IN DEFENSE OF JUDICIAL PRUDENCE: AMERICAN CONSTITUTIONAL THEORY, VIRTUE, AND JUDICIAL REVIEW IN HARD CASES

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I. Introduction

What is the most important virtue for judges to exhibit when they are interpreting and applying the U.S. Constitution to "hard cases" involving vague and abstract language such as "cruel and unusual punishment" and "equal protection of the laws"?[1] In this essay, I contend that advocates of three major theories of judicial review – majoritarianism, originalism, and perfectionism – emphasize the virtues of restraint, fidelity, and justice respectively, but that a fourth virtue – prudence – ought to be regarded as the most important judicial virtue for judges deciding hard constitutional cases.[2] Advocates of each of these three theories of judicial review embrace these respective virtues because they accept three particular constitutional theories.[3] By

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[1] I follow Ronald Dworkin in defining "hard cases" as "those cases in which the result is not clearly dictated by statute or precedent." See Ronald Dworkin, "Hard Cases," *Harvard Law Review*, Volume 88, No. 6, April 1975, 1057. Throughout this essay, I follow the custom in scholarship on constitutional theory by focusing on how theory applies to Supreme Court justices. This is, of course, the norm because lower court judges are bound by additional constraints that serve to distract us from foundational questions of constitutional theory.

[2] This typology of judicial philosophies is taken from Cass Sunstein, *Radicals in Robes* (New York: Basic Books, 2005). The only difference is that Sunstein calls originalism "fundamentalism" in his text. It may be objected that Sunstein's typology is not the "standard" in the field. A leading textbook in the field, for example, includes chapters on "Textualism and Constitutional Interpretation," "Originalism and Constitutional Interpretation," "Structural Reasoning," "Moral Reasoning," and "Precedent in Constitutional Adjudication" in its Part on "Judicial Review and Constitutional Interpretation." See Michael J. Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr. *Constitutional Theory: Arguments and Perspectives*, 3rd Ed. (Newark: LexisNexis, 2007), xv-xix. While it is certainly true that scholars differ on how exactly to categorize various theories of judicial review and list could be endless, I feel that Sunstein's typology is defensible for a variety of reasons. Most importantly for this paper, Sunstein's typology is useful because it invites us to see the constitutional theories at the foundation of several prominent theories of judicial review and does not over-emphasize the importance of interpretive methodology. It is for this reason that I find Sunstein's typology especially useful. All too often in the study of judicial review, we get caught up in the details of interpretive method and neglect underlying debates about constitutional theory.

[3] I should note that I admit judges do not always rely on "theory" to guide their decisions. Many scholars of constitutional theory and theories of judicial review continue to believe, though, that whatever the

"constitutional theory," I have in mind what legal scholar David Strauss described as the "effort to justify a set of prescriptions about how certain controversial constitutional issues should be decided" based on what Judge J. Harvie Wilkinson has called "a grand and unifying constitutional vision." [4] Advocates of majoritarianism, a theory of judicial review that envisions a limited role for the judiciary and encourages judges to defer to the elected branches of government, emphasize the virtue of restraint. The constitutional theory at the foundation of majoritarianism is one that emphasizes democracy as the supreme constitutional value. Advocates of originalism, a theory of judicial review (and an interpretive method) that envisions a judiciary that is active in defense of the original meaning of the Constitution and passive when the Constitution is silent, emphasize the virtue of fidelity; they believe a good judge is a judge who remains *faithful* to the original understanding of the law even when there is political and moral pressure to do otherwise. The constitutional theory at the foundation of originalism is one that emphasizes the rule of law as the supreme constitutional value. Advocates of perfectionism, a theory of judicial review that envisions a judiciary that actively pursues an agenda guided by a desire to perfect the American political system, emphasize the virtue of justice; a good judge is a judge who makes decisions that are in accord with our aspirations to act consistently with the dictates of morality, or "higher law," in our politics. The constitutional theory at the foundation of perfectionism was described by the scholar Edward S. Corwin as the idea that the Constitution contains within it certain "principles of right and justice which are entitled to prevail" in constitutional interpretation because of "their intrinsic excellence…regardless of the attitude of those who wield the physical resources of the community."[5]

I believe majoritarians, originalists, and perfectionists are right to identify respect for democracy, preservation of the rule of law, and the pursuit of a more perfect union as central to the American constitutional project and, therefore, they are all right to identify restraint, fidelity, and justice as essential judicial virtues.[6] In other words, my argument is rooted in the claim that we live under a *pluralist Constitution*. By this, I mean to say that our Constitution – understood here both as the text and the history, tradition, and precedent that has developed through interpretation of that text – contains within it simultaneous commitments to democracy, the rule of law, and justice and that these

descriptive truth of these theories, there is still a strong normative case for carrying on this discussion of what judges *should* do when confronted with hard cases.

[4] David Strauss, "What is Constitutional Theory," *California Law Review*, Volume 87, Issue 3 (1999), 582. J. Harvie Wilkinson, *Cosmic Constitutional Theory* (New York: Oxford University Press, 2012), 1.

[5] Edward S. Corwin, "The Higher Law Background of American Constitutional Law," Part 1, *Harvard Law Review*, vol. 42, no. 2 (December 1928), 152.

[6] When I refer to "the American constitutional project" and "the American constitutional order" in this essay, I have in mind the written constitutional text, the history that produced that text, and interpretations of that text over time.

commitments are often in tension with each other. To demonstrate this point, I ask you to recall Isaiah Berlin's brilliant passage on pluralism in "Two Concepts of Liberty":

> If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict — and of tragedy — can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.[7]

To paraphrase Berlin and apply his ideas to my argument here: If, as I believe, the ends of our Constitution are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never wholly be eliminated from judicial decision-making in hard constitutional cases. The necessity of choosing between absolute constitutional claims is then an inescapable characteristic of the judicial office.

In the face of constitutional pluralism, what is a judge to do? It is precisely because majoritarians, originalists, and perfectionists capture part of the truth that I contend prudence, or *phronesis*, ought to be considered the most important virtue when judges are deciding hard cases.[8] Prudence is a notoriously difficult virtue to define, but at a very general level we can describe it as a virtue that is concerned with translating moral principle into practice.[9] Political theorist Ethan Fishman has written that, for Aristotle, "the unique value of prudence for politics is its ability to explain how to realize abstract ends through concrete means available to human beings so that we may do the right thing to the right person at the right time 'for the right motive and in the right way.'"[10] Prudence is, in short, practical wisdom. Without prudence, one cannot be wise in a practical sense; one cannot act on the appropriate principles in appropriate ways in the real world. It is for this reason that Thomas Aquinas called prudence the "master" virtue. Prudence "governs" the other virtues in the sense that is through the guidance of prudence that we act virtuously in the world. Political theorist Ronald Beiner describes the concept in this way:

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[7] Isaiah Berlin, "Two Concepts of Liberty," in *The Proper Study of Mankind* (Farrar, Straus, and Giroux, 1997), 191.

