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# Constitutional Design and the Point of Constitutional Law

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**Abstract:** This essay offers an account of the diverse range of rich insights Professor Finnis's work offers for several perennial questions of constitutional theory: such as what valuable moral ends constitutional law serves, how best to approach the design of constitutional arrangements and institutions, and how to best approach constitutional interpretation. I proceed in four parts. The first two parts begin by looking at Finnis's treatment of the purpose of law as a social practice and then, more specifically, the point or purpose of channeling political power through constitutional law. Having outlined the point or purpose of constitutional law and constitutional institutions, I then probe what Finnis has to say about questions of constitutional design. Finally, I give an account of how Finnis's work approaches constitutional interpretation.

**Keywords:** John Finnis, Constitutional Design, Constitutional Interpretation, Natural Law

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Several trends emerge from my study of Finnis's constitutional thought. When it comes to questions of institutional design, Finnis clearly considers certain forms of constitutional ordering—centered around a mixed or balanced constitution—to be particularly prudent and conducive to securing the common good of a

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polity. Finnis also appears particularly wary of what he regards as an imprudent trend in contemporary constitutional systems of permitting apex judicial bodies to approach their adjudicative functions in a way that transforms them into de facto lawmakers, empowered to make rules governing future treatment of some of a community's most sensitive moral-political questions.

When it comes to how officials should act in the course of constitutional adjudication and interpretation, Finnis is committed to at least two propositions that cabin the reasonableness and prudence of their actions. One is that a capacious "living instrument" approach to interpretation—that allows judges to functionally displace the principles posited in constitutional text—risks undermining law's critical coordinating and settlement function and shows disrespect for the choices made by legitimate authority expressed through the propositions they decided to enact into law. For Finnis, officials also cannot *reasonably* aim to be exclusively concerned with socio-historical facts when engaged in interpretation. For Finnis, such an approach is unreasonable because it involves the deliberate neglect of true moral principles that are always reasonable to consider part of our law and a necessary feature of resolving hard cases in a morally sound way.

## I. On Law's Point

One of Finnis's greatest contributions to legal theory was his powerful argument for the impossibility of offering a "neutral descriptive" account of law and legal practice. Finnis famously argued that one only truly understands the nature of a social phenomenon like law after grappling with its moral point and purpose, and that:

> [N]o theorist can give a theoretical description and analysis of social facts without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.[1]

If a theorist seeks to move beyond assembling a series of lexicographies about how a particular community and its members discuss or use the word "law" or "legal system," and to say anything *general* about it as a social phenomenon,[2] they will have to reckon with its moral purpose and point as a distinct kind of social practice. In doing so, the theorist will put themselves in a better position to be able to pick out a focal sense or central case of law as a social phenomenon, which is to say the richest account of that phenomenon they can offer—one able to accommodate the good and intelligible reasons people have for engaging in that practice and sustaining it.[3] As Pojanowski puts it, to make:

> sense of the welter of human practices that march under the banner of law, the framework holds, one has to identify how human law should truly serve the common good—and therefore the underlying human goods that provide the basis for any sound conception of the common good.[4]

[1] John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011), 3.
[2] Ibid., 4.
[3] Ibid., 14.
[4] Jeff Pojanowski, "Re-evaluating Legal Theory," *Yale Law Journal* 130 (2021): 1461.

Such engagement not only helps the theorist see the good reasons for people to make the kinds of choices that constitute and sustain a practice like law, but also give insight to the unsound reasons that generate defective or distorted instances of the practice. One can, for instance, pick a social practice like friendship, medicine, or argument, and identify a central case of what each practice is by attending to the good reasons *why* we have the practices and bring them into being, but nonetheless still intelligibly refer to phenomena like "quack medicine" or "half-baked argument." Similarly, the "bad" versions of law and legal systems are those which resemble the practice, but which are not true instantiations of the practice when measured against the good reasons why a complex practice like law is a reasonable response to human needs and goods.

Finnis convincingly argues that the classical natural law tradition works from the premise that the good and intelligible reasons officials and citizens have for establishing and upholding a system of authoritative rules and ordinances coordinating action, are tightly linked to the promotion of certain goods constitutive of human flourishing and ultimately the common good of a polity. These are the type of reasons and internal viewpoints adopted by morally reasonable citizens and officials in a political community, which can help bring legal systems and Constitutions into being, and then sustain them as social practices and institutions for regulating communal life over time. For the evil man, in stark contrast, securing their aims by resort to extralegal methods like sheer terror, or half-hearted dedication to law with liberal doses of extralegal violence, may be much more efficacious than establishing and genuinely adhering to a legal system of authoritative rules and ordinances.[5]

To count as law in this focal sense then, the posited law of the legitimate public authority—its rules and stipulations—must rationally conduce to the good of the community for which the lawmaker has a duty and privilege of care.[6] As Aquinas famously framed it in his *Treatise on Law*, law simpliciter is an ordinance of reason promulgated by political authorities for the common good.[7] And as a dishonest friend is no true friend, quack medicine is not real medicine, and illogical ramblings are not real arguments, so too an unjust law misfiring in this regard is not a *law* in its richest sense, but a diluted impoverished example such that, while it may be called law and enforced by law courts and officials, it is more akin to bare force.[8]

To be more concrete, Finnis thinks posited law serves to promote human flourishing and the common good in several interlocking ways.[9] First, posited law

[5] Finnis, *Natural Law and Natural Rights*, 273-4.

[6] Ibid., 276-7.

[7] Thomas Aquinas, *Summa Theologiae*, Ia-IIae, q. 90, art. 4, *Great Books of the Western World: Volume* 18, ed. Mortimer J. Adler (Chicago: Encyclopedia Britannica, 1990).

[8] Ibid.

[9] How precisely Finnis understands the common good seems to have evolved slightly over time, hovering in between an instrumental and distinctive conception. The instrumental view regards the common good as creating the sum of conditions where individuals and families and associations can truly flourish and pursue the good life. The distinctive or transcendent conception regards the common good as a good of unity, justice, and peace that is distinct from any singular individual's good yet at the same time not alien to an individual's good, but indeed his highest

is required to make more concrete the open-ended requirements of the natural law. Following Aquinas, Finnis notes how natural law becomes posited in human law in two ways. The first way is that some precepts of the natural law can be concretized in positive law via a straightforward deductive process. For example, the preservation of life is an aspect of human good and principle of the natural law. This yields the conclusive precept against the intentional taking of innocent life that is easily posited through laws prohibiting homicide and providing for self-defense.

But Finnis notes that in the classical tradition there has always been recognition that concretization of the principles of natural law—respect for the goods constitutive of human flourishing—is typically much less simple than this, as natural law's first precepts are broad and vague.[10] Respect for natural law principles and the political common good may demand creation of law-making, applying, and adjudicating bodies to issue ordinances and repeal law in response to good reasons and to fairly resolve disputes based on pre-existing law; organizing a just economy able to provide the necessities of life; respect and support for subsidiary units like the family; the prudent promotion of virtue; and ensuring peaceful relations with other nations. But the fact is there will be countless ways to proceed along all these fronts consistent with the natural law and common good, neither of which pinpoint a specific approach to any of these issues.

As Professor Ekins frames it, while the "reason and action" of political authority is at all times cabined and framed by "general moral truths" of the natural law, its duty is very often to specify these truths by "choosing in what specific forms they shall be given effect in the law" of this or that community and its particular context.[11] This is where the concept of *determinatio,* or determination, comes into the picture and why it is so important to the classical legal tradition. Determinatio is the process of giving content to a general principle drawn from a higher source of law, making it concrete in prudential application to local circumstances or problems. The need for determination arises when principles of justice are general and thus do not specifically dictate legal rules or when those principles seem to conflict and must be mutually accommodated or balanced. Such general principles must be given further determinate content by positive civil lawmaking intelligently confined, directed, and guided—but not dictated—by reason.[12] There are typically multiple ways to make concrete determinations in posited law which instantiate, respect, reconcile or trade off general principles of the natural

good. In *Natural Law and Natural Rights* Finnis seems to endorse the former position. But Professor Finnis has appeared to refine his position on the nature of the common good since its publication. More recently, he has suggested that the common good of a political community participates in the good of friendship and is, as such, an "intrinsically valuable" and not merely instrumentally good pursuit. See John Finnis, "Reflections and Responses," in *Reason, Morality, And Law: The Philosophy Of John Finnis*, ed. John Keown & Robert P. George (Oxford: Oxford University Press, 2013), 510-5.

