup> See Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 477–78 (2004) (arguing that “constitutional theory should make an *aretaic* turn—analogue to the turn to virtue ethics in moral theory”).

<sup>76</sup> See Strang, *supra* note 11, at 2027 (“Virtue ethics addresses human character and acts, while the fixation and contribution theses address the criteria for the truth of claims regarding constitutional meaning (within originalism).”). At the same time, according to Strang, there is nothing “preclud[ing originalism] from incorporating virtue ethics’ insights.” *Id.* at 2026.

<sup>77</sup> See *supra* note 51. Scholars have offered other moral arguments in favor of originalism, however—arguments not based explicitly on the virtues. See, e.g., J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. (forthcoming 2022) (arguing that the original meaning of the Constitution has independent moral weight because it is essential to sustaining the legitimate authority of the populace and, in turn, the pursuit of the common good).

A. *The Substantive Outcomes Promoted by Originalism*

Lee Strang has argued that originalism brings about “the best set of conditions for human flourishing for Americans today,”<sup>78</sup> or, at minimum, that “regardless of one’s conception of the Good, originalism is more likely to produce the conditions necessary for Americans to flourish than the alternative, judicial updating.”<sup>79</sup> Although Strang does not specifically define “judicial updating,” he appears to mean some generic form of nonoriginalism that permits judges to read contemporary norms into the Constitution—norms that were arguably absent originally.<sup>80</sup>

Strang explicitly adopts strong virtue jurisprudence in making this argument, asserting that “[l]aw is one of the key mechanisms that humans utilize to achieve human flourishing.”<sup>81</sup> He also defines “flourishing” in a manner consistent with the traditional virtue ethical backstory: “Human flourishing is when a human possesses deep, abiding happiness [through participation] in the basic human goods, such as life, knowledge, and friendship.”<sup>82</sup> He is careful to add that “[v]irtue is both constitutive of human flourishing and a mechanism to pursue flourishing” and that “the good life includes virtuous activity.”<sup>83</sup>

But Strang’s argument linking this ethical view to originalism omits essential details. According to Strang:

[T]he Constitution’s original meaning provides the conditions for human flourishing because it preserves a robust sphere for ordered individual freedom vis-à-vis the federal government, and it does so in multiple ways. First, the Constitution’s original meaning protects natural rights. Second, the Constitution’s original meaning preserves individual freedom via limits on federal power through the constitutional principles of limited and

---

<sup>78</sup> Lee J. Strang, *Originalism’s Promise, and Its Limits*, 63 CLEV. ST. L. REV. 81, 87 (2014).

<sup>79</sup> *Id.* at 90.

<sup>80</sup> *Id.* Elsewhere in his article, Strang refers to “judicial updating via nonoriginalist precedent,” citing work by John O. McGinnis and Michael B. Rappaport. *Id.* at 94. In their book, McGinnis and Rappaport attempt to assess “whether it would be superior to follow the original meaning of the Constitution or to allow judges to depart from the Constitution in an effort to update it or establish new constitutional norms.” JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 85 (2013). McGinnis and Rappaport appear to equate that view, reasonably enough, with “[t]he living constitution approach to interpretation.” *Id.* at 87.

<sup>81</sup> Strang, *supra* note 78, at 88.

<sup>82</sup> *Id.* at 87–88 (footnotes omitted).

<sup>83</sup> *Id.* at 88.



enumerated powers, separation of powers, check and balances, and federalism. Third, the Constitution's original meaning creates a wide space for democratic processes to operate, both on the federal and state levels. The wide berth originalism provides free human activity, which is constitutive of human flourishing, is central to its case for normative attractiveness.<sup>84</sup>

Although there is a great deal packed into this passage, there is also a great deal missing. At most, this extract gestures at the outlines of an argument linking originalism and the virtues, but it is entirely conclusory, leaving unstated numerous essential premises. For example, it can hardly be taken for granted that originalism protects natural rights better than nonoriginalism, or, even if it does, that protecting natural rights is the best way to facilitate human flourishing.<sup>85</sup> Similarly, it is not clear that "limits on federal power through the constitutional principles of limited and enumerated powers, separation of powers, check and balances, and federalism" protect individual liberty better than some purportedly alternative configuration of structural features of federal governance consistent with nonoriginalism—or, again, that protecting individual liberty in this specific way is the key to human flourishing.<sup>86</sup> It likewise begs the question to stipulate that originalism supports the range of "free human activity" necessary to facilitate human flourishing in a way that nonoriginalism fails to do. Strang continues:

[Further], and most directly—and most controversially—the original meaning is also substantively protective of human flourishing because it protects activities necessary to human flourishing and does not protect activities not conducive to flourishing. For instance, the Constitution protects the freedom of speech, but it does not protect abortion from government restriction. To make a persuasive case for this claim would require a detailed "cashing-out" of the Constitution's original meaning, which is beyond the scope of this Essay.<sup>87</sup>

---

<sup>84</sup> *Id.* at 90–91 (footnotes omitted).

<sup>85</sup> See Farrelly & Solum, *supra* note 29, at 2–3 (suggesting that promoting rights is different from promoting virtue).

<sup>86</sup> Strang, *supra* note 78, at 90–91; see also Farrelly & Solum, *supra* note 29, at 2–3.

<sup>87</sup> Strang, *supra* note 78, at 91 (footnotes omitted). Strang also offers a cluster of propositions that purportedly provide "indirect[]" support for the link between originalism and the virtues:

First, indirectly, numerous facets of the Constitution's history, meaning, and structure, suggest that the Constitution's original meaning facilitates human flourishing. As noted above, the process of Framing and Ratification

Strang is correct in noting that his position is controversial, but he must do more than elucidate the Constitution's original meaning to make his case. Once again, he must also explain why the original meaning conduces to human flourishing. Why is it that freedom of speech is essential to flourishing but reproductive freedom is not? The answer turns on controversial moral assertions not in evidence. Moreover, even if freedom of speech is essential to human flourishing, that proposition cannot count in favor of originalism if the alternative under consideration also privileges freedom of speech.<sup>88</sup>

More generally, we are inherently limited in our ability to assess the global "virtue outputs" of the substantive policy outcomes generated by generic forms of originalism and nonoriginalism. Such a task can only be undertaken partially and hypothetically.<sup>89</sup> In addition to a complete picture of an originalist

---

utilized the Framers' and Ratifiers' wisdom to construct a governmental structure that would facilitate human flourishing. Also, the supermajoritarian processes by which the Constitution was ratified utilized the American People's wisdom—and self-interest—to approve only those governmental structures that would be conducive to their and their descendants' flourishing. Third, the Constitution's writtenness itself both facilitated the creation of a better constitution and preserves that substantively good constitutional meaning.

*Id.* at 90 (footnotes omitted). I do not see how these propositions can provide even indirect support for Strang's view. Strang provides no basis for accepting that the Framers sought to promote *eudaimonia* specifically, rather than some other end. Even if Strang's assertion were true, it does not follow that the Framers got it right. Indeed, the mere fact that we now recognize many of the Framers' views as deeply morally problematic, see Barnett, *supra* note 13, at 613, strongly suggests that we should be skeptical of their moral calculations. It is one thing to argue that certain important objectives—stability in constitutional interpretation, for example, or limiting judicial discretion—compel us to accept originalism notwithstanding the prejudices of the Framers or the absence of viewpoint diversity in shaping the Constitution. It is quite another to suggest both that the Framers sought to prioritize virtue-centered human flourishing, *and* that we should accept their determinations about how to achieve such flourishing even when we recognize their own substantial moral limitations.

<sup>88</sup> Some of the staunchest defenders of freedom of speech, like the American Civil Liberties Union ("ACLU"), favor nonoriginalist judges. See *Free Speech*, ACLU, <https://www.aclu.org/issues/free-speech> [<https://perma.cc/KWK3-RS2A>] (last visited Jan. 22, 2022) (explaining the ACLU's prominent and century-long history of defending free speech); *ACLU Statement on Nomination of Neil Gorsuch to U.S. Supreme Court*, ACLU (Feb. 1, 2017), <https://www.aclu.org/press-releases/aclu-statement-nomination-neil-gorsuch-us-supreme-court> [<https://perma.cc/887S-W4V9>] (quoting the executive director of the ACLU criticizing the originalist approach of Neil Gorsuch, who had just been nominated to a seat on the Supreme Court).

<sup>89</sup> Citing some other scholarly work, Strang seems to think we can discern a great deal about the different consequences of originalist and nonoriginalist approaches. See Strang, *supra* note 78, at 87 (citing McGinnis and Rappaport for the conclusion that "originalism provides for the best consequences"). But McGinnis and Rappaport do not

world and its nonoriginalist alternative—something impossible to acquire in principle—we would also need a precise understanding of virtue-centered human flourishing. To achieve the latter, we must stake out contested positions on the list of the virtues and what those virtues entail.<sup>90</sup>

Strang ultimately falls far short of demonstrating a link between the virtues and originalism, but, in doing so, he highlights the need for a less contingent approach to understanding the connection between constitutional interpretation and human flourishing—namely, an approach less concerned with projecting substantive outcomes.<sup>91</sup> Still, to the extent we can link historical policy outcomes with the virtues of the people, the results are not encouraging for originalism, which is “commonly criticized for being inherently hostile to the interests of minorities and women.”<sup>92</sup> The version of the exclusionary critique offered in Part III elaborates on the relevance of this point in much greater detail, suggesting at minimum that for a substantial subset of the population—especially for groups that were excluded from the Framing and remain disadvantaged—the conditions generated by originalism are not particularly promising.

---

even address the virtues; they argue more generically and in the abstract that the “[i]f the legislature or judges were to depart from [our C]onstitution extraconstitutionally, that departure would not . . . lead to better results because the legislative and judicial processes do not have the attributes to regularly produce better norms than those contained in a pretty good constitution.” MCGINNIS & RAPPAPORT, *supra* note 80, at 20. Contra Strang, the connection between the functional features of originalism and human flourishing are attenuated at best. Thus, although it is possible to compare the functional characteristics of originalism—that it locks in a stable interpretation of the Constitution indefinitely—with the contrasting functional characteristics of non-originalism—that it allows for the possibility of judges reading newer interpretations or principles into the Constitution—that does not get us very far. What we need to know, and what we simply cannot know, is which *substantive values* some unnamed non-originalist judges might read into the Constitution, either now or in the distant future. The long-term substantive implications of selecting originalism or non-originalism turn on that question, and without an answer the analysis is largely hypothetical. It is an empirical question without the requisite empirical data to resolve it.

<sup>90</sup> See Sinha, *supra* note 29, at 213 (noting a disagreement between Plato and Aristotle on the number and proper classification of the virtues). Strang gestures at this when he suggests that reproductive freedom is not necessary for human flourishing, indicating that he may find abortion morally problematic. See Strang, *supra* note 78, at 91.

<sup>91</sup> See *infra* Part III.

<sup>92</sup> Fox, *supra* note 16, at 679; see also *id.* at 693–96 (responding skeptically to McGinnis and Rappaport’s argument that “originalism would have been more protective of black rights in the Jim Crow era had the Court followed Reconstruction-era meanings”); *infra* Part III.A.3.

Strang advances a more developed variation on his argument in a subsequent book.<sup>93</sup> More specifically, Strang offers a normative justification for originalism that he calls a “law-as-coordination account.”<sup>94</sup> Strang claims that this account “avoids directly relying on the substantive outcomes of constitutional interpretation to support its normative attractiveness,”<sup>95</sup> which distinguishes it from the version of his argument that I describe above. The thrust of the revised argument is that the Constitution helps Americans achieve human flourishing by coordinating our coexistence in a manner necessary to achieve the common good.<sup>96</sup> According to Strang, adopting a non-originalist understanding of the Constitution would “undermine[ ] the Framers’ and Ratifiers’ prudential judgments, reject[ ] their authority, and destabilize[ ] the social coordination established by the Constitution.”<sup>97</sup> Additionally, Strang argues that originalism “respects the Ratification process’ authority[,] . . . values the Framing process’ exercises of prudential judgment[,] and . . . explains why the Constitution is imperfect.”<sup>98</sup>

This variation on the argument shifts the focus away from the substantive outcomes promoted by any given method of constitutional interpretation. Presumably, however, the substantive outcomes remain relevant, as Strang continues to ground his case in some conception of virtue-centered flourishing.<sup>99</sup> As a result, if originalism happens to generate outcomes that undermine the virtue-centered flourishing of the public, then that outcome should still count against its selection as a mode of constitutional interpretation. As I argue below, there is at least one powerful way in which originalism does this that scholars have overlooked.<sup>100</sup>

Moreover, the relationship between the theoretically intermediate factors Strang has highlighted in this revised argument and the flourishing of the public is unclear. For instance, Strang suggests that permitting judges to draw on non-originalist factors may introduce a form of disharmony into our

---

<sup>93</sup> See generally LEE J. STRANG, ORIGINALISM’S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019).