[8] I am not the first to recommend prudence as a judicial virtue. For a classic defense of the importance of prudence in constitutional interpretation, see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (Indianapolis: Bobbs-Merril, 1962), 235-243.

[9] It is worth noting that my focus in this essay is on prudence as an intellectual virtue not as a temperamental disposition.

[10] *Ibid.,* 4.

> *Phronesis* is not one virtue among others, but is the master virtue that encompasses and orders the individual virtues. Virtue is the exercise of ethical knowledge as elicited by particular situations of action, and to act on the basis of this knowledge as a matter of course is to possess *phronesis*. Without *phronesis* one cannot properly be said to possess any of the virtues, and to possess *phronesis* is, conversely, to possess all the virtues, for *phronesis* is knowledge of which virtue is appropriate in particular circumstances, and the ability to act on that knowledge.[11]

The prudential theory of judicial review I defend in this essay recognizes democracy, the rule of law, and justice as relevant sources of "ethical knowledge" for judges deciding hard constitutional cases and, as such, it acknowledges that all of the virtues described above – restraint, fidelity, and justice – are essential. The unique value of prudence for judicial review in hard constitutional cases is its ability to realize constitutional ends through concrete means available to justices so that they may do the right thing in the right case at the right time for the right motive and in the right way. Prudence is the supreme judicial virtue precisely because we live under a Constitution in which several ends exist in a state of dynamic tension with each other. "Since, in practical life, there are always multiple ends to pursue [e.g., security and freedom, inclusiveness and excellence, etc.]," political theorist Richard Ruderman has written, "*phronesis* should determine, at any given time, which end to pursue [in light of the resources, not the least the moral resources, required to pursue it]." For Ruderman, therefore, "the beginning of prudence is the recognition that conflict [of principle as well as interest] is a permanent part of political life."[12] It is precisely because, in the words of legal scholar John Hart Ely, "our Constitution is too complex a document to lie still for *any* pat characterization," that we need justices to exercise prudence in hard constitutional cases.[13] For the "prudent man," writes theologian Josef Pieper, "does not expect certainty where it cannot exist, nor…does he deceive himself by false certainties."[14]

My argument proceeds as follows. In Part II, I describe the theory of majoritarianism and I make the case that majoritarians emphasize the virtue of restraint because they believe judges should be deferential to the will of democratic majorities. In Part III, I describe the theory of originalism and make the case that originalists are committed to the virtue of fidelity because they believe it is necessary for a judge to be faithful to the original understanding in order to preserve the rule of law. In Part IV, I describe the

[11] As quoted in Ethan Fishman, "Introduction," *Tempered Strength: Studies in the Nature and Scope of Prudential Leadership* (Lanham: Lexington Books, 2002), 2.
[12] *Ibid.,* 5.
[13] John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), 101. Emphasis in original.
[14] Josef Pieper, *The Four Cardinal Virtues* (South Bend: Notre Dame University Press, 1962), 18.

theory of perfectionism and I make the case that perfectionists are committed to the virtue of justice because they believe judges should be animated by a desire to perfect the American polity. In Part V, I conclude by contending that the virtue of prudence invites the appreciation of complexity and dynamism that is necessary for judges to balance the simultaneous commitments to democracy, the rule of law, and justice that are at the heart of the American constitutional order.

II. Majoritarianism and the Virtue of Restraint

Advocates of majoritarianism embrace a modest approach to constitutional interpretation in hard cases. The restrained view of the judiciary accepted by majoritarians is rooted in their belief that the primary commitment of the American constitutional order is to popular sovereignty. Legislative majorities, they contend, ought to be given a great amount of leeway in the governance of political communities. According to the majoritarian way of thinking, judges ought to conceive of their role in the constitutional system as facilitators of, not impediments to, democratic action.

A restrained judge is able to resist the temptation to abuse the immense power of judicial office. According to this view, a good judge will have the self-control to abstain from exercising his power when it is inappropriate and to exercise his power with moderation when it is appropriate. In the words of Robert H. Bork, who might justly be called a majoritarian in originalist clothing, it is because the "orthodoxy of our civil religion…holds that we govern ourselves democratically" that "abstinence" is of "inestimable value" as a judicial virtue.[15]

We can identify many advocates of majoritarianism throughout the history of American politics and see that the virtue of restraint emerges as central to their philosophy. The classic nineteenth century expression of majoritarianism is found in James Bradley Thayer's *The Origin and Scope of the American Doctrine of Constitutional Law*.[16] "The judicial function," Thayer argued, "is merely that of fixing the outside border of reasonable legislative action" and the greatest sin a judge can commit is to attempt to "step into the shoes of the law-maker."[17] Our constitutional system provides "our courts a great and

[15] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990), 153, 163.
[16] James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Boston: Little, Brown, and Company, 1893).
[17] *Ibid.,* 22, 26.

stately jurisdiction," but it is incumbent upon judges to refrain from abusing their immense powers.[18]

Not long after Thayer published his important tract, Justice Oliver Wendell Holmes penned his famous majoritarian dissent in *Lochner v. New York*.[19] According to constitutional scholar Howard Gillman, Holmes' jurisprudence "emphasized the need for judges to get out of the habit of imposing anachronistic constraints on contemporary officeholders, and embracing instead an ethic of judicial restraint and a tolerance for political adaptation through legislative innovation."[20] In *Lochner*, the Court was confronted with the question of whether or not a New York maximum hour labor law violated the liberty protection of the 14th Amendment's Due Process Clause. The Court answered this question in the affirmative, with the majority declaring that the maximum hour law was "unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract." Holmes authored a dissent in which he argued the Court's decision was rooted in "an economic theory" and it is not the province of the judiciary to decide upon the wisdom of economic legislation: "I do not conceive it to be my duty [to make up my mind about the wisdom of this economic theory]…because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." The Constitution, Holmes declared, "is made for people of fundamentally differing views" and it is illegitimate for judges to impose their own opinions of legislation on the democratic majorities of various political communities.[21]

Armed with abstract constitutional text and confronted with what they took to be an unwise economic regulation, the *Lochner* majority decided to exercise its power to overturn the law. From Holmes' perspective, this decision demonstrated a lack of judicial self-control. According the majoritarian theory of judicial review, it is precisely when judges are confronted with laws that they believe are unwise that their virtue is put to the test. Judges *can* step in and overturn what they believe to be unwise legislation, but majoritarians contend they *should* have the humility to respect the opinions of democratic majorities. According to Gillman, Holmes' judicial philosophy was "almost anti-constitutional in its commitment to legislative supremacy and the sovereignty of elected officials."[22] Even when a judge objects to a law, he must appreciate the fact that on most

[18] *Ibid.,* 26.