[10] Aquinas, *Summa Theologiae*, Ia-IIae, q. 90, art. 4.

[11] Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), 130-1.

[12] See John Finnis, "Critical Legal Studies," in *Philosophy of Law: Collected Essays Volume IV* (Oxford: University Press, 2011), 301.

law while remaining within the boundaries of the basic charge to act to promote the common good—the basis of public authority.

As Finnis puts it: "The kind of rational connection that holds even where the architect has wide freedom to choose amongst indefinitely many alternatives is called by Aquinas a *determinatio* of principle(s)—a kind of concretization of the general, a particularization yoking the rational necessity of the principle with a freedom (of the law-maker) to choose between alternative concretizations, a freedom which includes even elements of (in a benign sense) arbitrariness."[13]

The natural law can be conceived as offering a skeleton law to communities which determines what posited arrangements are just and right, but to enjoy concrete existence it requires the sinew, flesh, and muscle provided by positive law enacted through human creativity and discretion, a fact long recognized by the classical natural law tradition.[14]

The second reason posited law is critical is that it provides authoritative direction to a community in its pursuit of the good. Unanimity on how to pursue the common good is impossible in a society of any complexity, and so political authority is required. Making concrete the open-ended demands of human flourishing in a community in the here and now—demands of peace, justice, and abundance—requires the co-ordination and ordering of persons, families, and associations. This ordering ensures these conditions are pursued prudently, efficaciously, and harmoniously, and not in a chaotic, disordered manner. Posited law promulgated by political authority with capacity to ensure co-ordination is effective and prudently done, is critical for our communal good.[15] Professor Endicott notes that it is the "systematic and authoritative aspects of law [that] secure regulation in the distinctively transparent, stable, prospective, and reflexive fashion that distinguishes the rule of law from military rule, and from gangsterism, and from other forms of arbitrary rule"[16]—that is, from forms of rule that do not conduce to the common good. As a web of authoritative rules and norms that presents itself as seamless, law offers the prospect of "combining speed with clarity in generating practical solutions to constantly emerging and changing coordination problems."[17]

Finally, and contrary to some contemporary views of the proper ambit of law and public authority, in the classical tradition legal ordinances are emphatically regarded as having a critical pedagogical function. Posited laws can and do encourage citizens subject to the law to form certain desires and habits, and eventually *beliefs*. For the classical lawyer, laws should be used to prompt citizens to act in a way, and eventually form beliefs, that better track and promote genuine well-being.[18] A healthy constitutional order cannot be sustained "in the long term" if

[13] John Finnis, "Natural Law Theories," Stanford Encyclopedia of Philosophy (June 3, 2020), https://plato.stanford.edu/entries/natural-law-theories [https://perma.cc/KG3R-SNBX].

[14] Lee J. Strang, *Originalism's Promise: A Natural Law Account of the American Constitution* (Cambridge: Cambridge University Press, 2019), 266-7.

[15] John Finnis, "Law's Authority and the Social Theory's Predicament", *Philosophy of Law*, 61-5.

[16] Timothy Endicott, "The Irony of Law," in Keown and George, *Reason, Morality, And* Law, 337.

[17] Finnis, "Law's Authority and the Social Theory's Predicament," 64.

[18] See Aquinas, *Summa Theologiae*, I-II, q. 95, art. 1.

a political authority is not able to promote civic virtue, but "depends upon" precisely this capacity.[19] This is an important but subsidiary role complementary to the primary role played by the family, churches, civic associations, and local communities.[20] It is also a role that must be handled prudently, and with awareness that sometimes toleration of social vices is the most sensible course of action to avoid greater harm to peace and order. Aquinas himself noted, people are best brought to virtue through the rough engine of posited law "gradually" not "suddenly."[21]

## II. Constitutional Law's Point

Decisions concerning constitutional law implicate some of the most significant determinations a community can make; given that this domain involves the positing, amending, and interpretation of the fundamental rules, principles, and norms that aim to generate, sustain, and channel political authority and public power.[22]

For Finnis, the most basic principle of constitutional order is that those with the sheer capacity to ensure coordination—of persons, families, and associations for the common good—have presumptive authority.[23] Another first priority for the practically reasonable community and its citizens, as Ekins notes, is that the "location of authority should then itself be settled by authority"[24] through constitutional rules that address fundamental co-ordination problems around determining who may legitimately exercise authority.[25] In the classical tradition, the charge to secure the common good means that legitimate political authorities enjoy inherent authority to "impose restrictions on private conduct and holdings, for the sake of the public goods of justice, order, peace, security, and welfare."[26] In exercising this authority, government is always and everywhere limited by the directive force of the basic norms of the natural law and by the need to act consistently with the ultimate purpose of legitimate political authority: upholding the common good.[27] These are "limits, side-constraints, recognized in the conscientious deliberations of every decent person" and official.[28]

[19] John Finnis, "Virtue and the Constitution," *Human Rights and the Common Good: Collected Essays Volume III* (Oxford: Oxford University Press, 2011), 113.
[20] See Mary M. Keys, *Aquinas, Aristotle, and the Promise of the Common Good* (Cambridge: Cambridge University Press, 2006), 80-2.
[21] Aquinas, *Summa Theologiae*, I-II, q. 96, art 3.
[22] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 11-2. Loughlin correctly notes how public law and constitutionalism are profoundly power-generating practices and cannot myopically be regarded as only acting as a fetter on political power.
[23] Finnis *Natural Law and Natural Rights*, 246-7.
[24] Richard Ekins, "How to be a Free People," *The American Journal of Jurisprudence* 58 (2013): 172-3.
[25] Finnis *Natural Law and Natural Rights*, 249-50.
[26] Finnis "Virtue and Constitution," 113.
[27] John Finnis, "Is Natural Law Theory Compatible with Limited Government?," in *Natural Law, Liberalism, and Morality*, ed. Robert P. George (Oxford: Oxford University Press 1996), 1-26.
[28] John Finnis, "Liberalism and Natural Law Theory," *Mercer Law Review* 45 (1994): 690.

But some Constitutions, in addition to confirming and authoritatively settling the location of authority, also try to consciously limit and channel that authority via posited law or unwritten principles considered fundamental. In other words, they embrace what Finnis, following Aquinas before him, dubs "political" government. In "regal" or kingly forms of government, rulers have plenary authority that remains subject to the natural law and the directive force of posited law; but there is "no-one who has the legal authority to coerce them."[29] In contrast, in "political" regimes the authority of rulers is further "limited … in accordance with certain laws of the polity" made with the assent of the realm[30] which ensure they "govern in accordance with the laws concerning the establishment of their office, their appointment and their responsibilities."[31]

Far more common today is the latter type of regime, which, as Ekins highlights, tends to have a "wider set of constitutional rules and principles, legal and conventional," marking out ways in which public power should "lawfully and/or constitutionally be exercised."[32] Constitutional arrangements frame how governing institutions that exercise authority act, and encompass rules which concern the structure of government which divide up "authority and jurisdiction amongst separate office holders,"[33] the specification of fundamental principles of *ius* and aspects of human flourishing in a bill of rights,[34] and the positing of rules which settle the way existing constitutional rules are themselves amended and replaced. Each of these kinds of constitutional rules help inform the exercise of political authority either directly, by bearing on how officials must act, or indirectly, by "forming a set of norms about how other officials (soldiers, tax collectors) should act" and which norms the legislature "ought to consider in exercising its authority to change the law."[35]

As with law more generally, a focal case of a constitution comprised of these kinds of rules and principles will involve channeling and enabling state power in a manner responsive to the good moral reasons we have for wanting authoritative political institutions. To paraphrase Professor Barber, the principles of constitutionalism should be "directed towards ensuring that the state possesses an institutional structure that has the capacity to effectively advance" the common good.[36]

In other words, practically reasonable citizens and officials will strive to create and sustain a set of constitutional rules and principles, legal and conventional,

[29] Finnis, *Natural Law and Natural Rights*, 259. For extensive treatment of this distinction see Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: University Press, 1997), Chapter IV.
[30] John Finnis, "Reflections and Responses," 560.
[31] John Finnis, *"Aquinas' Moral, Political, and Legal Philosophy"* (March 16, 2021) Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/aquinas-moral-political/.
[32] Richard Ekins, "How to be a Free People," 173.
[33] Finnis, *Natural Law and Natural Rights*, 352.
[34] John Finnis, "Human Rights and Their Enforcement," in *Human Rights and the Common Good*, 28.
[35] Ekins, "How to be a Free People," 53.
[36] N.W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018), 12. Professor Barber himself uses the phrase "the well-being of its members" to conclude the sentence paraphrased.

that "form the plan on which the people jointly act"[37] with an eye to empowering and disciplining legal and political authorities for the common good of that polity, and not a more myopic (say, to protect negative liberty) or partisan aim. A constitution and its constitutive rules, principles, and conventions should ultimately arrange institutions in such a way that they are apt to ensure the community is governed well[38] and suited to the pursuit of the wide-ranging and complex conditions required for human flourishing.