<sup>94</sup> *Id.* at 227.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 284.

<sup>97</sup> *Id.* at 290.

<sup>98</sup> *Id.* at 293.

<sup>99</sup> See *id.* at 309.

<sup>100</sup> See *infra* Part III.

constitutional jurisprudence,<sup>101</sup> but even if that were true—which is far from obvious when the original document reflects a complex political compromise rather than the work of a solitary author—it is not obvious what implications that has for community flourishing. Indeed, rejecting an original understanding of the Constitution plausibly entails a qualified rejection of the authority of the Framers, as Strang suggests. For reasons I offer in Part III, however, that rejection will *improve* the ability of the Constitution to promote flourishing among the public. There may even be an internal tension among the criteria Strang identifies. For example, to the extent originalist readings of the Constitution alienate disadvantaged groups,<sup>102</sup> adherence to the Framers' prudential judgments might itself destabilize the mechanisms for social coordination established by an original understanding of the document. In short, although Strang's second argument offers a different pathway to the conclusion that originalism supports virtue-centered flourishing, that conclusion remains underdetermined—and possibly even undermined—by his premises.

*B. Originalism as the Approach of Choice for Virtuous Judges*

A second approach purports to justify originalism by describing it as the mode of adjudication favored by virtuous judges. Strang offers a version of this argument,<sup>103</sup> as does Lawrence Solum.<sup>104</sup> These arguments extend a popular approach of applying virtue analysis to the professional roles of legal

---

<sup>101</sup> See STRANG, *supra* note 93, at 303.

<sup>102</sup> See Mulligan, *supra* note 7, at 398.

<sup>103</sup> See Strang, *supra* note 11, at 2033–39 (explaining this argument).

<sup>104</sup> See Solum, *supra* note 75, at 520–21 (describing the approach of a virtuous judge and prominently listing a commitment to “[o]riginal [m]eaning” as his fourth principle).

officers, especially lawyers<sup>105</sup> and judges.<sup>106</sup> Solum is a particularly committed advocate of applying a virtue framing to the professional responsibilities of judges.<sup>107</sup> There is a compelling logic to analyzing the duties of legal officers through the lens of the virtues. One factor behind the return to virtue analysis in moral philosophy is the perception that it has a special capacity to capture the richness and complexity of moral deliberation.<sup>108</sup> The intricacies of moral deliberation find analogs in professional legal practice, such as the demands of balancing one's professional responsibilities as an attorney, or the challenges inherent in ably presiding as a judge over a complicated legal matter.<sup>109</sup>

---

<sup>105</sup> See Rosalind Hursthouse, *Two Ways of Doing the Right Thing*, in VIRTUE JURISPRUDENCE 247–48 (Colin Farrelly & Lawrence B. Solum eds., 2008); Justice Jeff Brown, “A Scout Is Trustworthy”: *Applying Virtue Ethics to Lawyer Professionalism*, 3 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 2, 11 (2013); Michael S. McGinniss, *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community*, 87 N.D. L. REV. 19, 30, 35–36 (2011); Robert Araujo, S.J., *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMU L. REV. 433, 435 (1997); see also Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 305, 305 (2000); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 334 (1998); Robert F. Cochran, Jr., *Lawyers and Virtues: A Review Essay of Mary Ann Glendon’s A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society and Anthony T. Kronman’s The Lost Lawyer: Failing Ideals of the Legal Profession*, 71 NOTRE DAME L. REV. 707, 708–09 (1996); Heidi Li Feldman, *Beyond the Model Rules: The Place of Examples in Legal Ethics*, 12 GEO. J. LEGAL ETHICS 409, 409, 412 (1999); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 908–09 (1996); James W. Perkins, *Virtues and the Lawyer*, 38 CATH. LAW. 185, 187 (1998); Thomas L. Shaffer, *The Legal Profession’s Rule Against Vouching for Clients: Advocacy and “The Manner That Is the Man Himself,”* 7 NOTRE DAME J. L. ETHICS & PUB. POL’Y 145, 146 (1993); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 511–32 (1999); Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 491–92 (1999).

<sup>106</sup> See Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 797–98 (2003); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 METAPHILOSOPHY 178, 182–83 (2003) [hereinafter Solum, *Virtue Jurisprudence*]; Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365, 1368–69 (2005); Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 675–77 (2005).

<sup>107</sup> See *supra* note 106 (identifying several of Solum’s pieces on this subject).

<sup>108</sup> See HURSTHOUSE, *supra* note 57, at 12–13 (describing the complexity of properly applying practical wisdom to identify and balance the competing demands of the various virtues).

<sup>109</sup> At the same time, Solum has argued that “[j]udging seems to be the paradigm case in which we want adherence to constraining rules and transparent decision procedures[,]” which may render “virtue ethics . . . more awkward” than various alternatives. Solum, *Virtue Jurisprudence*, *supra* note 106, at 185. It is partly for this reason that Solum thinks a successful account of judicial virtue would be valuable; it

Accepting for the sake of argument that the virtues are suited for assessing the roles of legal officers, there is a gap between that proposition and any attempt to attribute a preferred mode of constitutional adjudication to a virtuous judge. Strang thinks that practical wisdom, temperance, and fortitude will help judges exercise their discretion judiciously, and that both practical and theoretical wisdom—combined with a commitment to a virtue he calls “justice-as-lawfulness”—will help judges “construct the best legal doctrines” in circumstances where they lack discretion.<sup>110</sup> Strang makes no secret of his view that originalism is the legal doctrine a virtuous judge would select in the context of constitutional adjudication,<sup>111</sup> though in some ways he seems to presume originalism is appropriate and fit the virtues around that presumption.<sup>112</sup>

Solum itemizes a number of basic judicial virtues (temperance, courage, good temper, intelligence and practical wisdom)<sup>113</sup> and judicial vices (corruption, cowardice, bad temper, and certain intellectual limitations).<sup>114</sup> Like Strang,<sup>115</sup> Solum also places heavy emphasis on the virtue of justice,<sup>116</sup> and specifically on the notion that justice incorporates lawfulness, which Solum defines as “a special concern for fidelity to law and for the coherence of law.”<sup>117</sup> Solum believes a good judge will also be a just judge, and that a conception of justice inclusive of lawfulness helps ground a judicial commitment to incorporating original meaning where necessary.<sup>118</sup>

Note that these arguments adopt a free-standing list of the judicial virtues, which then happen, in their authors' views, to align at least to some extent with originalism. Of course, it is plausible that good judges are courageous, wise, just, and so forth.

---

would show that “virtue ethics . . . will have succeeded where many would expect it to fail.” *Id.*

<sup>110</sup> Strang, *supra* note 11, at 2039.

<sup>111</sup> *Id.* at 2038 (“[J]udges will also need the moral virtue of justice-as-lawfulness. This ensures that the judges follow the original meaning.”).

<sup>112</sup> *See id.* at 2033 (mapping out a section of his argument by identifying “facets of originalist constitutional interpretation” and then “describ[ing] how virtue ethics provides the tools originalism needs to make originalism the best it can be.”).

<sup>113</sup> Solum, *supra* note 75, at 507–12.

<sup>114</sup> *Id.* at 503–06.

<sup>115</sup> *See supra* note 111.

<sup>116</sup> *See* Solum, *supra* note 75, at 512–18 (exploring the importance and dimensions of the virtue of justice in some detail).

<sup>117</sup> *Id.* at 516.

<sup>118</sup> *Id.* at 521.

But judicial virtues are secondary virtues—properties of a good legal officer in her official capacity—and Strang and Solum both accept that the law should conduce to virtue-centered flourishing.<sup>119</sup> As a result, both commit themselves to a natural objective around which judicial virtues should be defined. For a theorist endorsing strong virtue jurisprudence, the virtues of a judge as judge, or a lawyer as lawyer, should be those that help the system promote the primary virtues of the public.<sup>120</sup> Judicial virtues are thus instrumental.<sup>121</sup>

Put another way, human virtues and judicial virtues are not on the same plane. Human virtues are the highest ends individual moral agents can attain, and a necessary condition for their flourishing; by contrast, judicial virtues are *role-virtues*, a second-order concept useful for molding a legal system into an effective tool for promoting human flourishing throughout the system's jurisdiction, or even beyond.<sup>122</sup> A judge who exhibits Solum's list of virtues will not necessarily be a flourishing human manifesting *eudaimonia*. To flourish, she will need to be virtuous off the bench as well, as a parent, sibling, neighbor, and so on. Perhaps being good at one's job—demonstrating the virtues through one's professional role, whatever that happens to be—is part of the story for her own personal flourishing,<sup>123</sup> but it is hardly sufficient. After all, one can easily imagine an able and fair-minded judge who is vicious in her personal life. At the same time, however, her role as a judge is especially important—for a strong virtue jurisprudence theorist—because she has the power to administer and shape a system that *ex hypothesi* should conduce to the virtue-centered flourishing of its subjects.<sup>124</sup> If she fails to do that, whether by appeal to some independent list of qualities she seeks

---

<sup>119</sup> See Sinha, *supra* note 29, at 215; *supra* text accompanying note 81.

<sup>120</sup> See Strang, *supra* note 78, at 88; Solum, *supra* note 75, at 498.

<sup>121</sup> Solum seems to deny this proposition. See Solum, *supra* note 75, at 501–02 (noting that many views, including originalism and welfarism, would see judicial or constitutional virtues as instrumental to a particular end, and contrasting those approaches with an “aretaic” or virtue-centered approach like his own, which “begins with an account of the virtuous judge as primary and then proceeds to derive the notion of a virtuous constitutional decision”). Perhaps a weak virtue theorist could take this approach, but I am skeptical that Solum can square this stance with his commitment to strong virtue jurisprudence.

<sup>122</sup> See *id.* at 507.

<sup>123</sup> See STRANG, *supra* note 93, at 300–01 (arguing that “judges . . . that follow the Constitution's original meaning preserve and build their characters . . . [because they] exercise the virtues of justice-as-lawfulness, civic friendship, and faithfulness”).

<sup>124</sup> See Sinha, *supra* note 29, at 215.



to possess or otherwise, she undermines what the system is *for*. The very concept of judicial virtues is parasitic on the purpose of the legal system; we will have to define away as undesirable—in this context, vicious—any approach to adjudication that undermines the power of the system to achieve that purpose.<sup>125</sup>

In the next Part, I argue that originalism harms the power of the legal system to conduce to the human flourishing of its subjects. If that is correct, a proper list of the judicial virtues will leave little room for originalist methodologies.

### III. EXCLUSION-AS-INEQUALITY AND CONSTITUTIONAL INFLUENCE

The foregoing virtue-based arguments for originalism are flawed. The idea that originalism provides the best set of circumstances for virtue-centered human flourishing is badly underdetermined both by the relevant theory and by the data available, as is the proposition that virtuous judges would select originalism. Both arguments, in their own way, assume what they set out to show. But even if either argument were plausible, this Part offers an independent and countervailing argument, which begins from a reframing of the problem of constitutional exclusion. Commentators have reasonably asked whether exclusion leads to bad outcomes for disadvantaged groups; whether exclusion undermines the legitimacy of the Constitution; whether exclusion creates some general moral contamination for the Constitution; and whether the Framing alienates subsequent generations of excluded populations.<sup>126</sup> These interpretations of the problem of exclusion reinforce each other—indeed, they overlap in part—because they all gesture indirectly at a common core: in virtue of its origins, our Constitution elevates principles of moral and

---

<sup>125</sup> For this reason, there is a genuine question whether any judicial character trait that generally undermines the flourishing of the subjects of the legal system could be regarded as a judicial virtue in a meaningful sense. Even if it were, it would be counterbalanced by the need for the legal system to promote the primary virtues of the public. Thus, for example, the judicial virtue of lawfulness endorsed by Strang and Solum may require reinterpretation given the primary purpose of the legal system in a virtue-centered society.