[19] *Lochner v. New York*, 198 U.S. 45 (1905).

[20] Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* 11 (Fall 1997): 191-247.

[21] *Lochner v. New York*, 198 U.S. 45 (1905).

[22] Howard Gillman, "Political Development and the Origins of the Living Constitution," (2006). *Schmooze 'tickets'*. Paper 53, 4.

matters "men reasonably might differ" and in a democratic system it is illegitimate for a small handful of elites to impose their views on legislators who are, according to this view, closer to the will of the people.[23]

The disagreement between Holmes and the *Lochner* majority was carried on by progressives and conservatives for several decades. While conservatives appealed to originalism as a basis for striking down some regulatory and social welfare legislation, progressives embraced majoritarianism. On the Supreme Court, the philosophy of Holmes was carried on by Justice Felix Frankfurter and his allies. Prior to his ascent to the Court, Frankfurter's majoritarianism was on display in a short essay entitled "The Present Approach to Constitutional Decisions on the Bill of Rights." In the essay, he singled out Thayer and Holmes for praise and argued that it is "a fundamental of American constitutional law" that "the wisdom or justice of legislative policy is entirely outside the judicial province" before lamenting that this "rule has not always been honored" in judicial practice. Frankfurter concluded the essay on an emphatically majoritarian note: the "responsibility for mischievous or inadequate legislation" should be "brought home where it belongs" – "to the legislature and to the people themselves."[24]

Over the course of the last several decades, socially conservative judges have often appealed to majoritarianism as the basis for judicial deference to the will of legislative majorities in the moral realm. In *Lawrence v. Texas*, for example, the Court was confronted with the question of whether or not a Texas "Homosexual Conduct" law that forbade "deviant sexual intercourse with an individual of the same sex" violated the liberty protection of the Fourteenth Amendment's Due Process Clause.[25] The Court's majority declared that it did. In the majority opinion, Justice Anthony Kennedy argued that the Due Process Clause protected individuals from excessive state interference with consensual, intimate, non-commercial conduct. In dissent, Justice Scalia defended a majoritarian role for the Court. Scalia argued that the long-standing laws against bigamy, bestiality, fornication, obscenity, and incest are evidence that the "promotion of majoritarian sexual morality" is well within legitimate state police powers: "What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new constitutional right by a court that is impatient of democratic change." Rather than using the Due Process Clause as a basis for interference with the sexual morality of democratic majorities, Scalia contended that members of the Court should have adopted a deferential stance: "the

[23] Justice Holmes dissenting, *Bartels v. Iowa* 262 U.S. 404 (1923).
[24] Felix Frankfurter, "The Present Approach to Constitutional Decisions on the Bill of Rights," *Harvard Law Review*, Vol. 28, No. 8 (June 1915), 790-793.
[25] *Lawrence v. Texas* 539 U.S. 558 (2003).

Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[26]

Justice Thomas concurred with Scalia in *Lawrence* and also offered a brief dissent of his own. A brief mention of Thomas' dissent is worthwhile here because his words draw a sharp contrast between the majoritarian view of the judiciary and the perfectionist view. Thomas wrote separately in order to declare that he thought Texas' law was "uncommonly silly" and that, if he were a member of the legislature, he would vote to repeal it.[27] Although he disapproved of the law, he believed it was imperative that he resist the temptation to strike it down because such an action would not be in keeping with the deference to democracy that is required of judges in the American political system.

To sum up, majoritarians believe judges must exhibit the virtue of restraint because self-control is necessary for judges to resist interfering with the legitimate processes of democratic governance. Throughout the history of American constitutional law, majoritarianism has been advocated by both liberals and conservatives with the former tending to embrace deference to legislative majorities in the economic realm and the latter tending to embrace deference to legislative majorities in the realm of sexual morality. In both instances, the defense of restraint was rooted in the contention that a commitment to popular sovereignty lies at the heart of the American constitutional order.

III. Originalism and the Virtue of Fidelity

Advocates of originalism believe the best judge is the one who remains faithful to the rule of law even in the face of political and moral pressure to do otherwise. Originalism can be defined as strict adherence to the text of the Constitution and when the meaning of the text is not clear to the public understanding of the text in question at the time of its adoption. In the words of political scientist Keith Whittington, "Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present."[28] Unlike majoritarianism, Whittington notes, "originalism is less likely to emphasize a primary commitment to judicial restraint" because originalists believe the doctrine "may often require the active exercise of the power of judicial review in order to *keep faith* with the

[26] *Ibid.,* Justice Scalia dissenting.
[27] *Ibid.,* Justice Thomas dissenting.
[28] Keith Whittington, "The New Originalism," reprinted in Michael Gerhardt, et al., *Constitutional Theory: Arguments and Perspectives* (Newark: Lexis-Nexis, 2007), 233.

principled commitments of the founding."[29] The "primary virtue" of originalism, Whittington has argued, "is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism."[30] In a recent book entitled *Constitutional Redemption*, legal scholar Jack Balkin has challenged the claim that fidelity is a virtue essential to originalism. Balkin objects, though, not because he thinks fidelity is unimportant to originalism, but rather because he thinks it is so important that "virtue" does not quite capture its essence. "Fidelity is not a virtue," Balkin writes, "but a precondition. It is not just a good thing, but the point of the practice of constitutional interpretation. To claim to interpret the Constitution is already to claim to be faithful to it. Conversely, insisting that one does not care about fidelity….is to announce that one is doing something else—whether it is political theory, economics, or sociology, but most assuredly not constitutional law. When we say that fidelity is not important to us, we are no longer interpreting the Constitution, we are criticizing it."[31]

Why do originalists emphasize fidelity to the Constitution as the primary judicial virtue? Like the majoritarian view, the originalist answer to this question has something to do with how they understand the core commitments of the American constitutional order. For some originalists, like Keith Whittington, the obligation of fidelity is rooted in the idea that there is a foundational commitment in American politics to fundamental law that has been legitimated by popular consent. In *Constitutional Interpretation*, Whittington contends that the authority of the Constitution is rooted in the fact that it was created by an act of popular sovereignty. The process by which the Constitution was created and has been amended has by no means been perfect, he admits, but it is still binding on contemporary interpreters. "By accepting the authority of the Constitution," Whittington writes, "we accept our own authority to remake it. The existing Constitution is a placeholder for our own future expression of popular sovereignty. As such it performs an important function. It is not simply a vacancy but an instrument that maintains a political space. We can replicate the fundamental political act of the founders only if I am willing to recognize the reality of their act. Stripping them of their right to constitute a government would likewise strip us of our own."[32] Although Whittington shares the majoritarian belief that popular sovereignty is at the core of the American constitutional order he rejects their conclusion that this should lead to a deferential view of the judicial role. Instead, Whittington concludes that activism can sometimes be justified precisely because the Constitution is a product of popular sovereignty.

