2001

Justifying the Natural Law Theory of Constitutional Interpretation

Michael S. Moore

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol69/iss5/22
CONSTITUTIONAL INTERPRETATION AND ASPIRATIONS TO A GOOD SOCIETY

JUSTIFYING THE NATURAL LAW THEORY OF CONSTITUTIONAL INTERPRETATION

Michael S. Moore*

INTRODUCTION

An interpretive problem always exists in preparing papers on preset topics in symposia such as the present one. The questions my fellow panelists and I were asked to address were: (1) whether (and to what extent) the aspirations for a good society should enter into judicial interpretations of the Constitution; and (2) whether such infusion of moral theorizing by judges was consistent with their duties of fidelity to the Constitution? The interpretive problem arises because of the different readings possible for the phrase, "aspirations for a good society."

One reading suggested by these Fullerian phrases—"morality of aspiration," "fidelity to law"—is that we are to address the possibility/desirability of judges interpreting the Constitution so as to further both the public and private virtue of our citizens. For example, Christopher Eisgruber plausibly takes that interpretation of our topic. I do not, in part because I agree with Eisgruber's conclusions: constitutional law (as opposed to ordinary law) is by-and-large unsuited to this task; indeed, a properly interpreted

* Warren Distinguished Professor of Law, and Co-Director, Institute for Law and Philosophy, University of San Diego. The last part of this paper derives from my half of a formal debate held at the University of Pennsylvania in 1995 with Jeremy Waldron on the topic, the rights-based argument for judicial review. A later version of this paper was also given at the Conference on Legal Interpretation, Judicial Powers, and Democracy, Monash University, Melbourne, Australia, in June, 2000.

1. Lon L. Fuller, The Morality of Law 5, 42 (1964); Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 630 (1958).
Constitution—one giving due weight to liberty—will prohibit, not require, ordinary law from going very far down this road.³

My present topic is different. I take "aspirations for a good society" in a much more minimalist sense. Surely a good society, at a minimum, protects the basic human rights of its subjects. My topic is the extent to which our Constitution should be interpreted so as to further this minimalist sense of "the good society." More precisely: (1) how much moral theorizing should judges do in interpreting the rights-conferring clauses of the Constitution?; and (2) is such moral theorizing consistent with judicial obligations of fidelity to the Constitution?

The answers to these questions that I have defended for the past twenty years have been, respectively: "a lot"; and "perfectly consistent." Such a comfortable accommodation of judicial activism and full fidelity is made possible by what has come to be known as the "natural law" or "realist" theory of constitutional interpretation.⁴ Despite numerous invitations to do so by various friends and critics of the theory,⁵ I am afraid that I am unable to see anything wrong with it.

---


Such a confession no doubt reveals serious flaws of character, yet the theory unaltered still seems preferable to its numerous alternatives.

So I have no new theory of constitutional interpretation to lay before you nor shall I utilize this occasion to tech up the natural law theory of interpretation in various ways. Rather, I shall seek to provide a new reason for judges to adopt such a theory of interpretation with regard to the United States Constitution. More specifically, in the three sections that follow, I shall: (1) describe briefly the salient features of the natural law theory of interpretation; (2) detail why the old argument I advanced in favor of using this theory in constitutional adjudication does not work in that context; and (3) lay out an argument for use of the theory that does work in the constitutional context.

I. THE NATURAL LAW THEORY OF INTERPRETATION REVISITED

To begin with, a theory of interpretation is a  theory, that is, a set of general statements describing the right-making characteristics of a good legal decision under a legal text. It is fashionable these days in some quarters to decry the possibility or the utility of such a theory for a practical activity like judicial interpretation. As a Chancellor in Equity in Mississippi once said in one of my seminars for the judges of that state, on this view judges "should pick whichever among the various theories of interpretation gives the best result in a particular case." 8

Unfortunately, such a theory-less, ad hoc approach has all too often been the attitude adopted by American judges towards interpretation. It is remarkable that a skill this basic to judging, and this outcome-determinative in cases, should be as unprincipled and up-for-grabs as it is in America. The rule of law is possible only if we have uniform methods of interpretation of laws, a uniformity given by a theory of how interpretation is to proceed.