<sup>126</sup> See Mulligan, *supra* note 7, at 382–83 (breaking up concerns about exclusion into these categories). Mulligan also considers exclusion as a “[d]ead [h]and [p]roblem[.]” *id.* at 394, which I address immediately below. See *infra* Part III.A. As I argue in what follows, exclusion-as-inequality is not just a problem of moral contamination pegged to the Framing, but rather a moral problem over which we retain partial control today, and a problem with substantive—rather than purely abstract—implications for the outcomes of constitutional adjudication.

substantive inequality to the highest possible status in our constellation of cultural and legal norms. And originalism only exacerbates that problem.

A. *Constitutional Exclusion as a Three-Tiered Affront to Equality*

To see why constitutional exclusion is fundamentally about inequality, we might begin with a misunderstanding of the problem as a generic objection to dead-hand control. Michael McConnell has argued that the exclusion of broad classes of people from the drafting and ratification of the Constitution is irrelevant because nobody alive today participated in those processes either.<sup>127</sup> This position misses the point of the objection in a revealing way. It would not make sense to say that more recent generations were “excluded” from the Framing; they were uninvolved for the simple reason that they did not exist at the time and therefore could not have been *included*. By contrast, Native Americans, Black Americans, women, and white men of limited means alive at the time were excluded in a meaningful sense.<sup>128</sup> Whether as a matter of policy or simply because the circumstances “organically” closed the door to participation from those of lower social station, the Framing and ratification were largely restricted to propertied, white men.<sup>129</sup> Indeed, the Framers themselves belonged to a group so elite that Thomas Jefferson famously referred to them as “demi-gods.”<sup>130</sup>

This Part explores how these conditions, and the constitutional text they generated, implicate the Constitution in entrenching moral and substantive inequality; how originalism exacerbates those implications; and why those implications matter. More specifically, the Constitution’s propensity to serve as a repository for our core national values ensures the importance of updating it to include fundamental commitments our society comes to accept as it makes moral progress. Perhaps most interesting of all, the inspirational moral role of the Constitution

---

<sup>127</sup> See *supra* note 18.

<sup>128</sup> See Stein, *supra* note 16, at 398 (footnotes omitted) (“Only a small minority of the adult population was able to participate in ratifying the Constitution or its amendments. Among those excluded from the franchise were women, African-American slaves, almost all Native Americans, and many poor white males, who were excluded by property qualifications and poll taxes.”).

<sup>129</sup> *Id.*

<sup>130</sup> STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 16 (7th ed. 2020).

aligns neatly with the presuppositions of strong virtue jurisprudence. This result highlights our collective proclivity for a virtue-centered view of the law's purpose even as it forces originalists into a difficult choice between their preferred method of constitutional interpretation and their increasing acceptance of the virtues as an organizing principle for the legal system.

Throughout this Part, I refer to equality—or inequality—in two different senses. *Moral* equality is the widely-recognized notion that each person possesses equal moral worth and warrants equal respect in some meaningful sense, regardless of race, sex, wealth, or various other characteristics.<sup>131</sup> That is not to say everyone ought always to be treated *the same*, but rather that they ought to be treated with equal concern and respect.<sup>132</sup> Another way to state this idea is by claiming that all people possess equal worth or dignity.<sup>133</sup> The principle of moral equality lies outside the realm of serious philosophical debate; it “is accepted as a minimal standard by all leading schools of modern Western political and moral culture.”<sup>134</sup> For example, I assume without argument—and without controversy, I hope—that permitting one race or class of people to own another as property conflicts with the principle of moral equality.

I also refer to *substantive* equality, a state of affairs in which different groups are treated equally along important axes of life, and therefore experience comparable life outcomes—especially in relation to and under the law.<sup>135</sup> It is more difficult to identify an uncontroversial conception of substantive equality,<sup>136</sup> which could encompass equality of welfare, opportunity, material resources, or other important criteria.<sup>137</sup> But it is sufficient for the argument advanced below that important opportunities and life outcomes are empirically and demonstrably worse for some groups than for

---

<sup>131</sup> For an introduction to the theoretical debates about the concept of equality, see Stefan Gosepath, *Equality*, STAN. ENCYCLOPEDIA PHIL. (June 27, 2007), <https://plato.stanford.edu/entries/equality/> [<https://perma.cc/88FE-FKTF>].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* Under whichever formulation the reader prefers, moral *inequality* refers to a principle that rejects the notion of moral equality—a view that accepts the superior moral worth of some people over others.

<sup>134</sup> *Id.*

<sup>135</sup> Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L J. CONST. L. 712, 712–13 (2016).

<sup>136</sup> Gosepath, *supra* note 131 (noting that “we find competing philosophical conceptions of equal treatment serving as interpretations of moral equality”).

<sup>137</sup> *See id.*

others, primarily for groups that have historically been treated as morally inferior as well.<sup>138</sup>

### 1. The First Level of Constitutional Exclusion: History

As a problem of inequality, constitutional exclusion manifests at three distinct levels. First, as noted above, it is an incontrovertible feature of history that the process of drafting and ratifying the Constitution drew on a narrow demographic slice of the American population,<sup>139</sup> excluding many other groups at least in part as a function of their lower social standing.<sup>140</sup> In turn, at least for some of these groups, lower social standing reflected widespread acceptance of their morally inferior status in the eyes of society at large or of the Framers in particular.<sup>141</sup> This fact

<sup>138</sup> See *infra* Section III.A.3.

<sup>139</sup> For a particularly detailed account of the ratification process, see generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010). The Constitution ultimately came into effect upon approval by nine elected state ratifying conventions. *Id.* at ix. In the most immediate sense, then, approval turned on the perspectives of those who were elected to the relevant state ratifying conventions. For more information on the state ratifying conventions, see generally Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 466–81 (2009). See also Carlos E. González, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution’s Ratification Clauses*, 38 U.C. DAVIS L. REV. 1373, 1440 (2005) (“[I]n the debates over Article VII, the Constitution’s drafters, ratifiers, and contemporaneous commentators unwaveringly manifested the understanding that only specially elected conventions, and not ordinary legislatures, could serve as representational structures through which the popular sovereign ratifies constitutional norms.”).

Voting on representatives for the state ratifying conventions was more inclusive than the drafting of the Constitution, but still quite exclusive. See Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 563–66 (1995) (noting that “property requirements did not disqualify a substantial percentage of white male voters from casting a ballot[, and] indeed, a few states suspended all property requirements for this special election” but that “participation rates were unspectacular” and “of course, a vast majority of Americans—women and slaves—were simply excluded from the process”). For more specific data on the demographics of voters in the relevant states, who were primarily white males, see *id.* at 563 n.255. See also Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 35–36 (2000) (celebrating the “momentous, broad, and explicit popular consent” behind the state ratifying conventions, which invited “[h]undreds of thousands of ordinary folk . . . to vote,” but dismissively conceding that “[s]laves and women are excluded from this moment” because “they had never been included elsewhere”).

<sup>140</sup> See Stein, *supra* note 16, at 398.

<sup>141</sup> See Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 383–84 (1997) (footnotes omitted) (“Most of [the Framers] thought it acceptable to hold property in human beings (and those who didn’t were prepared to compromise the issue). Virtually

retains significance whether the views of the Framers were common or even progressive for the era,<sup>142</sup> and regardless of whether the Framers sought specifically to exclude anybody from the constitutional process. The moral inferiority operating in the background also translated tangibly into substantive inequality for excluded groups, which were by definition denied equal influence over a matter of supreme political and legal importance: the fundamental shape of our government.<sup>143</sup>

Additionally, the original constitutional text and the bare fact of exclusion are intertwined.<sup>144</sup> Some original text plainly reflected acceptance of moral inequality,<sup>145</sup> and we cannot know what the

all of them believed that married women should be treated, in essence, as the property of their husbands. The Founders generally assumed that people without property should not participate in politics, either because they lacked a sufficient stake in the community to justify their participation in its governance or because their poverty deprived them of the independence necessary for the exercise of responsible citizenship.”); Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835, 1851–53 (1992).

The framing of the American Constitution itself furnishes another chilling example of how the supposedly communal pursuit of the common good can lead to violent oppression. . . . Publius, writing in *The Federalist*, reasoned that some groups of people, including African Americans, are so incapable of perceiving the objective common good that they can be justifiably excluded from the deliberations within the political community. Once these diverse voices were politically silenced, Publius could observe that the (remaining) American people were unusually homogeneous. The framers thus envisioned a political community distinguished by consensus among members and closure to all others, and the Constitution enforced this vision by sanctioning the legal subjugation of racial minorities.

*Id.* (footnotes omitted); JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS AND PERSPECTIVES 28 (2d ed. 2019) (quoting a 1776 letter from John Adams wondering whether “men in general, in every society, who are wholly destitute of property, are . . . too dependent on other men to have a will of their own”). One might describe Adams’s concerns as practical ones, consistent with the principle of moral equality, though that is debatable and much less persuasive in the case of the exclusion of women and certain racial minorities.

<sup>142</sup> See Amar, *supra* note 139, at 35 (noting that probing constitutional exclusion raises “[e]xcellent questions . . . from the vantage point of the twenty-first century[,]” but that the matter looked different in “the eighteenth-century world giving birth to the Preamble’s bold words”).

<sup>143</sup> See *id.* at 34–36.

<sup>144</sup> See Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 518–19 (2011) (“It is not just that people of African descent were not represented at Philadelphia or at the state ratifying conventions, but that the Constitution that emerged from those conventions preserved and protected both slavery itself and slavery’s institutional infrastructure.”).

<sup>145</sup> One example is the notorious Three-Fifths Clause, which originally read as follows:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their

original text would have said if it had been informed from the outset by people deeply committed to a recognizable and consistent principle of moral equality, let alone by a diverse set of such people.<sup>146</sup> Moreover, subsequent revisions are not redemptive in any relevant sense because they leave this issue untouched.<sup>147</sup> Thus, from the moment of the Framing, the Constitution both incorporated substantive inequality and bore the stamp of moral inequality.

At this first level, the problem of constitutional exclusion is intractable, and it therefore counts to some degree against fidelity to the Constitution.<sup>148</sup> Perhaps deference to the Constitution

---

respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3, *amended* by U.S. CONST. amend. XIV, § 2. The phrase “all other persons” encompassed slaves, whose enslavement was preserved by the original Constitution but who were given partial weight in population counts as part of an agreement meant to boost the relative congressional and Electoral College influence of southern states. *See* Greene, *supra* note 144, at 519; *see also id.* (summarizing two other “direct accommodations for slavery” included in the original constitutional text: the Fugitive Slave Clause, and the importation clause).

<sup>146</sup> *See* Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 75 (1991) (“Blacks were not consulted by the ‘Founders’ nor were their concerns considered relevant by the drafters. Jefferson wrote the Declaration of Independence and Madison wrote the preliminary draft of the Constitution—Frederick Douglass did not.”). As I noted above, some feminist scholars argue that the values expressed in the Constitution are inherently masculine, and that the exclusion of women from the process of shaping our legal institutions—both in the framing of the Constitution and in the centuries since—results in a radically different legal structure from the one we might otherwise have had. *See supra* note 14.

<sup>147</sup> *See* Fox, *supra* note 16, at 696 (rejecting efforts by McGinnis and Rappaport to address constitutional exclusion by pointing to later amendments). As Fox notes, Time moves forward. Our notions of equality, justice, race, gender, and democracy all change and develop over time based on our collective experiences. The Constitution of 1868 was not simply the 1789 Constitution without slavery, and the 1789 Constitution was not the Constitution of 1970, but for slavery. Slavery and matters of race, gender, and social equality are complex historical processes that cannot be addressed by such back-filling. A restorative method cannot correct the original exclusions.