[29] *Ibid.,* 242-3.
[30] *Ibid.*
[31] Jack Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge: Harvard University Press, 2011), 106.
[32] Keith Whittington, *Constitutional Interpretation* (Lawrence: University of Kansas Press, 1999), 133.

For other originalists, like Randy Barnett, the commitment to originalism and the belief that judges must be faithful to its dictates is rooted in something other than popular sovereignty. According to Barnett, our obligation to be faithful to the original understanding of the Constitution cannot be maintained through popular sovereignty because none of us were given the opportunity to choose whether or not we consented to the Constitution. For a libertarian like Barnett, this is unacceptable. "What legitimates a constitution," Barnett writes, "is the merits of the lawmaking process it establishes."[33] More specifically, Barnett says "the legitimacy of a constitutional regime" should "be assessed by how well it protects individual rights."[34] When Barnett reads the Constitution he sees a document that, if followed according to its original meaning, would yield a better society than if we ignored it. Barnett is willing to admit that a return to the original meaning of the Constitution would bring about radical changes in American society, but he believes those changes would be well worth making. If Barnett's originalism was enforced by the Supreme Court, the size and scope of the federal government would be reduced dramatically and the constitutionality of many state and federal laws would be called into question. This may seem like a daunting proposal, but Barnett thinks judges should feel that fidelity requires them to take these steps if the original understanding of the Constitution requires it.

There are many examples in Supreme Court jurisprudence in which a justice has claimed he or she was employing an originalist method. Many of these examples have been the subject of much debate in political and academic circles. If we can set some of those debates to the side and take a justice at his word for a moment, we might better be able to see why originalists might place such a high value on fidelity. The following passage from Justice Antonin Scalia's *A Matter of Interpretation* is worth quoting at length:

> Several terms ago a case came before the Supreme Court involving a prosecution for sexual abuse of a young child. The trial court found that the child would be too frightened to testify in the presence of the (presumed) abuser, and so, pursuant to state law, she was permitted to testify with only the prosecutor and defense counsel present, with the defendant, the judge, and the jury watching over closed-circuit television…. I dissented, because the Sixth Amendment provides that "in *all* criminal prosecutions the accused shall enjoy the right…to be confronted with the witnesses against him" (emphasis added). There is no doubt what confrontation meant – or indeed means today. It means face-to-face,

[33] Randy Barnett, "An Originalism for Non-Originalists," *Boston University School of Law Working Paper Series*, No. 99-14, 25.

[34] Randy Barnett, "Scalia's Infidelity: A Critique of Faint-Hearted Originalism," in Michael J. Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr. *Constitutional Theory: Arguments and Perspectives*, 3rd Ed. (Newark: LexisNexis, 2007), 269.

> not watching from another room….Now no extrinsic factors have changed since that provision was adopted in 1791.[35]

Scalia introduces this discussion of *Maryland v. Craig* (1990) in order to challenge the claim that "Living Constitutionalism" (the bête noire of originalism) will always lead to the expansion of liberty. Scalia's argument, though, is rooted in his view that it is only through the sort of fidelity required by originalism that we maintain a "government of laws and not of men."[36] If we think about the constitutional question at stake in *Maryland v. Craig*, the majoritarian might be tempted to defer to the legislature's interpretation of the Sixth Amendment; after all, the closed circuit television option was a product of state law. Furthermore, I think it is fair to suspect that confronted with the facts of this case, a strong majority of citizens would support the idea that a victim of child abuse should not be forced to testify before the accused perpetrator of the crime. One can also imagine how a perfectionist might go either way in this case. Perhaps the perfectionist would view the constitutional question through the eyes of the victim and conclude that justice requires the right of the child to be spared the trauma of direct confrontation with his or her alleged abuser. One can also imagine that the perfectionist would incorporate very robust protections for the accused into her understanding of justice and would, therefore, conclude that the Maryland closed circuit television option is unconstitutional. The fact that his opinion is counter-majoritarian and it is in tension with some of our notions of justice is precisely why, from Scalia's perspective, originalism is needed. Originalism, he contends, makes a "difference" in constitutional decision-making because it provides justices with a firm ground upon which to reject "usurpatious" principles of constitutional law. In some cases this will mean that the originalist judge will vindicate the rights of the individual – like in the Sixth Amendment case described above – and in other cases, Scalia contends, this will mean the originalist judge will stay out of the way of democratic majorities and government officials because the original meaning of the Constitution does not provide a legitimate basis for intervention.

IV. Perfectionism & the Virtue of Justice

Perfectionism is a theory of judicial review that is less deferential to democratic majorities or the original understanding of constitutional text than it is devoted to the idea that judges have an important role to play in perfecting the American polity. Perfectionists read the Constitution and find commitments to abstract concepts such as

[35] Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1998), 42-43
[36] *Ibid.,* 25.

liberty, equality, and human dignity. Rather than leaving the meaning of these concepts to democratic majorities or attempting to decipher the meaning of these concepts for those who adopted the text, perfectionists propose that judges have a special role to play in giving these concepts meaning. Legal scholar Henry Monaghan puts the matter succinctly when he says that the "distinctive and controversial premise" of perfectionism is that "the 'outputs' of even a fairly structured political process must satisfy some core substantive notions of political morality."[37]

It is important to note that perfectionism is not a philosophy that is necessarily wedded to one side of the political spectrum. On the liberal side, the legal philosopher Ronald Dworkin calls this constitutional philosophy "the moral reading." The Constitution, Dworkin contends, is full of "very broad and abstract language" and the "moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice."[38] In so doing, Dworkin continues, interpreters "must decide how an abstract principle is best understood."[39] While thinkers like Dworkin articulate philosophies of liberal perfectionism in order to defend such positions as the unconstitutionality of the death penalty and the constitutional right to have an abortion, there is a tradition of conservative perfectionism as well. Perhaps the most prominent academic defender of conservative perfectionism is the political philosopher Hadley Arkes. According to Arkes and his fellow conservative perfectionists, the Constitution cannot be understood without the light provided by the absolute moral principles expressed in the Declaration of Independence. In Arkes' words, we "will persistently find a need to appeal to those moral understandings lying behind the text; the understandings never written down in the Constitution, but which must be grasped again if we are to preserve – and perfect – the character of a constitutional government."[40]