## III. Constitutional Design and the Powers of Government

### A. General Principles of Constitutional Design

A political community which decides to adopt these kinds of constitutional rules and provisions, those which empower and channel political authority for the common good, faces a truly bewildering array of choice. Determination of a large-C Constitution and determination *within* the constitutional order both involve an immense degree of creative choice that is cabined, but not dictated by, reason and an orientation to the common good. As noted above, the concept of *determinatio* is critical to the classical legal tradition, and this includes determination at the level of institutional design, indeed the specification of the whole constitutional order and its rules and principles.

The common good in its capacity as the fundamental end of government shapes and constrains, but does not fully determine, the nature of institutions and the allocation of lawmaking authority between and among them in any given polity, or the presence and absence of something like a bill of rights. But aside from the loose constraints imposed by this conceptual frame, in the classical tradition design of institutions and allocation of authority between and among them in any given polity will be within a wide scope of reasonable determination. A range of regime types can be ordered to the common good, or not.[39] If they are, then they are just, and if they are not, they are tyrannical, but their justice is not defined by or inherent in any set of institutional forms.[40] Thus, parliamentary, semi-presidential, and presidential systems, monarchies, and republics—all these and more can in principle be ordered to the common good. Likewise, the common good does not, by itself, entail any particular scheme of (for example) judicial review of constitutional questions.[41] All of which is to say, as Finnis notes,

[37] Ekins, "How to be a Free People," 174.

[38] Richard Ekins, "The Balance of the Constitution," *The American Journal of Jurisprudence* (Forthcoming 2022).

[39] A well-worn example of a total misfiring of a constitutional order being Nazi Germany and its emphasis on "unrestricted domination of the people by the Executive" to secure a political order united by racist national homogeneity. Finnis, "Reflections and Responses," 562.

[40] See Richard Ekins, "The State and Its People," *American Journal of Jurisprudence* 66 (2021): 49-67; Ekins, *The Nature of Legislative Intent*, 143-4.

[41] For an excellent overview of that many-faceted debate, see generally Aileen Kavanagh, "Recasting the Political Constitution: From Rivals to Relationships," *King's Law Journal* 30 (2019): 43-73.

that different forms of constitutional arrangements will simply suit different social circumstances.[42]

But as Finnis makes clear, there remain broad but nonetheless important limitations on the reasonableness of determinations concerning constitutional design and structure. Constitutional regulators[43] should not proceed myopically in designing or amending constitutional arrangements but should be conscious of the demanding needs of the common good and the conditions conducive to human flourishing that political authorities are charged with pursuing. Reasonable use of constitutional laws and rules to arrange and channel public power will, therefore, be partly oriented to imposing constraints to ensure that "abuse of legal and de facto powers is kept to tolerable levels"[44] and that rulers "will not direct the exercise of their authority towards private or partisan objectives"[45]—the classical definition of tyranny.[46]

Constitutionally bounded government also involves a valuable commitment to holding rulers to "their side of a relationship of reciprocity" where their claims to authority are respected on condition they act consistently with the common good, part of which will involve adhering to the ordinances of reason the community has posited to secure it.[47] Vermeule has recently pointed out that the argument constitutional law can be a potent means to restrain the abuse of public power is perhaps the "main thought"[48] of liberal constitutionalism, but Finnis reminds us that it pre-dates this tradition and has long been an important feature of classical thought.

Curbing the risk of abuse of public power should thus be an important consideration for constitutional designers. But it is, critically, far from the only relevant consideration when it comes to the sound design of governing institutions. Indeed, a focal case of a well-ordered constitutional order will be designed with recognition of the fact government being "limited" by constitutional rules and principles is "only to a limited extent a desirable characteristic."[49] This is because the classical natural law tradition adopts the premise that a government limited in its ability to tackle non-state abuses of social and economic power, and exploitation of the weak and vulnerable, poses its own serious risks to the common good. As Finnis puts it pithily, we must never forget the fact that "bad and powerful people and groups want government limited so that they can bully and

[42] Finnis, *Natural Law and Natural Rights*, 252.

[43] By this I adopt Vermeule's definition of any actors "who make constitutional rules, whether at the stage of constitutional design or at the stage of constitutional 'interpretation' and implementation." Adrian Vermeule, *The Constitution of Risk* (Cambridge: Cambridge University Press, 2017), 5.

[44] John Finnis "The Nature of Law," in *The Cambridge Companion to: The Philosophy of Law*, ed. John Tasioulas (Cambridge: Cambridge University Press, 2020), 57.

[45] Finnis, *Natural Law and Natural Rights*, 249.

[46] Finnis, "Liberalism and Natural Law Theory," 688-689.

[47] Finnis, *Natural Law and Natural Rights*, 272-273.

[48] Adrian Vermeule, "*The Publius Paradox,*" *Modern Law Review* 72 (2019): 10.

[49] John Finnis, "Limited Government" in *Human Rights & Common Good*, 83-106. See also John Finnis, "Reflections and Responses," 517, where Finnis suggests that a refusal to enforce public morality—via regulating individual or inter-personal choices that genuinely harm the common good—risks "grave and irreversible" "bad consequences" to the polity and its members.

exploit the weak, or simply enjoy their wealth untroubled by care for others."[50] Constitutional arrangements that place their sole or even primary emphasis on curbing government power in order to protect individual autonomy or interests, and which in doing so hamstrings the political authority's ability to affirmatively protect the common good must therefore be regarded, in an important sense, a defective instance of the practice.[51]

Consistent with the classical tradition, Finnis says there is "no grand balance sheet"[52] that can be tallied up, in the abstract, to argue for the unique justness of certain kinds of constitutional arrangement. For example, the common good does not have much to say about matters like the *precise* parameters of judicial or legislative authority, whether to have a justiciable bill of rights or not, or whether to have a directly or indirectly appointed executive. That said, by considering his spirited defense of what Ekins calls the United Kingdom's "mixed constitution and its constitutional balance,"[53] fruitful insights *can* be gained into what kind of arrangements Finnis regards as particularly prudent, and which he clearly thinks can serve as basic rules of thumb or useful conceptual heuristics for structuring a sound constitutional order.

For Finnis, a "fine" mixed or balanced constitution include a division of powers and responsibilities along the following lines:[54] a robust executive enjoying the capacity to govern and direct the polity toward the common good and respond decisively to the contingencies and dangers of governing, but legally constrained in its ability to change the law or adjudicate cases; a democratically responsible legislature that is well-equipped and structured to deliberate and decide whether and how to change the law to alter citizens' rights, duties, and obligations for good reasons and which can hold the executive accountable for its decisions; and an independent judicial branch competently able to apply the law of the community to resolve legal disputes in a way that is faithful to both its prior settlements and determinations as well as to basic moral principles *ipso jure* part of the law.[55]

The classical tradition, as noted, is emphatic that a range of regime types can be ordered to the common good. As such, Professor Vermeule is correct to note that common contemporary arrangements like mass-electoral representative democracy have no "special privilege" when it comes to assessing a regime's conduciveness to the common good.[56] While Finnis also assents to this principled starting point, he

[50] Ibid.