*Id.*

<sup>148</sup> *See supra* text accompanying note 33; Samuel Marcossan, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 L. & INEQ. 429, 468–69 (1998) (“It is worth pausing to note that this flaw in originalism, that it perpetuates an original understanding that was the product of race-based exclusion, is also true, to a lesser degree, of other forms of traditionalist interpretation.”); Thurgood Marshall, *The Bicentennial Speech*, THURGOOD MARSHALL (May 6, 1987), <http://thurgoodmarshall.com/the-bicentennial-speech/> [<https://perma.cc/T7YB-E2BN>] (“Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective

remains appropriate nevertheless because other values served by adhering to it—stability or certainty, for example<sup>149</sup>—outweigh the first-level concerns raised by constitutional exclusion.<sup>150</sup> But even justified adherence to the Constitution communicates our national willingness to abide by the deep and offensive inequality, both moral and substantive, reflected in the voices of those who informed the foundational choices about how to structure our government. In short, fidelity to our Constitution commits us to a document that was historically exclusive. This is a substantial cost even though—and in fact partially because—the text of an alternative Constitution is unknowable. Unless we start from scratch with a new document, we cannot erase the original exclusions.

## 2. The Second Level of Constitutional Exclusion: The Symbolism of an Original Understanding

At the second level, there is a symbolic significance in our choice of how to interpret a document created under exclusionary circumstances.<sup>151</sup> The more overtly we incorporate deference to an original understanding of the Constitution, the more dismissive we show ourselves to be about the harmful and inequitable presumptions behind the original exclusions at the first level.<sup>152</sup>

---

from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”); see generally Klarman, *supra* note 141 (arguing against fidelity to the Constitution on other grounds).

<sup>149</sup> See Siegel, *supra* note 17, at 483 (noting that originalists often defend their approach to constitutional interpretation by referencing similar aims).

<sup>150</sup> No doubt there are also practical challenges to starting over, though it is beyond the scope of this Article to explore the feasibility or net desirability of attempting to overcome those hurdles.

<sup>151</sup> The thriving debates between originalists and nonoriginalists provide ample evidence for this.

<sup>152</sup> See Stein, *supra* note 16, at 450 (arguing that “if the meaning of antebellum provisions cannot evolve, the meaning of those provisions will remain fixed in the political and legal culture of an exclusionary slave society.”).

Originalism is tied to the political and legal culture of the antebellum Constitution. That culture is morally illegitimate, from a contemporary perspective, in that it protected slavery and excluded most of the population from politics. Even if we assume that a contested provision was not itself the result of original exclusions, and even if we reject the public choice-type argument that the original meaning of some provisions is likely to retard moral progress, and even if originalism can claim some source of authority that is not itself tainted by the original exclusions, still the unattractiveness of fixing meaning in antebellum culture gives us some reason to reject originalism.

This concern is symbolic because it would stand regardless of the actual, tangible outcomes in constitutional adjudication promoted by an originalist approach. It is conceivable—though unlikely, as I argue below—that an originalist approach could fare poorly in addressing the problem at the second level but fare better than alternatives at the level of producing equality in its substantive application to constitutional questions.<sup>153</sup> As a symbolic concern, the second level of the problem of constitutional exclusion might seem relatively unimportant. I argue, however, that it is of greater significance than commentators have previously recognized.<sup>154</sup>

One partial response to this concern is that the Constitution has undergone revisions over time that have struck out offending text and replaced it with a more comprehensive understanding of the moral equality of different groups of Americans.<sup>155</sup> To the extent that some of these amendments capture more modern moral sentiments, originalism will reproduce those sentiments.<sup>156</sup> The original understanding of the Nineteenth Amendment, ratified in 1920 to extend constitutional voting rights to women,<sup>157</sup> might be less symbolically offensive to prevailing notions of equality than the original understanding of the Fourteenth Amendment, ratified in 1868 to, among other things, extend citizenship to former slaves and “equal protection of the laws” to all citizens.<sup>158</sup> Both might be superior to original understandings of text that no longer appears in the Constitution, such as the Three-Fifths Clause.<sup>159</sup> Originalism thus becomes less

---

*Id.*

<sup>153</sup> For example, non-originalism need not in principle be devoted to updating the Constitution in any particular way. One could adopt a non-originalist approach devoted to producing even more morally and substantively inequitable outcomes than original meaning would produce. Originalism would still score poorly at the symbolic level, but it might outperform this specific variant of non-originalism in application.

<sup>154</sup> See *infra* Part III.D.

<sup>155</sup> See Greene, *supra* note 144, at 519–20 (acknowledging that, although “[t]he process of constitutional design was unrepresentative along racial lines in 1787, . . . the Constitution that emerged from that process has been amended so as to be more inclusive. . . . Correctly practiced, originalism fixes on the whole Constitution, as amended”).

<sup>156</sup> See *id.*

<sup>157</sup> U.S. CONST. amend. XIX.

<sup>158</sup> U.S. CONST. amend. XIV, § 1; see also *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/14thAmendment.htm> [<https://perma.cc/3RRE-96RM>] (last visited Jan. 9, 2022) (offering this characterization of the Fourteenth Amendment).

<sup>159</sup> See *supra* note 145.



symbolically regressive over time as the text of the Constitution comes to reflect our modern understanding of equality.

This observation is fine as far as it goes, but it is not particularly helpful in mitigating the symbolic concerns arising from the second level of the problem of constitutional exclusion. After all, a great deal of the original text of the Constitution remains, carrying with it significant regressive associations.<sup>160</sup> And the original understanding of important later additions preserves a great deal of inequitable sentiment as well. For example, the Equal Protection Clause of the Fourteenth Amendment did not originally extend moral or substantive equality to women.<sup>161</sup>

Some originalists recognize a version of this problem, and therefore support efforts to “[s]eparat[e] author from [t]ext.”<sup>162</sup> For example, Christina Mulligan suggests that, although it may be

---

<sup>160</sup> See Culp, *supra* note 146, at 75 (arguing that “‘Defer to the past’ is the implicit message[ of a]lmost all [forms of originalism.] Listen to the wiser and greater (and whiter) founders.”); Marcossou, *supra* note 148, at 467 (footnote omitted) (“But even beyond the Fourteenth Amendment, racism permeated the original understanding of countless Constitutional provisions, including those directly accommodating slavery and numerous others that did the same thing less directly.”); Stein, *supra* note 16, at 429–30 (noting that, although some “blithely assume that the abolition of slavery and the expansion of the franchise excised from the Constitution all provisions with a morally questionable original meaning, . . . the existence of some morally retrograde provisions suggests that there are other morally retrograde provisions, and also perhaps morally retrograde omissions”).

<sup>161</sup> See Fox, *supra* note 16, at 699 (“The Fourteenth Amendment framers assumed that women lacked the capacity to be full citizens and engage in public life.”); *id.* at 697 (arguing that “[g]ender exclusion presents originalism with perhaps its toughest challenge [because h]alf the population (including half of the then-privileged race and class) was excluded from constitutional ratification until the twentieth century.”); see also Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1289–90 (2000).

Although the Fourteenth Amendment often was understood generally to guarantee certain rights to all citizens, it also was understood not to threaten the extensive regime of legal disabilities that the states imposed on women. To whatever extent the Amendment protected political rights, for example, it seems to have been understood to leave the states free to continue denying such rights to women. The Amendment’s apparently categorical guarantees of civil rights likewise left states free to deny such rights to married women, just as they were free to deny them to children. This is not because women (or children) were not regarded as citizens; everyone seems to have understood that they were. Rather, these understandings often seem to have been based on the idea that women enjoy these rights vicariously through their families, and perhaps that legal regulation of women’s rights was indeed a kind of regulation of the family peculiarly suited to the states rather than the federal government.

*Id.* (footnotes omitted).

<sup>162</sup> Mulligan, *supra* note 7, at 431.

important to inquire into the moral views of the Framers, such matters do not bear a “close relationship to whether originalism is a desirable method of constitutional interpretation.”<sup>163</sup> Viewed through the lens of virtue jurisprudence, this claim is likely false.<sup>164</sup> Moreover, it is impossible and inappropriate to separate the authors from the text when the authors’ views about their compatriots so heavily influenced the text—both in overt, observable ways, and in unknowable ways through the exclusion of their perspectives.<sup>165</sup> This is especially true if we adopt an originalist methodology, one that necessarily pushes us to understand the authors—and similarly-situated, privileged contemporaries—as a means of understanding the text. In all relevant respects, and especially if we adopt originalism, we operate under the Framers’ Constitution.<sup>166</sup>

---

<sup>163</sup> *Id.* at 431–32.

<sup>164</sup> *See infra* Part III.D.

<sup>165</sup> *See id.*

<sup>166</sup> Philosophers studying the concept of identity over time have long wrestled with the link between the identity of an object and its extended, piecemeal revision. One prominent thought experiment for testing intuitions about that link is known as “the ship of Theseus”:

Over a long period all of the planks composing a certain ship are replaced one by one. Eventually a ship indiscernible from the original, but composed of entirely different planks, results. Call that later ship Replacement. As each plank is removed from the original ship it is used to construct a ship that is constituted from all and only the planks belonging to the original ship. Call the ship composed of the same planks as the ones initially composing the original ship Reassembly.

Andre Gallois, *Identity Over Time*, STAN. ENCYCLOPEDIA PHIL., (Oct. 6, 2016), <https://plato.stanford.edu/entries/identity-time/> [<https://perma.cc/W85G-8ZV7>]. The case may help us to refine our views about identity by forcing us to consider which ship—the replacement or the reassembly—is the true ship of Theseus. But it also has application in the case of the Constitution, which has been undergoing a slow and partial process of replacement since its adoption. Most significantly, the interesting philosophical questions raised by the ship of Theseus are nowhere on the horizon for the Constitution, which retains the bulk of its original structure, and has been modified primarily by subsequent additions that leave most of the original wording intact. *See generally The U.S. Constitution*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/full-text>

[<https://perma.cc/RTR8-QS7U>] (last visited Nov. 18, 2021) (showing the original text of the Constitution and highlighting subsequent alterations and interpretations). It is implausible to separate the Constitution from the Framers under these conditions, even at the symbolic level. *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019) (“Our law today incorporates our original law by reference. Officially, we treat the Constitution as a piece of enacted law that was adopted a long time ago; whatever law it made back then remains the law, subject to various de jure alterations or amendments made since.”).

In short, at the second level, the problem of constitutional exclusion relates to our *choice* of a mode of constitutional interpretation, and what we communicate by that choice. Our options allow us to place different degrees of separation between our current moral commitments and the problematic presumptions of the Framers or the drafters of early amendments. Even if modern amendments to the Constitution help to blunt originalism's sharp edges, originalism still prioritizes an original understanding—compared to non-originalist approaches more inclined to minimize original understandings—and therefore clearly conveys an acceptance of original prejudice. There may be a spectrum of options before us at the second level,<sup>167</sup> but originalism lies on the wrong end of that spectrum; electing to embrace originalism carries negative symbolic significance for moral equality.

### 3. The Third Level of Constitutional Exclusion: The Tangible Outcomes of Constitutional Adjudication

At the third and final level, the problem of constitutional exclusion concerns the extent to which our current understanding of the Constitution tangibly erases, preserves, or compounds the inequality expressed through the original exclusion of various groups—despite amendments and pursuant to the ongoing adjudication of constitutional questions.<sup>168</sup> One underappreciated reason for the persistence of concerns about constitutional exclusion is that the groups excluded from shaping the Constitution—and groups with similar features—continue to manifest social disadvantage relative to the groups that were not excluded.<sup>169</sup> There may well be a complicated causal connection between the original exclusions and the persistence of systemic

---

<sup>167</sup> See *supra* note 36 and accompanying text.