The nature of the differences between perfectionism and the judicial philosophies explored above can be elucidated by a consideration of two perfectionist judicial opinions. Justice William Brennan's concurring opinion in *Furman v. Georgia* (1972), a case dealing with the constitutionality of capital punishment, stands out as an example of liberal perfectionism. In his opinion, Justice Brennan contends that "the duty" of judges is to decipher the "values and ideals" embodied in the Constitution. When reading abstract text like the Eighth Amendment's prohibition of "cruel and unusual punishments," judges should recognize that the Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." When

[37] Henry Monaghan, "Our Perfect Constitution," *New York University Law Review*, Vol. 56, 1981: 368.
[38] Ronald Dworkin, *Freedom's Law*, (Cambridge: Harvard University Press, 1997), 2.
[39] *Ibid.*
[40] Hadley Arkes, *Beyond the Constitution*, (Princeton: Princeton University Press, 1992), 17.

Justice Brennan read the Eighth Amendment in this way, he determined that the judicial task was to ensure that the "State, even as it punishes," treats "its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual, therefore, if it does not comport with human dignity." It is worth noting that Justice Brennan's reading of the Eighth Amendment, while not uninterested in democratic and historical considerations, is primarily philosophical in nature. He waxes eloquently on the meaning of human dignity as a philosophical concept, and concludes not only that the practice of capital punishment in the United States in 1972 fails to meet the requirements of the Eighth Amendment, but that the practice of capital punishment is prima facie inconsistent with this clause.[41]

It is worth noting the ways in which Brennan's approach in this case differs from the majoritarian and originalist approaches to this issue. Majoritarians would shudder at much of what they would find in Brennan's opinion, but they would be especially appalled by this line: "Legislative authorization, of course, does not establish acceptance" of any particular punishment.[42] For the majoritarian, when there is no explicit constitutional condemnation of a particular practice, legislative authorization carries an enormous amount of weight. In the case of capital punishment, the majoritarian would say that this is precisely the kind of issue judges should leave to the elected branches of government. There is no clear constitutional basis for striking down this practice, the majoritarian would say, so the judge should get out of the way.

The originalist approach to the Eighth Amendment would not be all that much different from the majoritarian approach. In the words of originalist thinker Michael McConnell: "There is no serious argument that the framers of either the Eighth or the Fourteenth Amendment deemed death, in all cases, a cruel and unusual punishment; indeed, the very language of the constitutional text belies this. Nor is there any serious argument that the tradition of the nation has judged capital punishment to be immoral."[43] For the originalist, the question of whether or not capital punishment is consistent with the Eighth Amendment is a *historical* question and judges must remain faithful to the historical meaning they find.

In addition to finding conservative perfectionism in the works of theorists like Arkes, we can find examples in Supreme Court decision-making. Perhaps the most obvious example of conservative perfectionism is Justice Clarence Thomas' jurisprudence in affirmative action cases. In these cases, the Court is confronted with the question of

[41] *Furman v. Georgia,* 408 U.S. 238 (1972).
[42] *Ibid.*
[43] Michael McConnell, "The Importance of Humility in Judicial Review: A Comment Ronald Dworkin's 'Moral Reading' of the Constitution," in *Constitutional Theory*, 374.

whether or not the government can make distinctions on the basis of race without running afoul of the Equal Protection Clause of the Fourteenth Amendment. Again, we can imagine a variety of paths available to a judge who must respond to this question. First, an originalist judge might seek to determine whether or not the racial distinctions in the law are consistent with the original understanding of the clause. This judge would engage in the historical exercise of seeking to determine whether race-based public policies were consistent with the principles and practices of the generation that adopted the Fourteenth Amendment. Due to his desire to be faithful to the rule of law, the outcome of this historical investigation would direct the originalist judge to the proper conclusion. Although there has been much scholarly debate on this issue, the dominant view is that an originalist judge would be forced to conclude that racial distinctions in the law were fully consistent with the original understanding of the Equal Protection Clause and that there would be no legitimate constitutional basis for him to strike down affirmative action programs.[44]

A majoritarian judge would care less about being faithful to the original understanding of the Fourteenth Amendment than he would about being deferential to the will of the relevant political community. In the case of, say, an affirmative action program at a state university in Iowa, the majoritarian judge would feel a sense of deference to the state legislature in Iowa. According to majoritarian reasoning, it would be essential that the judge check his own views of affirmative action at the door and respect the will of the elected branches, which more closely represent the will of the people who will be governed by the law. Given the polarized debate over the legitimacy of affirmative action and the ambiguity of the constitutional text at issue, the majoritarian judge would argue that the judicial obligation is to resist the temptation to intercede and allow the controversy to be resolved by democratic mechanisms.

The perfectionist judge would ask himself about the meaning of "equality" as an ideal of political morality and then he would ask himself whether or not the program in question promoted or undermined that ideal. Given the level of abstraction invited by perfectionism, one can imagine a judge going in either direction on the question of affirmative action. A liberal perfectionist might say that true equality requires government to make benevolent racial distinctions when making social policy in the present because malignant racial distinctions were such an important part of the American past.

[44] For two sides of this debate, see, e.g., Raoul Berger, *Government By Judiciary*, (Indianapolis: Liberty Fund Books, 1997) and Michael McConnell, "The Originalist Case for Brown v. Board of Education," 19 *Harvard Journal of Law & Public Policy*, 457 (1996).