[51] Ekins notes that "any reasonable constitution will have to preserve considerable freedom for legislators to reason and choose over time." Richard Ekins, "Intentions and Reflections: The Nature of Legislative Intent Revisited," *The American Journal of Jurisprudence* 64 (2019): 146.

[52] Finnis, "Human Rights and Their Enforcement," 44.

[53] Ekins, "Balance of the Constitution." Finnis's endorsement of mixed or balanced constitutional arrangements echoes Aquinas's contention that the best constitution is "well mixed," with a combination of "monarchy," "aristocracy" and "democracy," that is, the rule of *one* person (whose "monarchy" is probably better elective rather than hereditary), governing in concert with a *few* high officials chosen for their excellence of character and aptitude, by an electorate comprising the *many*." Finnis, "Aquinas' Moral, Political, and Legal Philosophy."

[54] Finnis, "Reflections and Responses," 563.

[55] Finnis, "Aquinas' Moral, Political, and Legal Philosophy."

[56] Adrian Vermeule, *Common Good Constitutionalism* (Cambridge: Polity, 2022), 47. Finnis, *Natural Law and Natural Rights*, 252. As Ekins points out, sharing authority more widely through democratic mechanisms may simply not conduce to the common good where it "would, in some

argues that a regime with elements of democratic rule should nonetheless be thought of as particularly prudent to adopt because of their likelihood of helping to support a flourishing polity. Following Aquinas, he argues that a polity enjoying democratic elements can be thought of as a "necessary condition for its being ordered in the best way."[57]

By allowing citizens to seek election, to elect others, or to vote in plebiscites, a mixed government with democratic elements facilitates the governed sharing in the task of governing and in shaping how public power is exercised.[58] These democratic elements can help foster the common good in several ways. It can promote peace, stability, and legitimacy by joining the people in government and ensuring the different views and sentiments across a community are aired and inform the rulers work, extending to all a share in the duty to decide what is to be done for the common good.[59] For Aquinas, a constitution where "all . . . take some share in the government" ensures "peace among the people, commends itself to all, and is most enduring."[60]

Moreover, a constitution with democratic elements unites ruled and rulers in a shared plan of governing for the common good, allowing authority to be deployed effectively (which is impossible with direct democracy or if unanimity is required for action)[61] but also subjecting its exercise to check through giving citizens some say, whether in the appointment of the ruler, or over the content of the rules they ought to adopt. Finally, where the many have some say in governing, it may also act as a useful means for staving off a ruler "going rogue" and sliding into tyrannical rule for personal or partisan benefit.[62]

## B. Executive Power

The starting point Finnis adopts for assessing the proper place of the executive branch in a constitutional order is not to assume there is "something generally wrong with constitutional executive power."[63] This would be to view the executive branch as a kind of necessary institutional evil that should be tolerated while being cabined and structured as much as possible with a view to curbing the risk it will abuse its powers.[64] Instead, Finnis appreciates what he refers to as the common good's "standing need" for a robust, efficient, and unified executive that is

particular social conditions, destabilize government, degrade lawmaking, encourage corruption and/ or distract the government from acting for the common good." Ekins, "The State and Its People," 57.

[57] John Finnis, "Just Votes for Unjust Laws," in *Philosophy of Law*, 436-66; John Finnis, "Reflections and Responses," 563.

[58] Ekins, "The State and Its People," 56.

[59] Ekins, *Legislative Intent*, 159.

[60] Aquinas, *Summa Theologiae*, I-II, Q. 104, a.1.

[61] See Yves Simon, "A General Theory of Authority," *The Philosopher's Calling: An Yves Simon Reader*, ed. Michael D. Torre (Notre Dame, IN: University of Notre Dame Press, 2021), 349-351.

[62] Thomas Aquinas, *De Regno*, in *Aquinas: Political Writings*, ed. R.W. Dyson (Cambridge: Cambridge University Press, 2002), 18.

[63] Timothy Endicott, *The Stubborn Stain Theory of Executive Power*, Judicial Power Project (London: Policy Exchange, 2017), 22.

[64] Vermeule, *The Constitution of Risk*, 11-4. As Köpcke pithily puts it, institutions of public power like the executive are "not like an earthquake or storm, whose effects we can only seek to

responsible for governing day and night 365 days a year.[65] Finnis here echoes the classical tradition's recognition of the necessity and value of the institutional traits often associated with the executive—its ability to deploy state power with "co-ordination" and "unity" which promote "effectiveness in the pursuit of the common good."[66] These are the kind of traits famously outlined in Alexander Hamilton's argument in the *Federalist Papers*, where he argued the core features of a well-functioning executive branch included an ability to act with unity, speed, secrecy, and a capacity to be perpetually active and not hamstrung when acting by elaborate procedural formalities.[67]

There are for Finnis, however, good reasons why the executive should be legally constrained from exercising legislative or judicial power. These kinds of limitations are prudent and a useful determination for curbing the risk power will be abused or simply mishandled. This means that the executive ought not to be able to unilaterally "change the law of the land or, without statutory authority, affect the legal rights of subjects"[68] without assent from the legislature and those whom it represents.[69] It also ensures the judicial power to do justice according to law, by applying the settled commitments of the political community to resolve disputes, remains exercised by independent officials relying on the "artificial reason" of legal argumentation and interpretation, ideally free from public or private pressure or partisan temptation.[70]

But Finnis is also wary of an over-judicialization of apex executive authority that, by subjecting it to an excess of veto points (such as via intensive and wide-ranging judicial review), might dent its ability to successfully handle the "'high politics' involved in . . . governing, at home and abroad" which encompasses the stresses of what he memorably refers to as the "open horizon of responsibility for the wellbeing of all the people of the realm, in the ceaseless flow of unpredictable events" that impact political communities.[71] The executive's powers and the constraints on them must therefore be tailored to respect the fact its main function is to do:

> what is here and now, in the present, required to protect the community's common good so far as that depends on measures which can neither be provided for reasonably by legislation nor await or ever be reasonably submitted to adjudication.[72]

mitigate." Maris Köpcke, "Law and the Limits of Sovereign Power," *The American Journal of Jurisprudence* 66 (2021): 116.

[65] John Finnis, *Judicial Power and the Balance of the Constitution*, Judicial Power Project (London: Policy Exchange, 2018), 141.

[66] Finnis, *Natural Law and Natural Rights*, 252.

[67] Alexander Hamilton, *The Federalist Papers* No.70, ed., Mortimer J. Adler (Chicago: Encyclopedia Britannica 1990).

[68] Finnis, *Judicial Power and the Balance of the Constitution*, 137; See also John Finnis, "Royal Assent—Reply to Mark Elliott," U.K. Constitutional Law Blog (8th Apr. 2019) (available at https://ukconstitutionallaw.org/2019/04/08/john-finnis-royal-assent-a-reply-to-mark-elliott/).

[69] Finnis, *Judicial Power and the Balance of the Constitution*, 46.

[70] Ibid., 59-60.

[71] John Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment*, Judicial Power Project (London: Policy Exchange, 2019), 10.

[72] Finnis, *Judicial Power and the Balance of the Constitution*, 30.

In the round, Finnis appears content that the current configuration of executive power in the UK is a broadly balanced and sound one—suitably empowered and constrained—such that it is apt to fulfil a critical standing need of the common good. To quote Professor Endicott, Finnis's position seems to be that it is "well justified in constitutional principle" to maintain that "the Government should have very roughly the range of executive power that it has now."[73] More precisely, this is an arrangement where the political executive drafts most legislation with the assistance of an impartial civil service equipped with suitable technical expertise; dominates the legislative timetable to advance its agenda; drafts and implements the annual budget with legislative assent; exercises copious delegated statutory power subject to parliamentary scrutiny; exercises sensitive unilateral constitutional/prerogative powers especially in the field of national security and foreign affairs; and more generally, tries to steer the community and assist its subsidiary components to valuable political ends.[74]

## C. Legislative Power

The legislature's responsibility is to make new or amended public commitments about private rights and public powers for the future.[75] The legitimate scope of legislative power is set by reference to its need to respect constitutive aspects of the common good, like basic human rights and the principle of subsidiarity which commands respect for the integrity of part-wholes of the community.[76] But legislative power should not be cabined in a manner that unreasonably hamstrings a legislature's ability to, for example, tackle private abuses of social and economic power, and exploitation of the weak and vulnerable.[77] Nor should legislative power be, as a matter of principle, prevented from encouraging virtue and discouraging vice where necessary to prevent harm to the public good.[78] As already noted, in the classical tradition, using law to perform this function is not regarded as a badge of contempt for the dignity of the individual whose choices may be curtailed if they are circumscribed because contrary to the common good. Instead, in this tradition it manifests a desire on behalf of those charged with protecting the common good to remedy distorted views of human dignity, worth, and flourishing, precisely to respect these values[79] in those persons and others impacted by their actions. Legislative authority being limited should not be thought of as good *of itself*, but good insofar as particular limitations are imposed for reasons intelligibly conducive to the common good and human flourishing.