A complete theory of constitutional interpretation will have various components within it. For example, plausible theories find room for: the precedential force of prior judicial interpretations of the Constitution; 10 the purpose (spirit, function, point, value) served by the clause in question; 11 the purpose served by some larger aggregation of such clauses, when considered together—including the overall purpose of the Constitution as a whole, if there is one; 12 the "safety valve" question of all-things-considered justice; 13 and tie-breaker rules, such as the presumption of constitutionality in certain areas and the presumption of unconstitutionality in others. 14

---

6. See infra text accompanying notes 98-101 for the distinction between a theory of interpretation as a description of the right-making characteristics of a judicial decision and such a theory as a recipe for judges to use in arriving at the right judicial decision.

7. See, e.g., Fish, Dennis Martinez, supra note 5, at 1779-80. My reply to Fish is in Moore, The Interpretive Turn, supra note 4, at 905-17. My most recent exchange with Fish on this topic is in Michael S. Moore, Theories of Areas of Law, 37 San Diego L. Rev. 731 (2000), and Stanley Fish, Theory Minimalism, 37 San Diego L. Rev. 761 (2000). Of the present panelists, Michael Dorf shares some sympathy for Fish-like theory skepticism. See Michael C. Dorf, The Good Society, Commerce, and the Rehnquist Court, 69 Fordham L. Rev. 2161, 2162 (2001).


10. See Moore, A Natural Law Theory, supra note 4, at 358-76.

11. Id. at 383-86.

12. Id.

13. Id. at 386-88.

14. Tie-breaker rules such as the rule of lenity in criminal cases essentially function as "burden of proof" rules about law, not about facts.
The component I shall focus on here is more fundamental than any of these other parts of an overall theory of constitutional interpretation. I refer to the meanings of the words and sentences that make up the text of our written Constitution. "Meaning," of course, cannot here mean the output of a theory of interpretation, that is, the meaning given to a constitutional provision by a judge's interpretation. Rather, the meaning I refer to here is the meaning words possess as a matter of their ordinary English semantics. In linguistics, such meanings are studied by lexical semantics (for words) and compositional semantics (for sentences).

Although one can divide semantic theories along any number of dimensions, a relevant division here is by the priority accorded sense over reference in determining the extension of any predicate. Traditional semantic theories are sense-determines-reference theories. These are usually checklist sorts of theories. The meaning of a word like "bachelor" is a list of properties, such as unmarried, male, person. (Such list is then the sense of the word "bachelor.") To apply the word is to check the list, so that anything possessing such properties is within the class denoted by the word and anything lacking such properties is outside that class. (Such class of referred-to-items is called the extension of such a predicate.)

The alternative semantics reverses this priority. On what is often called "realist" semantics (or "K-P semantics," after two of its progenitors in philosophy), the reference of a word determines its sense. The sense of a word like "water" is not a list of properties or a set of a paradigm examples assigned to the word by a speaker or society of speakers; rather, the sense of the word is determined by the best theory of the nature of the kind, water. Such theory is discovered, not posited, by some speaker or by some community of speakers.

Examples are better heuristics here than are generalizations. Consider this one by Leo Katz. My spouse directs me to go meet that man over there, "the one in the Brooks Brothers suit, Yves St. Laurent tie, and Gucci shoes." As Katz points out, typically this list of properties is not to be taken in the manner of traditional semantics. That is, my spouse intends me to meet a certain person irrespective of whether or not he is wearing what she thinks he is wearing. The descriptions are thus not to be taken as fixing the reference of who I am to meet, but are only heuristics to help me pick out that person.