We can see in Justice Thomas' concurring opinion in *Adarand Constructors v. Pena* (1995) that perfectionism can cut in the other direction as well. *Adarand* was a case in which the Supreme Court was confronted with the constitutionality of a Department of Transportation practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals."[45] The Court concluded that this practice was unconstitutional and in his concurring opinion, Justice Thomas contended that "there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some notion of equality." Even though he is the most committed defender of originalism on the Supreme Court, Thomas' justification for this conclusion is light on history and heavy on moral philosophy. Affirmative action programs, he writes, "undermine the moral basis of the equal protection principle" because they are "at war with the principle of equality that underlies and infuses our Constitution." In order to defend this claim, Thomas cites the famous "All men are created equal…" language of the Declaration of Independence. Here is the vital paragraph in Thomas' opinion:

> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("I hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").[46]

Thomas believes that authentic equality requires government to be colorblind. Whatever the merits of this view, it is clear that he could only reach this conclusion by viewing the affirmative action program through a perfectionist, not an originalist, lens. At the time when the Fourteenth Amendment was ratified, most Americans did not believe it required the government to abstain from making laws that made distinctions on the basis of race.[47] In order to reach this conclusion, then, Thomas had to import the principle of

[45] *Adarand Constructors v. Pena* 515 U.S. 200 (1995).
[46] Justice Clarence Thomas, concurring, *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).
[47] Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, (New York: Oxford University Press 2004), 18.

color-blindness into his judicial analysis. In this case, he was not moved by a desire to be faithful to the rule of law, but rather by a desire to do what he believed to be just.[48]

The connection between perfectionism and the virtue of justice is perhaps more obvious than any of the other connections I am attempting to make in this essay. At the most abstract level, to do justice to another human being is to give him his due. In *Summa Theologica*, Thomas Aquinas writes, "Justice, properly so called, is one special virtue, whose object is the *perfect* due" and later in the text he describes justice as the moral virtue that is "directed to good, which involves the notion of right and due…."[49] Justice is an enormously complex concept. For the purposes of this essay, it is enough to say that as a virtue, justice is concerned with acting in a way that is consistent with the dictates of morality.

The meaning of justice in particular circumstances is, of course, a matter of unending debate, but I need not enter into that debate to extract what is relevant to my purpose. When we speak of justice as a virtue, we usually have in mind the disposition of an individual to do the right thing. In "hard cases," perfectionists want judges to exhibit the virtue of justice. When confronted with a difficult question of constitutional interpretation, perfectionists contend judges should be animated by a desire to do what is right. This differs from majoritarianism in the sense that perfectionists believe the disposition to do what is right should often trump the deference the judge feels to the will of a democratic majority. This differs from originalism because perfectionists do not believe respect for the rule of law should be an invitation to ignore the demands of political morality.

To sum up, perfectionists believe that in hard cases judges should be animated by the virtue of justice; that is, they ought to be moved by the desire to do what is right. For perfectionists like those cited above (Dworkin, Arkes, Brennan, and Thomas) this commitment emerges out of a belief that American constitutionalism cannot be understood without an appreciation of the ideals of political morality at its core. Although their conclusions differ dramatically, Dworkin, Brennan, Arkes, and Thomas all agree that the commitments to universal human equality and liberty expressed in the Declaration of Independence are the first principles of the American political order and judges should keep these principles at the front of their mind when they are deciding hard cases.

V. In Defense of Judicial Prudence

[48] For an extended discussion of Justice Thomas' jurisprudence in this area, see Cass Sunstein, *Radicals in Robes*, 133-143.

[49] Saint Thomas Aquinas, *Summa Theologica*, Question 60, Article 4 and Question 61, Article 4. Italics added to emphasize the linking of justice with perfection.

Majoritarians, originalists, and perfectionists all capture part of the truth about the American constitutional project and, as such, they are each right to identify restraint, fidelity, and justice as important virtues for judges to exhibit when interpreting and applying vague and abstract clauses of the Constitution. It is precisely because each of these approaches captures part of the truth about the American constitutional order, though, that no one of these approaches has succeeded in identifying *the* supreme judicial virtue. In the context of constitutional pluralism – in other words, in the context of our simultaneous commitments to democracy, the rule of law, and higher law – what is needed is a virtue that *governs* these other virtues; what is needed is prudence. The beginning of constitutional wisdom is the recognition that there are competing ends enshrined in the Constitution and therefore, it is necessary to exhibit different virtues in different contexts. Prudence is the "master virtue" that should guide the judge as he or she attempts to translate this wisdom into practice.

Let me begin this defense of judicial prudence by returning to the difficult definitional questions I addressed ever so briefly in the introduction. Although it is beyond my scope to provide a detailed analysis of the many conceptions of prudence we find throughout the Western tradition, a brief word must be said on precisely what I mean when I use the term. Prudence is, to put it simply, practical wisdom; it is the habit of mind that we need to guide us as we attempt to translate wisdom into practice. In Aristotle's formulation, "Virtue makes the goal right, *phronesis* [practical wisdom] the thing toward the goal."[50] In other words, *phronesis* is an intellectual virtue – a particular kind of reasoning – that is necessary to achieve virtuous goals in a virtuous way. According to the rhetorical theorist Robert Hariman, in order to understand Aristotle's formulation of prudence, we must note that he contrasted it with four other kinds of intelligence: "scientific reasoning (*episteme*), technical reasoning (*techne*), wisdom (*sophia*), and comprehension (*nous*)." Prudence is a particular kind of wisdom; it is the wisdom that is necessary to accomplish "the integration of all the virtues" in practice.[51]

Marcus Tillius Cicero also identified prudence as a virtue of the utmost importance. According to Cicero, "all that is morally right arises from one of four sources: it is concerned with either (1) with the full perception and intelligent development of the true; or (2) with the conservation of organized society, with rendering to every man his due, and with the faithful discharge of obligations assumed; or (3) with the greatness and strength of a noble and invincible spirit; or (4) with the orderliness and moderation of everything that is said and done, wherein consists temperance and self-control."[52] The

[50] Aristotle, *Nicomachean Ethics*, 1144a7-9.
[51] Robert Hariman, "Theory without Modernity," in *Prudence: Classical Virtue, Postmodern Practice* (State College: Penn State University Press, 1998), 5.
[52] Cicero, *De Officiis*, Book I: IV, V.

first "source" – "the full perception and intelligent development of the true" – was, for Cicero, the concern of prudence. A proper understanding of prudence requires attention not only to the practical but to the true. In other words, it is crucial to note the ways in which Cicero draws our attention to the *cognitive* dimension of prudential action. In order to be prudent, we must have a full and intelligent understanding of what is true. Following this division of the virtues into these four categories, Cicero continued,

> Although these four are connected and interwoven, still it is in each one considered singly that certain definite kinds of moral duties have their origin: in that category, for instance, which was designated first in our division and in which we place wisdom and prudence, belong the search after truth and its discovery; and this is the peculiar province of that virtue. For the more clearly anyone observes the most essential truth in any given case and the more quickly and accurately he can see and explain the reasons for it, the more understanding and wise he is generally esteemed, and justly so.[53]

The search for truth, Cicero contends, is the task of wisdom. The "discovery" of truth, he suggests, "belongs" to prudence.