[73] Endicott, *The Stubborn Stain Theory of Executive Power*, 19.
[74] Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment*, 10.
[75] Finnis, *Judicial Power and the Balance of the Constitution*, 30.
[76] See John Finnis, "Subsidiarity's Roots and History: Some Observations," *The American Journal of Jurisprudence* (2016): 133-141.
[77] Richard Ekins, Maris Köopcke, Bradley Miller, Francisco J. Urbina, Grégoire Webber, Paul Yowell, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018), 115.
[78] Finnis, *Natural Law and Natural Rights*, 459.
[79] John Finnis, "Human Rights and Their Enforcement," in *Human Rights & Common Good*, 38; Finnis, *Natural Law and Natural Rights*, 220-1.

Finnis follows the Aristotelian-Thomist approach of regarding case-driven judicial tribunals as an inappropriate forum for the creation of new laws governing future conduct.[80] Like Aquinas, he argues the focal case of a legislature is a superior forum for this activity, because of distinct institutional advantages it enjoys relative to the judiciary. For a start, "serious"[81] (i.e., focal case) legislatures are generally well structured and internally arranged to carry out the task of making new law for the future. When deliberating on whether to enact a proposal, a well-structured legislature typically enjoys access to the expertise and experience of its specialized committees, the benefit of hearing from relevant figures from civil society, from the executive branch who likely drafted the proposal with the aid of the civil service and its institutional stock of expertise, and the ongoing input of a diverse range of constituents.[82]

The typical structure of the legislative process itself, which moves in stages from broad legislative debate on the goals and principles motivating a bill, to closer scrutiny in committee of the means proposed in the bill to concretely secure said goals, to final debate on the wisdom of enacting the given set of propositions into law, is one which is apt for the task of prudently setting rules to prospectively govern the community.[83] In contrast, the inter-partes, case-driven, and adversarial nature of the judicial process make it "wholly unsuited to be a central process of self-government."[84]

Another reason Finnis argues the task of promulgating ordinances to govern the community—including possible radical or wide-ranging changes to the law—should remain primarily with the legislature, is that making law involves "taking responsibility for the future."[85] Adjudication involves the application of *already existing* law to resolve a legal dispute, and it is to secure independence and impartiality in discharging this function which justifies judges being made "immune from any requirement to answer for their judgments, and from almost any liability for them."[86] But to introduce new law is to make a decision that is ultimately a "personal choice of one kind of future, in preference to all others, for themselves, their fellow legislators, and the people they represent and live among,"[87] and because such a choice has potentially awesome impact on the future of the community and its common good, it is prudent it be made by a body explicitly *responsible* to that community for their actions.

A prominent theme present in Finnis's treatment of legislative power is his rejection of the caricature of legislatures as constitutional actors concerned only with policy and promoting majoritarian preferences. On the depiction Finnis resists, legislatures are portrayed as being generally disinterested in issues like respect for, or promotion of, human rights or moral principles. On this conception,

[80] Aquinas, *Summa Theologiae*, I-II, Q. 95, a.1 ad2.
[81] Finnis, *Judicial Power and the Balance of the Constitution*, 36.
[82] Finnis, *Judicial Power and the Balance of the Constitution*, 38-9.
[83] Ibid.
[84] Ekins, et al., *Legislated Rights*, 113.
[85] Finnis, *Judicial Power and the Balance of the Constitution*, 36.
[86] Ibid.
[87] Ibid., 59.

for example, instead of "reasoning directly about what should be done" for the genuine good of the community, legislators are said to rely on facts like "majority preference as if it were a reason" for justifying action.[88] Finnis argues that this picture is misplaced, and that the well-functioning legislature will rarely make serious appeal to the bare fact that their view commands majority support in the legislature or, give "centrality" to the claim their view happens to be supported by a majority of the populace.[89] Instead, arguments from principle and reason—concerning what state of affairs would be truly good to bring about for persons, families, and the community as a whole—are the very "stuff" of arguments within the (well-functioning) legislature, and precisely what considerations motivate a great run of legislative proposals and legal enactments.[90] This characterization of the work of the well-formed legislature is relevant to the next aspect of Finnis's thought I will consider—his views on the proper ambit of judicial power.

## D. Judicial Power

Grounding the nuances and complexities of Finnis's discussion of judicial power is the basic proposition that the "primary responsibility of courts is to apply the law" in the course of resolving legal disputes.[91] For the reasons sketched above, the classical tradition has long emphasized that legislatures, not judges, should take the lead in the creation of new law. It is legislatures who should take the lead in specifying the means by which a particular community will respect the under-determinate principles of natural law and secure the demanding conditions of the common good. The secondary and related judicial role involves interpretation of a community's already existing law in the course of resolving disputes. These functions, and the role morality which attend them if they are to be done authentically, combine to radically cabin and structure a courts' ability to make far-reaching determinations which functionally make new law.[92]

This does not mean judges do not, in an important sense, develop the law—they surely do[93]—and Finnis accepts that the criteria for fixing the line between inappropriate judicial law-making on the one hand, and benign judicial development of the law on the other, can be "subtle and elusive."[94] But Finnis argues that a basic rule of thumb for assessing which side of this line a judicial decision falls, is to remember what has long been considered *the* special judicial responsibility: to faithfully interpret and apply the community's existing law.[95] That means that when judges do depart from a prior case or announce a new rule, it should be because such decisions are best regarded as so "out of line with principles, policies, and standards acknowledged in comparable parts of a community's law" that they ought to be declared mistaken and set aside for a new rule. And

[88] Ekins, et al., *Legislated Rights*, 89.
[89] Finnis, "Human Rights and Their Enforcement," 26.
[90] Ibid.
[91] John Finnis, "A Grand Tour of Legal Theory," in *Philosophy of Law*, 127-9.
[92] Ibid.
[93] Ibid.
[94] Finnis, *Judicial Power and the Balance of the Constitution*, 31.
[95] Finnis, "A Grand Tour of Legal Theory," 127-9.

this new rule, though new in "relation to the subject-matter and area of law directly in issue between the parties" is nevertheless critically "not a novelty or act of legislation,"[96] based on what the court thinks would be a good rule for the community to adopt all-things-considered, but rather is an authentic attempt to offer a determination that fits the existing law in a morally sound way.[97]

What does Finnis make of the now ubiquitous role the judiciary play (in Western legal systems at least) of enforcing constitutional rules or principles against the executive and legislature? Finnis's argument about the need for executive power to be legally bounded by an inability to exercise legislative or judicial power, indicates some comfort with the traditional ambit of judicial review in the UK for assessing the vires of executive and administrative action. Clearly more contestable for Finnis is the proper ambit of judicial review of legislation. Or, in a formulation typical in many constitutional systems, allowing a superior court to assess "whether existing laws measure up to the 'inspirational' terms of a novel constitutional instrument"[98] and possibly declare legislation incompatible or invalid due to perceived conflict with such terms.

Finnis's concerns are not grounded on an "overall balance sheet" that matches the frequency with which Courts or legislatures in this or that country tend to make substantively bad and harmful decisions. For Finnis, it is an absurd endeavor to seek to identify "possible worlds with and without judicial review of legislation as better and worse states of affairs all things considered."[99] Indeed, if one tried, he suggests we would very likely find that for every "unjust or malign and ill- reasoned decision" attributable to a court, we will be able to match it with an unjust or ill-thought-out executive decree or legislative ordinance.