<sup>168</sup> It is logically conceivable—if implausible—that a demographically unrepresentative group of people could draft a document that properly balances the views and interests of both excluded and included groups. Such an arrangement could be historically exclusive and would, by definition, entail some substantive inequality with respect to the framing, but the problem would extend less forcefully into the future at the second—and especially at the third—level.

<sup>169</sup> See Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 770–71 (1991) (defining a systemic disadvantage as one “that operates along standard and predictable lines, in multiple important spheres of life, and that applies in realms like education, freedom from private and public violence, wealth, political representation, and political influence, all of which go to basic participation as a citizen in a democratic society[.]” and finding that race and sex are among the bases for such disadvantage).

disadvantage.<sup>170</sup> At minimum, however, the fact that moral and substantive inequality continue to overlap for the very same populations ensures that an unbroken chain of inequality runs from the Framing to the present day. Considering the length of this arc, it is plausible to interpret the persistence of substantive inequality as a marker of society's continued acceptance of lower moral status for the groups subject to original exclusion. At minimum (and perhaps less controversially), at the substantive level just as at the symbolic, constitutional amendments have not eliminated the propensity of the document to be applied in a fashion that reinforces either moral or substantive inequality.<sup>171</sup>

Additionally, different modes of constitutional interpretation have the propensity to influence inequalities differently—whether to whittle away at them or to reinforce them.<sup>172</sup> Assessing any particular mode of constitutional interpretation on this metric is an imprecise exercise. As discussed above, one reason for this lack of precision is that the Constitution has changed meaningfully over time.<sup>173</sup> Once again, the Constitution originally permitted the practice of slavery,<sup>174</sup> though the Thirteenth Amendment later eliminated that particular feature.<sup>175</sup> Similarly, the Constitution

---

<sup>170</sup> I will not attempt to defend a strong, causal relationship between the fact of constitutional exclusion and the fact that the groups excluded from the Framing continue to face systemic disadvantage, though such a relationship may very well exist. Even at best, however—even if those two facts are *completely coincidental*—the latter is a constant reminder of the former, and a marker of a cultural and political willingness to accept outcomes that happen to dovetail with the principle of inequality enshrined at the time of the Framing. More likely, those results reflect our foundational constitutional norms at work. Excluded groups were regarded as inferior from the start, and Constitutional guarantees have not ensured substantive equality across those groups centuries later.

<sup>171</sup> See Fox, *supra* note 16, at 693 (“[S]lavery had a powerful, intricate, and essential effect on the structure, language, and meaning of the Constitution and nature of the federal government, an effect felt still to this day.”); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012) (documenting systemic disadvantages faced by Blacks in the United States today); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 30–31 (1987) (noting indicia of systemic disadvantage faced by women in the United States today); Erin A. Cech et al., *Cultural Processes of Ethnoracial Disadvantage Among Native American College Students*, 98 SOC. FORCES 355, 356 (2019) (examining bias toward, and inequality experienced by, Native Americans in the United States today).

<sup>172</sup> See *infra* notes 186–188 and accompanying text.

<sup>173</sup> See *supra* notes 155–161 and accompanying text.

<sup>174</sup> See *supra* note 144.

<sup>175</sup> U.S. CONST. amend. XIII.

eventually came to reflect the principle that women, too, ought to have the right to vote.<sup>176</sup>

Another reason it is difficult to assess many modes of constitutional interpretation is that, changes in the Constitution aside, there remains so much disagreement about the actual meaning of many of the document's provisions. For example, debates persist to this day about whether various forms of discrimination against certain groups of people are consistent with the meaning of the amended Constitution.<sup>177</sup>

But originalism is largely associated with regressive outcomes even today, which is highly suggestive that the original exclusions continue to reinforce substantive inequality. Originalism resolves constitutional questions by casting its eyes back toward a meaning fixed at a time when—especially for the oldest provisions of the Constitution—moral inequality was widely accepted. It therefore carries a propensity, somewhat variable depending on the specific strand of originalism in question,<sup>178</sup> to incorporate inequality substantively into the outcomes of constitutional adjudication. For this very reason, many scholars routinely link originalism with substantive inequality in result. For example, the Supreme Court's notorious "anticanonical"<sup>179</sup> opinion in *Dred Scott*, holding that "blacks were not 'citizens' within the meaning of Article III for purposes of diversity jurisdiction and therefore could not invoke the jurisdiction of the federal court,"<sup>180</sup> is widely considered an example of originalist analysis,<sup>181</sup> even if a flawed one.<sup>182</sup>

---

<sup>176</sup> See *supra* text accompanying note 157.

<sup>177</sup> See *supra* note 161 (quoting scholars who argue that the original understanding of the Fourteenth Amendment is consistent with limiting the rights of women); Farnsworth, *supra* note 161, at 1294 ("If a theory of interpretation casts its lot with a fixed set of understandings about what the clauses of the Fourteenth Amendment require, it is in ongoing and deepening danger as time passes of generating answers to questions that are unacceptable by contemporary lights.").

<sup>178</sup> See *infra* notes 195–198 and accompanying text (discussing modern variants made to soften the exclusionary impact of originalism).

<sup>179</sup> See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 407, 411 (2011) (arguing that *Dred Scott* is one of only a handful of cases in Supreme Court history almost universally regarded as so wrongly decided that it is "anticanonical").

<sup>180</sup> B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment,"* 91 TEX. L. REV. 1815, 1833 (2013); see also *Dred Scott v. Sandford*, 60 U.S. 393, 421 (1857).

<sup>181</sup> See Hill, *supra* note 180, at 1834.

<sup>182</sup> Greene, *supra* note 179, at 407 (describing *Dred Scott* as "bad originalism").

Similarly, although some originalists have objected,<sup>183</sup> numerous critics hold that an originalist analysis could not have justified desegregating schools, as the Supreme Court did in *Brown v. Board of Education*.<sup>184</sup>

To some extent, these sorts of outcomes are a feature of originalism, not a bug. Originalists like Henry Monaghan have accused certain nonoriginalists of pursuing substantive outcomes through constitutional adjudication—including the articulation of rights to privacy, autonomy, and equality—that the Constitution does not support.<sup>185</sup> According to Monaghan, “[i]f original intent be our guide, the [C]onstitution did not authorize judges to insulate from the political process most of the individual rights asserted in current conceptions of political morality.”<sup>186</sup> On Monaghan’s view, the role of the Constitution is much more limited than that; the document sets out a narrower agreement altogether.<sup>187</sup> As a historical matter, this view is not necessarily

<sup>183</sup> See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) (disputing the “consensus” that originalism would struggle to justify the result reached by the Court in *Brown*).

<sup>184</sup> See 347 U.S. 483, 495 (1954); see also Greene, *supra* note 179, at 381 (footnote omitted) (noting that “*Brown* . . . was in tension with the original expected application of the Fourteenth Amendment, [and] was not compelled by the text of the Equal Protection Clause”); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 12–13 (1996) (claiming similarly that originalism could not have justified the outcome in *Brown*). Approval of the result in *Brown* now serves as a test for the suitability of any given judicial nominee. Stein, *supra* note 16, at 421 (“While initially controversial, *Brown* is now almost universally accepted. . . . Rather than questioning whether *Brown* was correctly decided, we take it as given that the result is correct and measure the legitimacy of interpretive methods, such as originalism, by whether they can support *Brown*.”).

<sup>185</sup> See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 396 (1981) (arguing that, per “the original intent of the Framers of either the 1789-1791 text or 1868-1870 amendments[,] . . . the [C]onstitution has ‘very few ideas to contribute’ to the social equality, privacy, and autonomy claims now pressed by [nonoriginalist] commentators”); *id.* at 365 (“As a constitutional concept, equality demands no more than the *inclusion* of groups into the political process.”). Monaghan therefore criticizes the non-originalist view of some more progressive scholars according to which, “properly construed, the [C]onstitution guarantees against the political order most equality and autonomy values which [those] commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens.” *Id.* at 358 (emphasis omitted).

<sup>186</sup> *Id.* at 396.

<sup>187</sup> Scalia, *supra* note 5, at 861 (“It may well be, as Professor Henry Monaghan persuasively argues, that [originalist philosophy] cannot legitimately be reconciled with . . . the unrealistic view of the Constitution as a document intended to create a perfect society for all ages to come, whereas in fact it was a political compromise that did not pretend to create a perfect society even for its own age (as its toleration of

implausible, but it has important ramifications: it naturally rejects the more expansive government interventions necessary to secure substantive equality for groups that have been situated at a disadvantage throughout American history.<sup>188</sup> Similarly, Justice Antonin Scalia—a self-identified originalist<sup>189</sup> and a major figure in originalist debates more generally<sup>190</sup>—took the view that “[t]he purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable.”<sup>191</sup>

Plainly, the society that adopted the Constitution—or the subset of that society positioned to adopt the Constitution—rejected the notion that all their compatriots were moral equals, and accepted widespread substantive inequality, including in the

---

slavery, which a majority of the founding generation recognized as an evil, well enough demonstrates).”).

<sup>188</sup> See McCarthy, *supra* note 8 (citing Aziz Huq for the view that “originalist reasoning . . . harken[s] to a time when the conception of the federal government’s role was much narrower . . . making it a particularly useful tool for dismantling public health protections and other regulations”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 2–3 (1991) (arguing that even a purportedly “color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans”). This feature may also have limited the power of the Constitution to prevent moral inequality from leaking into adjudication not expressly concerned with constitutional questions. See generally, e.g., Johnson v. M’Intosh, 21 U.S. 543 (1823) (resolving a land dispute without reference to constitutional provisions by relying on racist characterizations of Native Americans).

<sup>189</sup> Randy E. Barnett, Lecture, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 7 (2006) (analyzing Scalia’s self-described “faint-hearted originalism”).

<sup>190</sup> See George, *supra* note 29 (eulogizing Justice Scalia as an important originalist).

<sup>191</sup> Scalia, *supra* note 5, at 862 (emphasis omitted); see also Greene, *supra* note 144, at 521 (“As Justice Scalia has written, the purpose of constitutionalism from an originalist perspective is to ‘obstruct modernity,’ and to prevent current majorities from diluting or altering the values of the past.”); Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 447 (2014) (quoting Justice Scalia as saying, in an interview, “Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t.”).

One of the most interesting problems with this point of view is that the “traditional values” captured in the Constitution are specifically the values of the tiny subset of the populace permitted to participate in the Framing and, perhaps, ratification. Modernity may have brought a change in moral attitudes, but some of those changes may simply result from our present willingness to take more seriously the views of groups that were excluded originally. It is difficult to distinguish genuinely “new” values from old values that simply went unheard and therefore unincorporated.

Framing itself.<sup>192</sup> We cannot therefore be surprised when originalist analysis conduces to inequality; indeed, we should be skeptical about the promise of elaborate efforts to demonstrate results to the contrary.

A form of this objection increasingly penetrates originalist scholarship. Beyond efforts to demonstrate that originalism might, counterintuitively, generate the right result in cases like *Brown*, some have recently attempted to bring greater diversity into originalism. For example, Christina Mulligan suggests that the demographic homogeneity of modern-day originalists may lead to unconscious distortions in their interpretations about original meaning.<sup>193</sup> To counteract that possibility, she recommends that scholars “seek consensus among other interpreters with different backgrounds who are asking the same questions.”<sup>194</sup>

James Fox Jr. goes further. He argues that originalist efforts to account for constitutional exclusion need to do more than consider how excluded communities later came to understand relevant constitutional terms; originalists should adopt “Counterpublic Originalism,” which would examine sources that documented how excluded groups interpreted the relevant language at the time it was adopted.<sup>195</sup> Such an approach would therefore recognize the multiplicity of contemporaneous meanings of ratified constitutional language or principles, acknowledging “counterpublic” interpretations by groups with limited influence over the text itself.<sup>196</sup>

These efforts reveal both an increasing understanding of the seriousness of constitutional exclusion among originalists and the limitations of originalism to confront the problem fully. Efforts to bring diverse points of view into originalist analysis might soften exclusionary inequality at the third level, but they could also heighten the problem.<sup>197</sup> After all, the perspective of excluded groups on the meaning of constitutional provisions—whether assessed presently or contemporaneously with the drafting of the text in question—is not guaranteed to read equality into the

<sup>192</sup> See Mulligan, *supra* note 7, at 398–99.