In the *Summa Theologica*, Saint Thomas Aquinas defined prudence as "wisdom concerning human affairs" or "right reason with respect to action."[54] Following Aristotle, Aquinas contends that the virtue of prudence is what provides human beings with the ability to put moral principles into practice. In other words, prudence is what is required for human beings to actually do good things in the world. What prudence requires, therefore, will depend on the situation and on what principles that one accepts as true. In the theologian Josef Pieper's words, "the virtue of prudence resides in this: that the objective cognition of reality shall determine action; that the truth of real things shall become determinative."[55]

In addition to these classical definitions and these scholarly interpretations, contemporary thinkers have had much to say about how the classical understanding might be "translated" into contemporary language. I do not have adequate space to explore these definitions in great detail, but I would like to take a moment to reflect on a contemporary definition that is especially relevant to my aims in the paper. Contemporary legal scholar Anthony Kronman has written extensively on the idea of prudence in law. In *The Lost Lawyer*, Kronman explains his understanding of prudence by comparing the ideas of Aristotle and Thomas Hobbes. "Hobbes," Kronman writes,

[53] *Ibid.*
[54] Thomas Aquinas, *Summa Theologica*, (IIaIIae, 47.2) and (IIaIIae47.4).
[55] *Ibid.,* 15.

"sought to establish a new science of politics consciously modeled on that of geometry." In so doing, Kronman contends, Hobbes was "repudiating an ancient tradition of thought reaching back to Aristotle." More specifically, by attempting to apply "his geometrical method to the most basic questions of politics," Hobbes was imagining a politics in which there would be no need for prudence as it was understood by the classics. Prudence is necessary, on Kronman's reading of the ancients, because it is a "trait of character" that allows us to navigate the political world, which is a world that lacks the precision of mathematics.[56] In another discussion of prudence, Kronman explains just what he means when he uses the concept:

> By prudence I mean a trait or characteristic that is at once an intellectual capacity and a temperamental disposition. A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities…. A prudent person is also one with a distinctive character – a person who feels a certain "wonder" in the presence of historically evolved institutions…[and] who…is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency….[57]

Kronman's definition is helpful because it reminds us of the importance of complexity and incommensurability as we attempt to translate principle into practice. As I noted in the introduction, political theorist Richard Ruderman captured the idea well when he wrote, "the beginning of prudence is the recognition that conflict [of principle as well as interest] is a permanent part of political life."[58]

With these definitional matters now on the table, we can return to the primary questions at hand: what is judicial prudence in hard constitutional cases and why should prudence be considered the supreme judicial virtue in these cases? It is not enough to simply import the language of Aristotle, Cicero, or Aquinas into the debates over judicial review. What would it mean to appeal to Aristotle to conclude that judicial prudence is the intellectual virtue that allows judges to do the right thing, in the right way, for the right reasons, in the right case? What would it mean to appeal to Cicero to say that judicial prudence is the ability to act on the "full perception" of what is true? What

[56] Anthony Kronman, *The Lost Lawyer* (Cambridge: Harvard University Press, 1993), 175-176.

[57] Anthony Kronman, "Alexander Bickel's Philosophy of Prudence," *Yale Law Journal,* Volume 4, No. 7 (June 1985), 1569. I should note that the ellipses in this quotation skip over language Kronman included that linked prudence to a conservative temperamental disposition toward social and institutional change. I did so because I think these ideas have their roots in modern redefinitions of prudence and are not a prominent part of the classical idea I am seeking to capture.

[58] As quoted in Ethan Fishman, "Introduction," *Tempered Strength*, 5.

would it mean to appeal to Aquinas to say that judicial prudence is "wisdom" concerning judicial affairs in hard constitutional cases? Prudence, as Pieper reminds us, is near impossible to understand in the abstract because "it applies to specific situations." It is, in his felicitous phrase, "situation conscience."[59] So in order to make sense of what judicial prudence is we must say more about the "situation" of judicial review in hard constitutional cases.

Consider the situation confronting a Supreme Court justice in a hard constitutional case. Recently, the Supreme Court considered a case regarding the constitutionality of California's Proposition 8, the state's ban on same-sex marriage.[60] The Court ended up deciding the case based on questions of standing, but just consider some of the questions on the merits at the heart of this controversy: does a law banning same-sex marriage violate the Due Process Clause and/or the Equal Protection Clause of the Fourteenth Amendment? The majoritarian would likely exercise restraint and let the law stand; after all, it was approved by a democratic majority. Even a more activist majoritarian like John Hart Ely would let the law stand unless it could be shown that the process that produced the law was undemocratic. The originalist would likely say that fidelity to original understanding requires us to let the law stand as well. He would ask himself if the original understanding of the clauses in question included the right to marry someone of the same sex (or, for a more liberal originalist, the right to marry someone of your own choosing) and if he answered in the negative, he would see no legitimate reason to strike down the law. The perfectionists, as always, could go either way. A liberal perfectionist like Ronald Dworkin would see the exclusion of same-sex marriage to be deeply at odds with the principles of liberty and equality at their best and hence would see a strong basis to strike down Proposition 8. The conservative perfectionist, on the other hand, might be animated by a moral defense of the "traditional family" and argue for the justice of the law.

Judicial prudence requires that the judge confronting this case take none of these easy routes. The majoritarian is right that democracy is at the core of our constitutional tradition, but so too are the rule of law and justice. The originalist is right to say that fidelity to the rule of law is at the core of our constitutional tradition, but so too are democracy and justice. And the perfectionist is right to say that aspiration to become a more perfect union is vital to our constitutional tradition, but so too are democracy and the rule of law. If I am right to argue that we live under conditions of constitutional pluralism, then the first lesson of judicial prudence in hard cases is this: pure majoritarianism, pure originalism, and pure perfectionism (and their corresponding virtues) ought to be rejected because they fail to recognize the tensions between the core

[59] *Ibid.,* 11.
[60] *Hollingsworth v. Perry*, 571 U.S. _____ (2013).

principles at the heart of the American constitutional project. [See Table 1 for a presentation of a typology of theories of judicial review with prudentialism included].