Finnis's position instead is that it is a reasonable "constitutional assumption" to maintain that judges and legislatures are suited to discharging different responsibilities for the common good, because of the institutional capacities well-functioning examples of these offices tend to have.[100] When grasping what these respective capacities are, Finnis is careful to stress that we must not proceed from caricatured starting points about the types of reason or justification each institution tends to employ. The kind of caricature Finnis has in mind is one where courts are said to be suited to reviewing the consistency of legislation with principled commitments to human rights because they are "forums of principle"; whereas, in contrast, legislatures are forums of policy, concerned with the general welfare, the public interest, and the collective good, which implicitly loom as a majoritarian threat against the rights and goods of individuals. On this picture, the "moral-political primacy of rights" as critical and constitutive elements of the common good, combined with the Courts apparently unique institutional

[96] Finnis, *Judicial Power and the Balance of the Constitution*, 30.
[97] John Finnis, "Adjudication and Legal Change," in *Philosophy of* Law, 402.
[98] Finnis, "Human Rights and Their Enforcement," 43.
[99] Ibid., 28.
[100] Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR," in *Lord Sumption and the Limits of the Law*, ed. N.W. Barber, Richard Ekins, and Paul Yowell (Oxford: Hart Publishing, 2016), 118-9.

suitability for vindicating them, is what ostensibly "grounds the constitutional supremacy of courts" and justifies judicial review.[101]

Finnis emphatically rejects this picture. A well-formed legislature will *inevitably* reason about moral principles and human rights when it deliberates about how to best move from reasoning in terms of "abstract dimensions of human wellbeing or general normative propositions"[102] to making concrete choices about legal rights, duties, and obligations embodied in posited laws. In a community with a well-formed legislature then, there is a real sense in which almost all legislation exists to protect "fundamental rights" or "human rights" by striving to secure the conditions for human flourishing and making more specific the open-ended requirements of natural law principles.[103]

Finnis's affirmative objection to judicial review of legislation begins from the premise that judicial supremacy over legal interpretation, when combined with an open-textured bill of rights, can quickly lead judges to act in tension with their special responsibility to ensure their decisions are consistent with, and reasonably follow from, existing legal commitments of the community.[104] When judges begin to act in a way that amounts to creating rules and choices governing the future of the community, they act contrary to the special responsibility for which they are institutionally suited. The difficulty with contemporary bills of rights is that they are frequently drafted in such a way that their indeterminacy and scope for malleable interpretation is so "far-reaching and deep-going that it would be thoroughly mistaken" to say that courts interpreting them are merely purporting to identify pre-existing legal rights and duties.[105] For Finnis, Courts act inauthentically when they purport to undertake the task of ascertaining the meaning of a community's already existing law, but actually act to set *future* rules for the community on some of the most sensitive issues of justice and morality, issues that can implicate the "self-understanding and future destiny of all or very many of the members of a political community."[106]

They do this when they take it upon themselves, for example, to adjudicate effectively open-ended moral questions like whether a given law is necessary in a democratic society, fulfils a compelling state interest, or strikes a proportionate balance between an individual rights claim and the public good to be achieved by a relevant measure under challenge.[107] Finnis is deeply skeptical any of these types of questions can be answered by what we would typically consider "legal learning or lawyerly skills"[108] precisely because they involve decisions in respect of which there are no "scales and metrics … available … suitable to the judicial role and its typical competences."[109] They instead involve exercise of the kind of

[101] Finnis, "Human Rights and Their Enforcement," 29.
[102] Ekins et al., *Legislated Rights*, 115.
[103] John Finnis, "A Response to Harel, Hope and Schwartz," *Jerusalem Review of Legal Studies* 8 (2013): 147-66.
[104] Finnis, "Human Rights and Their Enforcement," 42.
[105] Finnis, "A Response to Harel, Hope and Schwartz," 6.
[106] Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR," 118.
[107] Finnis, "A Response to Harel, Hope and Schwartz," 6.
[108] Ibid.
[109] Ibid.

open-ended practical reasoning and moral evaluation about what is to be done that judges and lawyers are neither responsible, nor institutionally equipped for.

To be sure, Finnis is aware the proper ambit of judicial review is a matter for prudential disagreement. He does not suggest for example that a system which embraces strong-form judicial review and judicial supremacy over interpretation is *per se* unjust. Indeed, he acknowledges that a community "living without judicial review of legislation lives dangerously"[110] and that forgoing a "justiciable bill of rights means accepting some real risks of injustices."[111] However, Finnis argues that just how dangerously a community will live or how much injustice is being risked by foregoing or diluting the strength of judicial review, will turn on the "political community, its composition and its history."[112] And in a community with a mixed or balanced Constitution of the kind sketched above, Finnis is concerned that adoption of a justiciable bill of rights likely means accepting into a polity's "institutional play of practical reasoning and choice" what he dubs a "greatly expanded, element of make-believe" and "new or ampler grounds for alienation from the rule of law."[113] By this, Finnis means accepting that Courts will likely engage in what is, functionally speaking, legislative activity but under the inauthentic guise—the "make-believe"—that they are merely using their lawyerly skills and learning to, more or less, apply the existing commitments their community's law has already established.

For Finnis then, if one already has a community with a well-balanced Constitution, it will be a "wrong turning" to seek the "conversion of courts into legislative bodies in permanent law-reform session to make changes in the law and the Constitution."[114] Such an evolution risks knocking that constitutional order off its current balance and from the image of a "free, self-governing assembly" by vesting law-making authority in an institution with "radically inappropriate techniques of deliberation" and shielded from full responsibility from the consequences of their decisions.[115]

## IV. On Constitutional Interpretation

Finnis's work also includes thoughtful consideration of how officials ought to approach constitutional interpretation. The first thing to note is that his thought on this topic is not overly prescriptive. That is, he does not claim that there is a form of constitutional interpretation that self-evidently flows directly from a basic commitment to authentic and faithful interpretation of constitutional text. Instead, Finnis states that "very little of wide generality can be said to resolve determinately the many issues of interpretation" that will arise when trying to

[110] Finnis, "Human Rights and Their Enforcement," ??
[111] Ibid., 44.
[112] Ibid.
[113] Ibid.
[114] John Finnis, "On the Nature of a Free Society," Notre Dame Law School Legal Studies Research Paper No. 1709, (2017), 1, 10-11, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896114).
[115] Ibid.

interpret constitutional text.[116] At the same time, however, Finnis thinks that several considerations cabin the reasonableness of how officials might approach interpretation.

One is that respect for legitimate authority, and its critical role in securing the common good, ensures all officials have a (defeasible) obligation to faithfully adhere to and interpret the meaning of X, Y or Z constitutional provisions posited and fixed by a legitimate political authority at a given historical point in time—whether 1789, 1868, or 1992—unless and until those provisions are lawfully repealed or replaced.[117] This means that interpreters of the law (such as judges) ought not to displace the posited law by reference to all-things-considered moral decision making.

For these reasons Finnis has been highly critical of so-called living instrumentalist or living document approaches to constitutional interpretation, which adopt the premise a constitution must be interpreted in the light of present-day conditions. More specifically, Finnis is not critical of approaches to interpretation which seek to unfold or develop the inner logic of principles posited in constitutional text in light of new social, technological, or economic situations, but rather those that maintain text can and should be deployed by courts in light of "present-day attitudes and/or opinions (so far as these are shared by a majority of some court, commission or tribunal) about better political or social arrangements" that effectively displace the choices made by the authority positing the text.[118] This type of interpretive jurisprudence is, for Finnis, a judicial "grasping" and "usurpation" of the legislative power to construct new law.[119]

Perhaps in response to perceived judicial overreach amongst high-profile common law and supranational Courts, Finnis's more recent work on constitutional theory has begun to include originalist terminology. In an essay from 2019, for example, Finnis suggests that ascertaining "Original public meaning is the primary guide to and constraint upon appropriately judicial exercise of the judicial power and duty to apply the law of the constitution."[120] Finnis argues that judges ought to consider "*what propositions* the makers of the document *meant (intended)—and took—their document to bring into force as propositions of law*" and also what "reasonably ascertainable propositions those makers certainly intended and meant it not to be bringing into law."[121] Later in the same essay he states that by original public meaning he means "what would be judged to be the meaning by reasonable, well-informed and legally competent or well advised observers in and of the circumstances of the time."[122] Methods of interpretation