<sup>193</sup> See *id.* at 404.

<sup>194</sup> *Id.*

<sup>195</sup> See Fox, *supra* note 16, at 719.

<sup>196</sup> *Id.*

<sup>197</sup> To the extent that the efforts at diversifying originalism are about severing its association with inequality, those results are extremely unlikely to succeed, in part because of the symbolic value of adhering to original meaning at the second level. See Mulligan, *supra* note 7, at 434.



meaning of the Constitution. Attending to these perspectives merely provides a limited form of procedural equality in the process of discerning original meaning.<sup>198</sup> Sources channeling “diverse” perspectives could well interpret the original meaning of constitutional language to be even more inegalitarian than “traditional” sources, in which case the diversification of originalism would actually yield counterproductive results in terms of promoting substantive equality.

In sum, we should *expect* an original understanding to have regressive results for equality, whether through cases that explicitly affirm moral inequality—like *Dred Scott*—or through cases that extend long-standing substantive inequality for excluded groups.<sup>199</sup> And although nonoriginalist approaches could in theory be used to inject even greater levels of moral inequality into constitutional analysis, that possibility runs against the grain of how nonoriginalist approaches have typically been applied. Ultimately, wedding ourselves to original meaning inherently limits our ability to deal with the problem of constitutional exclusion at the third level, sharpens the problem at the second level, and leaves it untouched at the first.<sup>200</sup>

### B. *The Sui Generis Moral Role of the Constitution*

I have argued that the problem of constitutional exclusion boils down primarily to its implications for moral and substantive inequality. In addition to its superficial plausibility, that explanation also unifies the various other characterizations of the problem surveyed above. If the original exclusions connote moral inequality and implicate substantive inequality, it is no wonder they alienate excluded groups<sup>201</sup> and create a sense of “moral contamination.” Exclusion-as-inequality also has an intuitive

---

<sup>198</sup> A contemporaneous, counterpublic interpretation of the Three-Fifths Clause, for example, could not possibly eliminate the bald inequality it conveys, even if the reasons immediately behind the compromise had more to do with a functional political arrangement than a specific moral view of slaves. *See supra* note 145.

<sup>199</sup> *See generally* Case, *supra* note 191 (making a version of this argument as to women specifically).

<sup>200</sup> Typical nonoriginalist approaches will also leave exclusion untouched at the first level, though they will perform better at the second level by definition and may, depending on how they are applied, outperform originalism at the third. *See supra* text accompanying note 49 (describing “living constitutionalism”); *see also* Solum, *supra* note 47, at 1246 (elaborating on living constitutionalism in greater detail).

<sup>201</sup> In fact, viewed through the lens of the virtues, the propensity of the problem of exclusion to alienate excluded groups is especially sharp and well-defined. *See infra* Part III.D.

relationship with democracy and legitimacy, although that relationship is more difficult to parse. One must define the criteria for legitimacy to argue that exclusion renders the Constitution illegitimate; and many political outcomes reflect inequality, but it is not necessarily clear that such outcomes are therefore illegitimate.<sup>202</sup> We also tolerate a great deal of inequality in our political processes—for example, widely divergent political influence of individual citizens based on their geographic locations<sup>203</sup>—with contested implications for democracy.

Despite its intuitive power, the implications of understanding exclusion as a problem of moral and substantive inequality are dependent on further assumptions. In theory, originalists could bite the bullet on exclusion-as-inequality. They could accept the three levels at which the problem manifests, agree that their approach heightens the problem at the second and third levels, and acknowledge that disadvantaged groups express concern about the problem, but still deny the relevance of any of those concessions to the selection of a mode of constitutional interpretation.<sup>204</sup>

But exclusion-as-inequality becomes much more powerful if we make one further assumption: the law should function in part

<sup>202</sup> That is not to say that arguments about legitimacy or democracy are bound to fail, but they require additional premises that I will not supply or defend in this Article.

<sup>203</sup> See, e.g., Ian Millhiser, *America's Anti-Democratic Senate, in One Number*, VOX (Jan. 6, 2021, 10:00 AM), <https://www.vox.com/2021/1/6/22215728/senate-anti-democratic-one-number-raphael-warnock-jon-ossoff-georgia-runoffs> [<https://perma.cc/Q42X-W6RL>] (noting that the 50-50 balance of Democrats and Republicans in the U.S. Senate in 2021 belies the fact that over 40 million more people voted for Democratic senators than Republican ones, reflecting in part the structural features of the Senate that gives greater weight to “whiter and more conservative” states); Lee Drutman, *The Senate Has Always Favored Smaller States. It Just Didn't Help Republicans Until Now.*, FIVETHIRTYEIGHT (July 29, 2020, 7:00 AM), <https://fivethirtyeight.com/features/the-senate-has-always-favored-smaller-states-it-just-didnt-help-republicans-until-now/> (tracing the recent history of the political shift that has allowed a minority of the nation's voters to determine the majority in the Senate).

<sup>204</sup> See Monaghan, *supra* note 185, at 396 (relaying Monaghan's view that the Constitution has little to say about social equality but nevertheless preferring originalism). Monaghan does not explicitly confront a three-tiered conception of exclusion-as-inequality, but his approach could serve as a model for originalist bullet-biting. To support such a stance, originalists might adopt criteria for legitimacy that exclude concerns about inequality. See Barnett, *supra* note 13, at 652 (“Because the binding nature of laws made pursuant to constitutional processes governed by the original meaning of the Constitution is not based on popular sovereignty or consent, it is not undercut, except indirectly, by the fact that women, slaves, children, resident aliens, convicts, or all of us now living were excluded from the ratification process.”).

to make us morally better. That assumption may seem controversial, but it lies at the heart of strong virtue jurisprudence, and it is a common view among originalists.<sup>205</sup> And nowhere is that assumption more plausible than in the context of the Constitution. As I argue below, a great deal of American legal and political culture in fact embraces this premise at the level of constitutional law.

There are several ways in which the law might influence us morally, either generally or in the specific sense envisioned by virtue jurisprudence. The most obvious method was well known to early scholars working on the virtues: the law often prohibits “immoral” conduct like *malum in se* offenses, backing such prohibitions with legal penalties.<sup>206</sup> Over time, the effect of those prohibitions might be to condition people to act in the right way, perhaps even for the right reasons.<sup>207</sup> The law can also establish the background conditions necessary for human flourishing, such as by providing entitlements to the material needs that underpin such flourishing.<sup>208</sup> A third possibility, however, is that the law might *inspire* the public by incorporating and modeling the most fundamental moral values.

The Constitution is not well-suited to conditioning the public into virtue by force of its prohibitions and penalties for the simple reason that it primarily dictates limitations on government power rather than regulating private conduct.<sup>209</sup> It is not a criminal code.<sup>210</sup> But the substantive outcomes it produces likely bear on

---

<sup>205</sup> See sources cited *supra* note 29 (listing a few examples).

<sup>206</sup> See Sinha, *supra* note 29, at 219–24 (summarizing relevant views of Aristotle and Aquinas). Aristotle accepted that “the coercive power of the law serves an important function in conditioning the public to be virtuous,” and Aquinas saw “obedience [to the law as] valuable because it ‘promotes the common good,’ helps to ‘avoid scandal or danger,’ and ‘provides a means to higher virtue.’” *Id.* at 220, 223.

<sup>207</sup> *Id.* at 219–20. It is for this reason that some scholars believe virtue jurisprudence justifies “morals” legislation, or the regulation of “private” immoralities. See, e.g., GEORGE, *supra* note 29, at 1 (defending “morals legislation” because it purportedly promotes the virtues of members of society); Cantu, *supra* note 26, at 1539 (arguing that modern interpretations of privacy rights and the decline of “traditional families” have undermined the virtues of the American populace).

<sup>208</sup> See Strang, *supra* note 78, at 88 (footnote omitted) (“Law is one of the key mechanisms that humans utilize to achieve human flourishing. . . . [H]umans must utilize law to set the background conditions—the common good—that make it possible for humans to flourish. [For example,] private property is (generally) necessary for human flourishing.”).

<sup>209</sup> Travis Gunn, *Knowledge Is Power: The Fundamental Right To Record Present Observations in Public*, 54 WM. & MARY L. REV. 1409, 1430 (2013).

<sup>210</sup> See *id.*

the material requirements for human flourishing,<sup>211</sup> and, even more obviously, the Constitution is the focus of a great deal of public attention and national pride as perhaps the single most prominent index of our political morality.<sup>212</sup> The Constitution enshrines and elevates the core values of our system, such as those articulated in its Preamble, which include “establish[ing] Justice” and “secur[ing] the Blessings of Liberty.”<sup>213</sup> Originalists widely accept that the Constitution expresses important values,<sup>214</sup> noting that one purpose behind adhering to an original understanding is “to prevent current majorities from diluting or altering the values of the past.”<sup>215</sup>

---

<sup>211</sup> See *supra* notes 84–87 and accompanying text (describing Strang’s view, which I challenge in this Article, that an original understanding of the Constitution would set optimal conditions for human flourishing).

<sup>212</sup> See, e.g., Aziz Rana, *Colonialism and Constitutional Memory*, 5 UC IRVINE L. REV. 263, 267 (2015) (“A large part of why exceptionalist narratives of American civic identity have had such a powerful grip on the national imagination is because of the presumed symbolic meaning of the Federal Constitution. According to today’s scholars and commentators, the Constitution gives concrete substance to the country’s civic ideals, generating a political order grounded in democratic consent, pluralism, and equal rights for all.”). Rana goes on to quote some prominent scholars celebrating these purported virtues of our Constitution. *Id.*; see also Nikolas Bowie, *Opinion: The Challenges of Teaching the Constitution in the Age of Trump*, WASH. POST (Jan. 18, 2021, 5:52 PM), <https://www.washingtonpost.com/opinions/2021/01/18/challenges-teaching-constitution-age-trump/> (arguing that “[t]he Constitution provides the vocabulary by which this country debates what is just”).

<sup>213</sup> The entirety of the Preamble reads as follows:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl. Notably absent, of course, is a reference to moral or substantive equality. Although the Declaration of Independence famously refers to the “self-evident” truth that “all men are created equal[,]” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), the legal structure subsequently imposed by the Constitution functionally countermanded that proposition.

<sup>214</sup> See Mulligan, *supra* note 7, at 431 (advocating for a focus on “the values embedded in the text” of the Constitution rather than on the “flaws” of the Framers).

<sup>215</sup> Greene, *supra* note 144, at 521 (citing Justice Scalia) (footnote omitted); see also Scalia, *supra* note 5, at 862 (emphasis omitted) (“The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable.”); Sean Hannity, *Sean Hannity: State of the Union Shows Trump Is for ‘We the People,’ Democrats Are for Hating Trump*, FOX NEWS (Feb. 6, 2019), <https://www.foxnews.com/opinion/sean-hannity-state-of-the-union-shows-trump-is-for-we-the-people-democrats-are-for-hating-trump> [https://perma.cc/4ZAN-2QH6] (describing President Trump’s first two Supreme Court appointees as “originalists . . . who will uphold our constitutional values”). Commentators across the political spectrum accept that we operate under, and may even be duty-bound to

The importance of the Constitution in political culture therefore extends beyond its status as legally primary; it has come to represent a vehicle for our national values, and we honor it as such. Although commentators disagree about the values expressed in the Constitution, prevailing legal and political culture invests it with widely-acknowledged normative and inspirational power. Numerous civic societies celebrate competing visions of the Constitution.<sup>216</sup> A national holiday commemorates its original signing.<sup>217</sup> By statute, most federal officials and members of the military must take an oath to “defend the Constitution . . . against all enemies, foreign and domestic.”<sup>218</sup> Legal advocacy groups frame their activities in similar terms because they (and their donors) see the defense of the Constitution or constitutional rights as a laudable goal.<sup>219</sup> Advocates and

---

defend, our “constitutional values.” See, e.g., Howard Simon, *We Must Fight Disinformation To Save Our Democracy*, TAMPA BAY TIMES (Jan. 13, 2021), <https://www.tampabay.com/opinion/2021/01/13/we-must-fight-disinformation-to-save-our-democracy-column/> [<https://perma.cc/5MU2-3D23>] (featuring an argument by a former ACLU lawyer arguing that “the protection of our constitutional values and the rule of law is our collective responsibility”).