Table 1

Theory of Judicial Review	**Constitutional Theory**	**Supreme Judicial Virtue**
Majoritarianism	Popular Sovereignty	Restraint
Originalism	Rule of Law	Fidelity
Perfectionism	Higher Law	Justice
Prudentialism	Constitutional Pluralism	Prudence

In Pieper's commentary on Aquinas, he argues there are two crucial dimensions of prudence: cognition and judgment. If what I said in the preceding paragraph is true, then the cognitive dimension of judicial prudence in hard constitutional cases requires us to recognize constitutional complexity and resist the temptation to choose the easy answers of majoritarians, originalists, and perfectionists. In the face of this complexity, though, the judge still must decide. This is where the second dimension of prudence – judgment – becomes central. Notice that I am not saying concerns about democracy, the rule of law, and justice should be left out of our consideration. Indeed, I am arguing just the opposite. The prudent judge should feel an obligation to respect all of these values in hard constitutional cases. As such, the virtues of restraint, fidelity, and justice are all competing for control of his soul in the process of deliberation. What is needed, though, is judgment in order to determine which value and virtue (or combination of values and virtues) is most appropriate for the case before him. Prudence, to paraphrase Pieper, "is not concerned directly with…ultimate…ends," but with the proper "means to these ends."[61] Judicial prudence will not help the judge decide which ultimate constitutional end is superior in all cases at all times, but it is what is needed as he attempts to determine which end ought to be served (and in what way) in the particular case before him. Prudence, in the words of philosopher Andre Comte-Sponville, "governs" the other virtues; it "determines which of them are apt" in particular situations.[62] The prudent Supreme Court justice in the Proposition 8 case would feel the pull of restraint, fidelity, *and* justice because he would recognize the legitimacy of the demands of

[61] Josef Pieper, *The Four Cardinal Virtues*, 11.
[62] Andre Comte-Sponville, *A Small Treatise on the Great Virtues* (New York: Picador, 1996), 32.

democracy, the rule of law, *and* higher law. In the end, he would have to exercise judgment about which virtue or virtues would allow him to best promote the ultimate ends of our Constitution in this particular case. This process cannot, in the famous words of John Marshall Harlan's dissent in *Poe v. Ullman*, be "reduced to any formula;" balances must be struck and judgments must be made.[63]

It is worth pointing out that I am concerning myself here with constitutional theory, which is just one level of analysis that must be part of a comprehensive theory of judicial review. Once judges have taken the cognitive step of appreciating the complexity of the American constitutional order, good judgment will depend, at least in part, on the judge's sense of her institutional role within this order. In other words, even a prudential judge who recognizes the complexity of the commitments at the core of American constitutionalism might still decide that the institutional design of the system requires her to give more weight to certain values in hard cases. More specifically, a strong argument can be made – without denying the importance of popular sovereignty in the American order – that the relative insulation of judges from popular pressure provides them with the institutional protection necessary to give more weight to the rule of law and justice than to democracy in hard cases.[64]

One may object at this point that the prudential approach invites too much judicial discretion in deciding hard constitutional cases. After all, does not the acknowledgement that democracy, the rule of law, and the higher law of moral principle are all at the core of American constitutionalism invite the conclusion that a judge has substantial flexibility to reach his or her desired outcomes? The short answer to this question is yes, but this should not be considered a mark against prudentialism. Indeed, judges already have this flexibility, but prudentialism asks them to admit it rather than hiding behind the false certainties of other judicial philosophies.

This flexibility should not lead us to conclude, though, that prudentialism should be equated with judicial pragmatism. While there may be some areas of agreement between prudentialism and pragmatism, I believe there are significant differences as well. Like prudentialism, pragmatism is often rooted in the recognition that the beginning of constitutional wisdom is acknowledging what one cannot know and recognizing the reality of constitutional contradiction. In the words of the pragmatist judge and scholar Richard Posner, "On a pragmatist view, our ideas, principles, practices and institutions simply are tools for navigating a social and political world that is shot through with indeterminacy." In the realm of constitutional understanding, pragmatists see that the

[63] *Poe v. Ullman*, 367 U.S. 497 (1961).

[64] For some discussion of this kind of argument, see e.g., Rebecca Brown, "Accountability, Liberty, and the Constitution," 98 *Columbia Law Review* 531, (1998).

"Constitution is full of contradictions and ambiguities [and] sources of endless contestation."[65]

With these areas of agreement in mind, I must also acknowledge areas of difference. First, for at least some pragmatists, the "quest for constitutional foundations" is misguided and judges should feel no strong obligation to be faithful to these indeterminate foundations.[66] I do not think the "quest for constitutional foundations" is "misguided." To say that the Constitution's foundations are pluralist is *not* to say that the Constitution lacks foundations at all. Instead, I believe that majoritarians, originalists, and perfectionists have erred in their contentions that this quest leads to a simple commitment to democracy, the rule of law, *or* higher law. The complexity of constitutional foundations is not, in my view, cause to dismiss them and the judicial virtues they encourage. Instead, I believe judges should feel obliged to respect these foundations, tangled though they may be.

Second, I view many forms of pragmatism as versions of perfectionism. Instead of proposing that judges be guided by abstract moral principles, pragmatists suggest judges be guided by, in the words of judicial pragmatist Richard Posner, "the best results for the future."[67] In *Problematics of Moral and Legal Theory*, Posner described *his* conception of judicial "prudence" as "interest balancing" when deciding a particular case.[68] In more recent work, Posner has declared that "pragmatic adjudication" has "at its core" a "heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than conceptualisms or generality."[69] In an important sense, the pragmatist's conception of prudence is uprooted from the sorts of constitutional foundations I have discussed in this essay.

I admit there may be something less than satisfying about this call for judicial prudentialism. While majoritarianism, originalism, and perfectionism seem to provide fairly clear directives to judges, the prudential approach asks judges to accept that the task of constitutional interpretation in hard cases is complex. While it is certainly true that my account provides a more nuanced approach to judicial review in hard cases, I do not think this is cause for dismissing it. If I am right to say that the American constitutional tradition contains within it commitments to democracy, the rule of law, and the "higher law" of moral principle, then the approach I recommend is more faithful to the spirit of that tradition. As noted above, Josef Pieper has written, "The prudent

[65] Richard Posner, *How Judges Think* (Cambridge: Harvard University Press, 2009), 231, 251.
[66] Suzanna Sherry and Daniel Farber, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago: University of Chicago Press, 2002).
[67] Richard Posner, *Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 2002), 241.
[68] Richard Posner, *Law and Literature* (Cambridge: Harvard University Press, 2009), 129.
[69] Posner, *How Judges Think*, 238.

man does not expect certainty where it cannot exist, nor…does he deceive himself by false certainties."[70] These wise words capture the essence of my message in this essay: a prudent judge should not expect certainty when interpreting a document as complex as the American Constitution, nor should he deceive himself with the false certainties of an overly-simplistic theory of judicial review.

[70] Josef Pieper, *The Four Cardinal Virtues,* 19.