[116] Finnis, "A Grand Tour of Legal Theory," 154.
[117] Richard Ekins, "Objects of Interpretation," 32 *Constitutional Commentary* 32 (2017): 23; Richard Ekins, *Legislative Intent*, 244-45.
[118] Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR," 85.
[119] Ibid., 87.
[120] John Finnis, "Prisoners' Voting and Judges' Powers," in *Constitutional Dialogue: Rights, Democracy, Institutions*, ed. Geoffrey Sigalet, Grégoire Webber, Rosalind Dixon (Cambridge, University Press, 2019), 355; See also John Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR."
[121] Finnis, "Prisoners' Voting and Judges' Powers," 356. Emphasis added by Finnis.
[122] Ibid., 358.

that depart wholesale from trying to ascertain the intended meaning of constitutional provisions as a deliberate law-making act are, for Finnis, "as a matter of strong presumption unjustified."[123]

This endorsement of public meaning originalism needs careful handling. For a start, Finnis appears to be outlining a form of presumptive originalism that hovers between seeking to ascertain the lawmaker's intent, an approach recently defended by Ekins,[124] and the public meaning originalism associated most prominently with Justices Scalia, Thomas, and Gorsuch, which asks what a reasonably informed person at the time of enactment would understand the provision in question to mean.

While Finnis does not discuss the differences between these schools of originalist thought, on balance it appears he is more concerned about inferring the propositions of law the legitimate authority which authored the Constitution intended to enact, and the mischief they did and did not seek to address in positing what they did.[125] This stance departs from much contemporary originalist scholarship and judicial opinion, which focuses on original public meaning.[126] Finnis also departs from much of contemporary originalism in his treatment of the appropriate role of moral principles in constitutional interpretation.

The classical tradition to which Finnis adheres is of course emphatic that legal interpretation will be heavily distinct from all-things-considered-moral-reasoning, from deciding legal questions by reference to the "flow of general ("extra-legal") straightforward practical reasoning"[127] about what should be done. Finnis says a system of positive law should be understood, legally, "as internally complete" and "thus as sealed off (so to speak) from the unrestricted flow of practical reasoning about what is just and for the common good."[128] However, Finnis critically also accepts that "[t]his drive to insulate legal from moral reasoning can never . . . be complete,"[129] for both descriptive and normative reasons.

In respect of the former, while classical lawyers understand that a great run of cases can be decided without *direct* recourse to background principles of law's morality, they also emphatically accept that these principles can never be *entirely* excluded from interpretation of legal materials by recourse to technical lawyerly tools and the search for socio-historic facts. As Finnis puts it, this is partly because we often do not "know and have no means of knowing what the author(s) intended to communicate on such and such a matter, to which their text seems

[123] Ibid., 356.
[124] Ekins, "*Objects of Interpretation,*" 24 and 1. Ekins argues that enacting a constitution is a "deliberate lawmaking act, which falls to be understood by recognizing an intended meaning that articulates authoritative choices" and that the point of constitutional interpretation is "primarily to understand the meaning that those who made the Constitution intended to convey by promulgating the text in question."
[125] Finnis, "A Grand Tour of Legal Theory," 152. Finnis suggests the interpretation of texts largely involves ascertaining "What a given author or set of authors intend to communicate in their text or other statement." See also Finnis, "Priority of Persons."
[126] Finnis, "Prisoners' Voting and Judges' Powers," 356.
[127] Finnis, *Natural Law and Natural Rights*, 473.
[128] Ibid., 355.
[129] John Finnis, "Natural Law and Legal Reasoning," *Cleveland State Law Review* 38 (1990): 12.

more or less closely relevant," an uncertainty which has its source in the "limitations which make human beings unable to foresee all relevant issues or address exhaustively even those issues they do foresee."[130]

Finnis is sympathetic to elements of Dworkin's characterization of how adjudication proceeds in the kind of hard cases common to appellate courts.[131] As Dworkin famously framed it, officials in hard cases do, and should, approach interpretation by reading under-determinate legal materials like constitutional text, precedent, and practice in light of moral standards "prevalent in the judge's community but in the last analysis just those standards that the judge can accept as in truth morally sound"[132] to reach a determination that fits the communities existing law in a morally sound way.[133]

Finnis goes on to say that these moral standards, which "Dworkin (in line with natural law theory) treats as capable of being morally objective and true" are not extra-legal considerations or policy arguments brought to bear by a judge, but themselves function as a "direct source of law (or justification for judicial decision) and, in a certain sense, as already law."[134] Basic precepts of the natural law, says Finnis, are therefore best regarded as "judicially applicable moral rules and principles" and "*ipso iure* (i.e., precisely as morally and judicially applicable) rules *of law*" belonging to the "*ius gentium* portion of our law."[135] These principles include moral absolutes which exclude "intentional killing, intentional injury to the person, deliberate deception for the sake of securing desired results, enslavement which treats a human person as an object or a lower rank of being than the autonomous human subject."[136]

Other arguments drawn from political morality internal to a legal system that can be brought to bear on interpretation may also include principles of solidarity and subsidiarity that find expression in the desirability of things like "coherence here and now, of stability across time, of fidelity to undertakings, respect for legitimate expectations, avoidance of tyranny, preservation of the community and its capacity for self-governance, protection of the vulnerable and … many others."[137] In the classical tradition such principles are by no means used to set

[130] Finnis, "A Grand Tour of Legal Theory," 152-3.
[131] Finnis, "Natural Law Theories,"; Finnis, "A Grand Tour of Legal Theory," 129. In "Grand Tour," Finnis says that "we should … broadly accept some main elements of Ronald Dworkin's account of adjudication."
[132] Finnis, "Natural Law Theories."
[133] To be sure, Finnis is very critical of other aspects of Dworkin's picture of adjudication, especially the latter's

> thesis that even in hard cases there is presumed to be a single legally right answer. That thesis exaggerates both the specificity of morality's own standards and the linguistic and purposive determinacy of most posited rules. The requirements of moral soundness and fit with the posited law and its social fact sources are requirements which eliminate countless logically possible resolutions of the case, and yield a uniquely correct legal resolution of all easy cases. But in a hard case they will leave more than one answer which is morally and legally right, that is, *not wrong*. (Emphasis added by Finnis).

Finnis, "A Grand Tour of Legal Theory," 129.
[134] Finnis, "Natural Law Theories."
[135] Ibid.
[136] Finnis, "Natural Law and Legal Reasoning," 11.
[137] Finnis, *Natural Law and Natural Rights*, 472.

aside or displace posited law; instead, they are looked to in hard cases as relevant to how one should conclude the ruler exercised his or her authority.[138]

Finnis is also adamant that constitutional interpretation can never *reasonably* strive to be exclusively historical and seek to confine itself to ascertaining socio-historic facts.[139] That is, from a normative perspective officials should not deliberately try to entirely exclude considerations of political morality during interpretation. It is defined into the nature of the posited law of a particular community that it derives from higher law that it determines and specifies. To attempt to exclude consideration of the natural law in cases of indeterminacy risks allowing posited law to clash with these background principles, and to devolve into a diluted or defective instance of law not conducive to the good of the community. This, in turn, undermines its legitimacy given that it is constitutional law's capacity to orient and guide public power toward the common good and human flourishing that provides it with any claim to guide and settle our present deliberations.[140] As Finnis puts it:

> Since law and legal thought are entitled to little respect or consideration unless they serve, or can be brought to serve, every person whom they could benefit, all the basic human rights should be regarded as controlling every otherwise open question of interpretation.[141]

For Finnis, interpretation is an act that "can and should" be "guided by 'moral' principles and rules" that are a matter of "objective reasonableness" (as opposed to mere current convention or sentiment).[142] Failure by officials to accept the proposition that where legal materials are under-determinate they should be read, insofar as possible, consistent with basic principles of the natural law, is at the heart of errors committed in infamous cases like *Dred Scott v. Sanford*[143] and *Roe v. Wade*.[144] In each case, Finnis notes there was a marked failure by officials to proceed with a "strong presumption, that, whatever the assumptions and expectations of its makers, every constitutional provision must, if possible, be understood as consistent with such basic human rights as to recognition as a legal person."[145] In another essay, Finnis similarly argued that the US Supreme Court's "radical failure" in *Dred* was to approach its duty of doing justice according to law with a "presumptionless positivism"[146] that did not recognize that "law . . . is for the sake of persons, and that the founders' intentions were therefore to be interpreted . . . in favour of the basic interests and well-being of every person within the