<sup>216</sup> See *About the National Constitution Center*, NAT'L CONST. CTR., <https://constitutioncenter.org/about> [<https://perma.cc/8NRT-V8V7>] (last visited Feb. 9, 2022) (providing information about The National Constitution Center, which “brings together people of all ages and perspectives, across America and around the world, to learn about, debate, and celebrate the greatest vision of human freedom in history, the U.S. Constitution”); *About ACS*, AM. CONST. SOC'Y, <https://www.acslaw.org/about-us/> [<https://perma.cc/T8GL-NATR>] (last visited Feb. 9, 2022) (providing information about the American Constitution Society, which “realizes the promises of the U.S. Constitution by building and leading a diverse legal community that dedicates itself to advancing and defending democracy, justice, equality, and liberty; to securing a government that serves the public interest; and to guarding against the abuse of law and the concentration of power”); *About Us*, FEDERALIST SOC'Y, <https://fedsoc.org/about-us> [<https://perma.cc/MB5M-JSC2>] (last visited Feb. 9, 2022) (providing information about The Federalist Society for Law and Public Policy Studies, which is more commonly known as The Federalist Society, and noting that the group “is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.”).

<sup>217</sup> *Celebrating Constitution Day*, NAT'L ARCHIVES, <https://www.archives.gov/news/topics/constitution-day> [<https://perma.cc/X934-LZJ5>] (last updated Sept. 13, 2021).

<sup>218</sup> 5 U.S.C. § 3331.

<sup>219</sup> See, e.g., *Some Highlights Why We Do What We Do How We Do It*, ACLU <https://www.aclu.org/about/aclu-history> [<https://perma.cc/2QB4-GP8T>] (last visited Feb. 9, 2022) (describing how the ACLU, “has evolved in the years since from this small group of idealists into the nation’s premier defender of the rights enshrined in the U.S. Constitution”).

politicians call on members of the public to defend the Constitution or its values as well,<sup>220</sup> including when doing so might involve breaking the law.<sup>221</sup> The government even spreads aspirational messages about the Constitution to audiences outside the United States.<sup>222</sup> Indeed, the notion of the average American enamored with constitutional values is so well recognized that it has become the subject of prominent political satire.<sup>223</sup>

That political leaders and members of the public disagree on the values expressed in the Constitution is no objection; if anything, that fact underscores the legal, political, and rhetorical potency of describing one's views as aligned with a proper reading of the Constitution. Even if we accept that the original purpose of the Constitution was a limited one—say, to establish relatively narrow channels of federal power, leaving a great deal of substantive discretion to the individual states<sup>224</sup>—conservative

---

<sup>220</sup> See Ryan Wolf, *MAGA Patriot Party Organizer Calls It 'Personal Calling' To Defend Constitution*, KTXS (Jan. 25, 2021), <https://ktxs.com/news/local/maga-patriot-party-organizer-calls-it-personal-calling-to-defend-constitution> [<https://perma.cc/U97P-Z7M8>].

<sup>221</sup> See Catie Edmondson & Luke Broadwater, *'Be Ready To Defend the Constitution': How Some Republican Lawmakers Fanned the Flames Before Riot That Shook the US Capitol*, BALT. SUN (Jan. 12, 2021, 10:04 AM), <https://www.baltimoresun.com/news/nation-world/ct-nw-nyt-capitol-riot-republicans-20210112-td6dq5bvvgvkvbwhlnm66do6iy-story.html> (citing Republican Congressman Paul Gosar's op-ed, calling for supporters of President Trump to "[b]e ready to defend the Constitution" against "illegitimate usurper" and winner of the 2020 presidential election, Joe Biden).

<sup>222</sup> See, e.g., *Statement by Michael Pompeo on the International Human Rights Day*, U.S. EMBASSY URU. (Dec. 10, 2019), <https://uy.usembassy.gov/statement-by-michael-pompeo-on-the-international-human-rights-day/> [<https://perma.cc/Z4UX-U9HF>] (featuring a statement by Secretary of State Mike Pompeo that was posted by the U.S. Embassy in Uruguay, in which Pompeo noted that "[t]he Declaration of Independence, U.S. Constitution, and Bill of Rights have guided our nation for more than 200 years in promoting rights and freedoms"). By the Department of State's own description, the Secretary of State is "the President's chief foreign affairs adviser" in support of the President's role "determin[ing] U.S. foreign policy." *Duties of the Secretary of State*, U.S. DEP'T OF STATE, <https://www.state.gov/duties-of-the-secretary-of-state/> [<https://perma.cc/FXL2-HYNR>] (last visited Feb. 9, 2022). The Secretary thus often addresses comments to foreign governments or populations. See *id.*

<sup>223</sup> See *Area Man Passionate Defender of What He Imagines Constitution To Be*, ONION (Nov. 14, 2009, 8:02 AM), <https://www.theonion.com/area-man-passionate-defender-of-what-he-imagines-consti-1819571149/> [<https://perma.cc/J39E-HWNV>] (mocking a fictional—albeit realistic—American man who, moved by the perception that the current political administration is violating the Constitution, believes "[i]t's time for true Americans to stand up and protect the values that make us who we are.").

<sup>224</sup> See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 843 (2020) (arguing that "[t]he American States could have compromised their sovereign rights—including

figures bear as much responsibility as anyone for the veneration of the Constitution and, accordingly, the deification of the Framers' values.<sup>225</sup>

As a result of the Constitution's lofty status, there is substantial normative significance to the conclusion that any specific values are enshrined there. Such values become deeply American, worthy of reverence and protection.<sup>226</sup> Their elevation shapes both the legal and the moral orientation of the public.<sup>227</sup> By the same token, values excluded from the Constitution lose perhaps the single greatest basis for gaining widespread

sovereign immunity, immunity from commandeering, and equal sovereignty—only by adopting constitutional provisions that clearly and expressly altered or surrendered them. Thus, unless the Constitution expressly overrides the States' preexisting sovereign rights, the 'States' necessarily retained such rights.”); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 188 (1996) (“The basic design of the Constitution sought to achieve some balance between the powers ceded and the powers retained by the states, such that those necessary for union were transferred while all those needed for local governance were retained.”).

<sup>225</sup> Conservative commentators frequently celebrate the various virtues of the Framers and the inspiration they provide. *See, e.g., What People Are Saying*, in *About Us*, FEDERALIST SOC'Y, <https://fedsoc.org/about-us#FAQ> [<https://perma.cc/W5UC-NP2G>] (last visited Feb. 9, 2022) (quoting conservative law professor Jonathan Turley describing himself as “an unabashed Madisonian[,]” who believes James Madison “helped shape a constitutional system which is unique and has proven itself time and time again to be inspired.”); *id.* (quoting President Ronald Reagan's praise for the Federalist Society for its role in “returning the values and concepts of law as our founders understood them to scholarly dialogue, and through that dialogue, to our legal institutions.”); Jay Nordlinger (@jaynordlinger), TWITTER (Jan. 19, 2021, 8:50 AM), <https://twitter.com/jaynordlinger/status/1351527460878352385> [<https://twitter.com/jaynordlinger/status/1351527460878352385>] (expressing the view of a senior editor for the conservative National Review describing the Framers as “geniuses”); Ben Shapiro (@benshapiro), TWITTER (July 4, 2017, 9:13 AM), <https://twitter.com/benshapiro/status/882225794210160640> [<https://perma.cc/QBN8-NYB6>] (referring to the Founders as “the greatest single assemblage of thinkers in world history”); Turning Point USA, *The Founding Fathers Were Selfless Leaders*, FACEBOOK (June 25, 2020), <https://www.facebook.com/turningpointusa/videos/3563631873652326> [<https://perma.cc/74NU-KW5C>] (featuring conservative pundit Charlie Kirk praising the Founding Fathers as “selfless”); Stephen Davis, *John Adams Was a Genius*, TURNING POINT USA (Dec. 11, 2020), <https://www.tpusa.com/live/john-adams-was-a-genius> [<https://perma.cc/U6QL-SH53>] (discussing John Adams's emphasis on morality and religion as foundational values behind the Constitution); *see also* Greene, *supra* note 5, at 84 (“The rhetoric upon which originalist arguments rely, often successfully, is driven by a narrative about the American ethos.”).

<sup>226</sup> Greene, *supra* note 19, at 713 (footnote omitted) (“Values imputed to ‘the Framers’ or ‘the Founders’ are not only distinctly American but have acquired a presumption of rightness within our political culture. An interpretive modality that avails itself of their views and associates its own rightness with theirs gains an immediate rhetorical advantage.”).

<sup>227</sup> *Id.*

acceptance among the public. In some essential sense, they are not traditional, and they therefore demand additional justification.<sup>228</sup> Crucially, it is the Framers' values that most obviously fit the constitutional story, especially for the originalist.<sup>229</sup> Based on the foregoing, the Framers' values do not plausibly include moral and substantive equality, and the persistence of substantive inequality under the Constitution is at least suggestive of its ongoing tolerance for, or consistency with, moral inequality.

Put another way, the Constitution's role in public life dovetails with the expectations of strong virtue jurisprudence.<sup>230</sup> But it does so in a distinctive way. Legal and political practice have conferred on the Constitution a *sui generis* power to influence the moral development of the populace by its power to define national identity and its apparent potential for moral inspiration.<sup>231</sup> Constitutional values are arguably the most important source of moral influence in American law, and our public embrace of that proposition has simultaneously invested originalist approaches with additional significance and primed us to accept strong virtue jurisprudence.

### C. *Equality and the Virtues*

The special role of the Constitution helps to explain the power of exclusion-as-inequality,<sup>232</sup> but we need one more premise to link all this to virtue jurisprudence. Specifically, we must accept that moral equality is central to manifesting the virtues. And, just as one might doubt the relationship between the protection of rights and the attainment of the virtues,<sup>233</sup> one might also doubt the relationship between moral equality and the virtues. For example, Solum has argued that promoting virtue-centered human flourishing through the law is a fundamentally different exercise from promoting equality, rights, or welfare.<sup>234</sup> There is something to his claim; perhaps a system devoted primarily to promoting the

<sup>228</sup> See Fox, *supra* note 16, at 682–83.

<sup>229</sup> See Greene, *supra* note 19, at 713; *supra* Part III.A.

<sup>230</sup> See *supra* Part I.B.

<sup>231</sup> It is perfectly coherent to maintain that the Constitution should not play this role, or more generally to reject a core premise of strong virtue jurisprudence. It is unclear how many people do—or would be able to—hold this line in a principled fashion, however. Moreover, so long as the Constitution does, in fact, function in this way, the values it reflects will take on outsized importance.

<sup>232</sup> See *supra* Part III.B.

<sup>233</sup> See FARRELLY & SOLUM, *supra* note 29, at 2–3.

<sup>234</sup> *Id.*



virtues would come apart, at least at the margins, from a system devoted primarily to equality, rights, or welfare.

But that is not to say that there is no relationship between the virtues and any of these concepts. A destitute population may struggle to flourish because happiness is elusive when one's fundamental needs go unmet, and because competition for daily necessities displaces the human capacity for manifesting various virtues, like benevolence and generosity. The same is true of equality, a conclusion we reach without making any particularly controversial assumptions. As I noted above, moral equality is a basic premise few would dispute.<sup>235</sup> Presuming the equal moral worth of our compatriots neutralizes the bases not only for racism, but also for sexism, homophobia, and various other prejudices pegged to ascribed or otherwise morally irrelevant characteristics.<sup>236</sup> Moral equality similarly precludes views built around the notion that certain groups—often advantaged ones—are intrinsically entitled to greater power or influence.<sup>237</sup> As noted above, even the Framers recognized the power of the concept of moral equality;<sup>238</sup> they simply did not believe it extended to all of their compatriots.<sup>239</sup>

It requires only a small leap to conclude that a virtuous person will enact the virtues—whatever they happen to be<sup>240</sup>—in accordance with an understanding of the moral equality of

---

<sup>235</sup> See *supra* text accompanying notes 133–134. Even the Trump administration attempted to claim equality as an original American value. See THE PRESIDENT'S ADVISORY 1776 COMM'N, THE 1776 REPORT 4 (2021) ("The core assertion of the Declaration [of Independence], and the basis of the founders' political thought, is that 'all men are created equal.' From the principle of equality, the requirement for consent naturally follows: if all men are equal, then none may by right rule another without his consent.").

<sup>236</sup> Naturally, the outer reaches of this basic principle may be contested. Reasonable disagreements might arise about which characteristics are morally irrelevant in this context. But that is no objection to the argument advanced here.

<sup>237</sup> See THE PRESIDENT'S ADVISORY 1776 COMM'N, *supra* note 235, at 5; see also Laura Smith, *Lone Wolves Connected Online: A History of Modern White Supremacy*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/us/louis-beam-white-supremacy-internet.html> (offering a recent history of white supremacy in the United States).

<sup>238</sup> See THE PRESIDENT'S ADVISORY 1776 COMM'N, *supra* note 235, at 4 (favorably citing the principle of moral equality expressed in the Declaration of Independence).

<sup>239</sup> See *supra* note 141.

<sup>240</sup> Above I have noted that virtue theorists disagree about the full list of virtues, *supra* note 62 and accompanying text, and I have not taken a position on the comprehensive list here. My claim here is that *any* compelling list of the virtues will require that their manifestation align with the acceptance of moral equality.

persons.<sup>241</sup> An otherwise kind, honest, intelligent racist or misogynist cannot manifest human excellence—especially, but not exclusively, if we accept that to possess any of the virtues is to possess them all.<sup>242</sup> Similarly, members of a disadvantaged population who internalize their diminished moral worth relative to that of their neighbors will struggle to demonstrate adequate pride or self-respect in the face of a legal system that has long created or countenanced their disadvantage.<sup>243</sup> There is no plausible conception of the virtues that exempts us from accepting the moral equality of persons as a baseline; a presumption of moral equality is the compass that orients our virtuous attitudes both toward others and toward ourselves.

Note that, from the standpoint of influencing the virtues of the modern-day populace, it is irrelevant whether the Framers were ahead of their time, morally speaking. We do not hold that excluded groups were, in fact, morally inferior at the time of the Framing; we hold that the Framers were simply mistaken about the relative status of their excluded compatriots.<sup>244</sup> Some might accept that the Framers' moral mistakes were more forgivable than they would be now, given prevailing social norms.<sup>245</sup> Even if that is true, it is entirely different from accepting that the Framers were right; we are well aware that they were not.

#### D. *The Originalist's Dilemma*

Considered collectively, the foregoing arguments create both a challenge to constitutional fidelity and an especially serious dilemma for originalists. Constitutional exclusion is a complex,

<sup>241</sup> See Sinha, *supra* note 29, at 211, 235 (defending a corollary—namely, that a virtuous person has license to demand equal treatment under the law as a matter of self-respect, including by taking a negative view of the law when it persistently treats her worse than her compatriots).

<sup>242</sup> See *supra* text accompanying note 64.

<sup>243</sup> See Sinha, *supra* note 29, at 235 (arguing that self-respect must appear on any list of the virtues, either as its own virtue or as part of another virtue like humility or pride). For a philosophical account of humility that supports this analysis, see G. Alex Sinha, *Modernizing the Virtue of Humility*, 90 AUSTRALASIAN J. PHIL. 259 (2012). A meaningful commitment to self-respect would arise from the application of the principle of moral equality to oneself.

<sup>244</sup> Or we pretend that the Framers accepted moral equality for all. See THE PRESIDENT'S ADVISORY 1776 COMM'N, *supra* note 235, at 4 (describing the principle of equality articulated in the Declaration of Independence as the "basis of the founders' political thought").

<sup>245</sup> See *supra* note 139 (quoting Amar's view that the ratification process was remarkably inclusive considering the social context at the time).

multi-layered problem that implicates moral and substantive inequality. As a problem of inequality, it is especially difficult to address at the first level, where we must choose either (1) to operate under a constitutional structure established—and influenced in ways both knowable and unknowable—through the exclusion of certain groups perceived at the time as morally inferior, or (2) to adopt a new constitution under less exclusionary conditions. Many may be willing to disregard this challenge to constitutional fidelity, if nothing else because of the practical difficulties of adopting a new document.<sup>246</sup>

But even if we reject this challenge and accept our Constitution, as amended, we retain greater control over the problem of constitutional exclusion at the second and third levels. More specifically, we can weigh the symbolic and substantive implications for moral and substantive equality in adopting any given method for interpreting the Constitution. As I have argued above, originalism does poorly on these levels by design; it seeks to preserve the original understanding of the Constitution in part to preclude the revision of original constitutional values, and in part because it takes a narrower view of the substantive values the Constitution can bear.<sup>247</sup> Whatever its other merits, as an approach, originalism is symbolically and substantively unsuited to addressing exclusion-as-inequality.<sup>248</sup>

None of this would matter much if exclusion-as-inequality were only a minor problem. But it extends beyond sentiments, which are more important than some may realize,<sup>249</sup> and it is not

<sup>246</sup> For a fascinating description of the Black Panther Party's 1970 convention, at which participants drafted new constitutional text, see Rana, *supra* note 212, at 284–86.

<sup>247</sup> See *supra* notes 185–187 and accompanying text.

<sup>248</sup> As I noted above, some originalists may be willing simply to accept this. See *supra* text accompanying note 204.

<sup>249</sup> See Greene, *supra* note 144, at 522.

Constitutional methodology translates, between word and deed, hope and reality, authority and violence. To choose a methodology is to choose the connective tissue between Constitution and subject. It is to adopt a narrative that enables a people not merely to submit to the state but to experience the Constitution as theirs. For that choice to be right, it needs to *feel* right; it must resonate with how one in fact experiences one's relationship with the nation and its commitments. A racially-sensitive constitutionalism must always, therefore, hold out the possibility of legitimate dissent from history. Originalism denies that possibility, and so for me, as I suspect for many African-Americans, it speaks in a foreign tongue.

*Id.* These sentiments find a firm basis in the thread of inequality that runs through the Constitution from the Framing to the present.

merely a regrettable fact with amorphous implications that we can acknowledge while pushing past.<sup>250</sup> It is a fundamental concern about the relationship between the law and the moral orientation of its subjects. For better or worse, the Constitution's prominent place at the heart of our political morality endows it with massive moral influence.<sup>251</sup> We therefore have weighty reasons to ensure that, to the extent possible, it reflects our most fundamental moral commitments—even if those commitments diverge from the original ones reflected in the document as drafted. In other words, powerful considerations compel us to incorporate moral equality into the Constitution where we can.

Moreover, if the law can condition virtue, it can also condition vice.<sup>252</sup> The question, then, is not merely whether the Constitution overtly incorporates key moral principles or simply remains silent about them. Otherwise, one might be tempted to fend off the challenge posed by the original exclusions by asserting that substantive equality is missing from the Constitution because the document memorializes a relatively narrow agreement about a limited federal power structure and little else.<sup>253</sup> Instead, we must be attuned to the most morally poisonous result, which would be for the Constitution to affirmatively model *vicious* principles. Exclusion-as-inequality alleges exactly this: adhering to original meaning ensures that the Constitution positively represents *moral inequality*, even if—or especially because—the Constitution was not originally conceived to promote substantive equality.<sup>254</sup> Because we can easily choose to reject adherence to original meaning, at least some of the time,<sup>255</sup> to embrace original meaning

---

<sup>250</sup> See generally Mulligan, *supra* note 7 (acknowledging the problem of constitutional exclusion but defending the view that a modified version of originalism is responsive).

<sup>251</sup> See *supra* Part III.B. The exalted status of the Constitution helps explain why members of systemically disadvantaged groups experience such a sharp sense of alienation from the Constitution. See *supra* note 249.

<sup>252</sup> See Rana, *supra* note 212, at 268 (suggesting that the “country’s identitarian shift from settler to civic nation has meant that Americans have never properly confronted the country’s colonial infrastructure or the living legacy of its settler history.”).

<sup>253</sup> See *supra* note 187.

<sup>254</sup> See Dworkin, *supra* note 184, at 13.

<sup>255</sup> See *id.* at 7–12 (describing Dworkin’s favored “moral reading” of the Constitution, which endorses “stating the constitutional principles at the most general possible level,” including in understanding the notion of equality, but also recognizing that the moral reading is not always appropriate because the “Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle”). For those concerned that the argument presented here

in those instances betrays a vicious, modern-day willingness to permit a document as important as the Constitution to continue modeling moral inequality.

This dilemma leaves originalists in a difficult position. Unless they soften their approach to embracing an original understanding of the Constitution, their best bet is to deny the importance of the law's moral influence.<sup>256</sup> Taking this path would allow originalists to whistle past the graveyard of constitutional exclusion, but at a cost: it entails both the repudiation of the role the Constitution has assumed in our political and legal practice and the rejection of strong virtue jurisprudence.<sup>257</sup> This result would be expensive for the originalist. Many originalists have celebrated traditional constitutional values,<sup>258</sup> and a number more have expressed an affinity for strong virtue jurisprudence.<sup>259</sup> Indeed, widespread moralistic celebration of constitutional values is a compelling piece of evidence that strong virtue jurisprudence has a wide base of support among the public and may be on the right theoretical track. Ideally, exclusion-as-inequality will channel scholars and judges onto the right track as well.

---

might broadly undermine the ability of lawmakers to set down guidance for the future, Dworkin's view highlights one possible limiting principle. Even leaving Dworkin's view aside, however, another limitation presents itself: the argument presented above gains its strength from the chasm between the contemporary recognition of the importance of moral equality (on one hand) and the disregard for that principle we show in adopting an originalist mode of interpretation for our most important legal text (on the other hand). Other legal dictates that are deemed morally deficient in the future may be vulnerable to a parallel challenge, but the strength of that challenge may be diminished by the nature of the perceived moral deficiency and the lower importance of the legal instrument in question.

<sup>256</sup> Strictly speaking, originalists have a few other options, but those options are nonstarters. Originalists could deny that constitutional exclusion implicates moral inequality, but that seems obviously implausible. They could also reject a commitment to moral equality, but that would be extraordinary. They could deny that the Constitution *should* play a moral role, but that ship has sailed, in part because of originalist celebrations of the values embedded in the Constitution. *See supra* note 225. Originalists could also dispute the influence of a constitutional embrace of moral inequality on the vices of the populace, although that connection seems far stronger than any countervailing connections originalists have identified between originalism and public virtue. *See supra* Part II.

<sup>257</sup> *See supra* Part III.B; *see also supra* Part I.A (defining strong virtue jurisprudence).

<sup>258</sup> *See supra* note 225.

<sup>259</sup> *See supra* note 29.

## CONCLUSION

This Article does not address the complete universe of putative merits and demerits of originalism. It does not suggest that concerns about constitutional exclusion form the only relevant basis for selecting a method of constitutional interpretation. Although it observes that certain non-originalist approaches could be better equipped to manage exclusion-as-inequality,<sup>260</sup> the Article also declines to endorse any specific approach to constitutional interpretation. Instead, the Article reframes the problem of constitutional exclusion and highlights its relevance. Exclusion-as-inequality poses a serious challenge to our constitutional order, but it presents an especially sharp challenge for originalists. Scholars and judges can still accept originalism if they are willing to pay the price exacted by exclusion-as-inequality, but they should recognize that the price is steep.

---

<sup>260</sup> The development of a consensus around a preferred model of nonoriginalism may ultimately prove essential. See Scalia, *supra* note 5, at 855 (offering an admonition that “[y]ou can’t beat somebody with nobody”). But the implications of exclusion-as-inequality may help to light the way forward.