[138] See Conor Casey & Adrian Vermeule, "Myths of Common Good Constitutionalism," *Harvard Journal of Law & Public Policy* 45 (2022): 124-5; Conor Casey & Adrian Vermeule, "Argument by Slogan," *Harvard Journal of Law & Public Policy: Per Curiam* 10 (2022).
[139] Finnis, "A Grand Tour of Legal Theory," 152.
[140] Ibid, 153.
[141] Ibid.
[142] Finnis, *Natural Law and Natural Rights*, 290.
[143] 60 U.S. 693 (1857).
[144] 410 U.S. 113 (1973).
[145] Finnis, "A Grand Tour of Legal Theory," 153.
[146] John Finnis, "Priority of Persons," *Intention and Identity: Collected Essays Volume II* (Oxford University Press, 2011), 27.

jurisdiction so far as was possible without contradicting the Constitution's provisions."[147] Put succinctly, for Finnis legal interpreters are "entitled and required" to treat legal propositions as "presumptively oriented towards justice and common good."[148]

Finnis's advocacy for a strong presumption courts read posited law and the intent of the legitimate authority consistent with core principles of *ius*—including "all the basic human rights"[149]—is a staple aspect of the classical tradition, one which helps ensure posited constitutional text remains an ordinance of reason oriented to the common good and flourishing of all persons, its basic purpose and *telos*, and does not misfire in this regard and devolve into a perversion of law.

When these strands of thought are tied together, Finnis's basic approach to constitutional interpretation appears to me to be as follows: there is a good deal of prudence in approaching interpretation with a heavy premium on constitutional text being presumptively understood "so far as possible" in a "historically accurate" way.[150] By this Finnis appears to mean discerning the intent of the legitimate authority in choosing to posit what they did posit, and the mischief they understood their enactment to address or not address.[151] This interpretative disposition is important in order to respect legitimate authority and its ability to "settle"[152] questions of social life that need settled for the common good, and to prevent judicial displacement of posited law by subjective exercise of the kind all-things-considered moral decision making they have neither jurisdiction nor responsibility for.

However, where legal materials are under-determinate (for example where, as Finnis says, we do not know and have no means of knowing what a legitimate authority intended to communicate on a particular issue) they should be read, insofar as possible, consistent with basic principles of the natural law also *ipso jure* part of the legal system, so that they might remain an ordinance of reason oriented to the common good. A "properly juridical interpretation," says Finnis, will consequently "not be as ready to consider authoritative an unjust as it will a just meaning."[153] Finnis's approach is a method seeking to keep faith with the

[147] Ibid., 27.

[148] Ibid., 33. Ekins articulates a similar argument in the context of statutory interpretation:

> [T]he central axiom of well-formed interpretive practice is that the legislature is an institution that aims to act responsibly for the common good. This axiom is no fiction for it responds to the rationale for legislative authority, giving subjects of the law reason to understand the legislature's act to change what they should do and also animating and explaining the structure and operation of the legislature. The legislature is a type of institution that is capable of acting responsibly for the common good and in understanding particular exercises of legislative authority interpreters should presume that the legislature was what it should be and is capable of being: a rational, reasonable lawmaker. It follows that there is an important difference between how a court (or citizen) interprets an authoritative legislative act and how a historian or political scientist explains legislators and their acts and intentions. The subject of the law should be slow to hypothesize, and even slower to conclude, that the legislative act is vicious, arbitrary or irrational.
>
> Richard Ekins, *Legislative Intent*, 245. [Internal citations omitted]

[149] Finnis, "A Grand Tour of Legal Theory," 153.

[150] Ibid.

[151] Finnis, "A Grand Tour of Legal Theory," 153; Finnis, *Judicial Power and the Balance of the Constitution*, 55; Finnis, "Priority of Persons," 33.

[152] Finnis, "A Grand Tour of Legal Theory," 153.

[153] Finnis, "Priority of Persons," 33.

principles and choices posited by legitimate authority in constitutional text, while also preserving, developing, and unfolding the intrinsic integrity of these choices to ensure they remain—insofar as possible in the face of new challenges and situations—ordinances of reason oriented to the common good of the community.

Finnis is clearly aware there is always a possibility that a constitutional provision may remain so radically unjust that it is not able to be understood consistent with natural law. This sobering fact is one long accepted by the classical tradition.[154] How judges or other officials respond in such circumstances—to declare a posited law void, to recuse themselves, to refuse to enforce the provision, to call for its amendment—is largely a matter of prudential determination, and little of universal application can be said.[155]

## Conclusion

Finnis's public law scholarship offers powerful applications of the precepts of the classical natural law tradition to questions of constitutional design and interpretation.

In respect of the former, Finnis's work gives good reason to hold that the focal case of a constitution comprised of fundamental rules, principles, and norms—that aim to generate, sustain, and channel political authority and public power—will involve channeling and enabling state power in a manner responsive to the good moral reasons we have for wanting authoritative political institutions. Practically reasonable citizens and officials will strive to create the plan on which the people jointly act, with an eye to empowering and disciplining legal and political authorities for the common good of that polity, and not a more myopic or partisan aim. A constitution and its constitutive rules, principles, and conventions should ultimately arrange institutions in such a way that they are apt to ensure the community is governed well and suited to the pursuit of the wide-ranging and complex conditions required for human flourishing.

When it comes to the latter, Finnis offers convincing reasons to accept there is considerable prudence in approaching interpretation by discerning the intent of the legitimate authority in choosing to posit what they did posit, and the mischief they understood their enactment to address or not address. Such an interpretative disposition is critical to respect legitimate authority and its ability to settle questions of social life that need settled for the common good, and to prevent judicial displacement of posited law by subjective exercise of the kind all-things-considered moral decision making they have neither jurisdiction nor responsibility for.

[154] This possibility is what explains the famous dictum that "an unjust law is not a law" attributed to the natural law tradition. More precisely, Aquinas in his *Treatise on Law* said that a "tyrannical law, through not being in accordance of reason, is not a law absolutely speaking, but rather a perversion of law." Aquinas, *Summa Theologica*, I-II, Q. 92, a. 1.

[155] John Finnis, "Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's 'Ideal Dimension,'" *The American Journal of Jurisprudence* 59 (2014): 103-4.

Finnis also provides a compelling account of why constitutional interpretation can never reasonably strive to be exclusively historical and confined to ascertaining socio-historic facts. Finnis's advocacy for a strong presumption officials read posited law and the intent of the legitimate authority consistent with core principles of the natural law, is a staple aspect of the classical tradition, one which helps ensure posited constitutional text remains an ordinance of reason oriented to the common good and does not misfire and devolve into a perversion of law.

Professor Finns's work on the natural law tradition is widely, and properly, regarded as one of the most important contributions to legal theory made in the last century. In a time when we are seeing a healthy resurgence of interest in classical legal approaches to public law,[156] I hope this essay demonstrates that there is also much to be gained by engaging with his sophisticated treatment of some perennial issues of constitutional theory.

[156] See Richard Ekins, *Legislative Intent*; Jeff Pojanowski and Kevin Walsh, "Enduring Originalism," *Georgetown Law Journal* 105 (2016): 97-158; Ekins et al., *Legislated Rights*; Brian McCall, *The Architecture of Law: Rebuilding Law in the Classical Tradition* (Notre Dame, IN: University of Notre Dame Press, 2018); Lee Strang, *Originalism's Promise*; Santiago Legarre, "A New Natural Law Reading of the Constitution," *Louisiana Law Review* 78 (2018): 877-905; Conor Casey, "'Common Good Constitutionalism' and the New Debate over Constitutional Interpretation in the United States," *Public Law* 4 (2021): 765-787; Vermeule, *Common Good Constitutionalism*; Casey & Vermeule, "Argument by Slogan"; Joel Alicea, "The Moral Authority of Original Meaning," *Notre Dame Law Review* (Forthcoming, 2022).