15. Id. at 288.
16. Id. at 291-301.
18. Id. at 85.
19. Id. at 85-87.
Consider secondly a legal example. In 1978, the California Supreme Court abandoned the McNaughten test for legal insanity and substituted the American Law Institute test.\(^{20}\) A popular initiative was proposed to return the state to the McNaughten test, and the initiative was adopted by California's initiative procedure.\(^{21}\) Oddly, the initiative had reworded the McNaughten test, transforming the disjunctive test of McNaughten (using the word "or") into a conjunctive test (using the word "and"). In *People v. Skinner*\(^ {22}\) the court was called upon to construe this language. The court took the reference (to the McNaughten test) to have priority over the description of the test used in the initiative; since the nature of the thing referred to was disjunctive, the court construed the word "and" in the initiative to mean "or."\(^ {23}\)

The application of this realist semantics to the rights-conferring language of the Constitution is probably clear enough. But, to belabor the obvious: on a realist semantics, when a judge construes the Eighth Amendment's ban on "cruel and unusual punishments," or the Fourteenth Amendment's guarantee of "equal protection of the laws," such a judge will take reference to determine sense. Specifically, such a judge will see these clauses as referring to underlying natural rights whose nature is to guide his application of the relevant phrases. He will have to develop a theory of such nature, as he does about the nature of things like water and the McNaughten test (for texts referring to those things). Such theory is not to be confused with lists of properties or sets of paradigm examples assigned to these phrases, irrespective of whether such lists or sets originate with the framers of the language or with some original or contemporary audience. Such a judge will pay attention to such matters only as heuristics at best. His essential task is to understand what equality really is, or what makes a punishment really cruel and unusual.

We are now in a position to appreciate why use of realist semantics can reconcile extensive moral theorizing by a judge with that judge's obligations of fidelity to the Constitution. Extensive moral theorizing is called for if a judge is to grasp the nature of the natural rights referred to in the Bill of Rights and the Civil War Amendments. Indeed, a judge has no other way to get at the nature of such rights except by his own best theories, bereft as he is (in realist semantics) of any guidance by conventional definitions or exemplars. As for fidelity, such theorizing seems to be called for by the document itself. Just as I do not show proper fidelity to my wife's instruction if I meet

---

22. 704 P.2d 752 (Cal. 1985).
23. *Id.* at 758-59.
someone who happens to meet the description she gave me if that person is not the one to whom she referred, so I do not show proper fidelity to the text of the Constitution if I construe it in accordance with the framer’s definitions or examples when I know those go against the actual nature of the right to which those very framers referred. If the realist semantics is the correct account of what these constitutional phrases mean, fidelity to them demands that judges give priority to their own moral theorizing over the constitutional expectations of anyone else, framers included.

II. THE ARGUMENT FROM THE SEMANTIC INTENTIONS OF THE FRAMERS

One argument often given in favor of realist semantics in linguistics derives from the intentions with which typical language users use certain words. Years ago, I taxonomized such intentions into three kinds: (1) a speaker of a given utterance intends to perform an act of speech, (2) means something by what he says, and (3) means to achieve something by the act of saying what he means to say. When Alec Guinness in the film, Kind Hearts and Coronets, says, “I say, the port is with you,” he: (1) spoke intentionally, (2) meant that the port sat before the person to whom he was speaking, and (3) intended that the port be passed to him in consequence of his speech-act.

It is the second of these intentions that is crucial for our present purposes, what I earlier called the “semantic intentions” of language-users. It is possible that one can have two very different kinds of semantic intentions. A speaker may use a word or phrase with the semantic intention to name whatever thing or class of things happens to meet the properties or exemplars the speaker has in mind as fixing the meaning of the word he has employed. I have long called these “rich semantic intentions,” because such a speaker has a rich set of resources in his mind to which an interpreter may repair to find out what was meant. Alternatively, a speaker may use a word or phrase with the semantic intention to name some definite thing or kind of things no matter what defining properties or exemplars the thing or

24. Moore, A Natural Law Theory, supra note 4, at 339.
27. Moore, A Natural Law Theory, supra note 4, at 340.
kind of thing may turn out to possess. Because such a speaker's mind is bereft of any resources with which to define or exemplify the thing or kind referred to, I call these "spare semantic intentions." 28

Consider again by way of illustration Leo Katz's example of the spousal direction to meet that man, "the one in the Brooks Brothers suit, Yves St. Laurent tie, and Gucci shoes." 29 Such a speaker typically would speak with only spare semantic intentions: she would intend to refer to a particular person no matter what that person is really wearing. The descriptive properties she mentions are merely heuristics given by such a speaker to help her audience pick out the person intended; if such heuristics prove inaccurate, she means her listener to ignore them in fixing the reference of the demonstrative, "that man." One could imagine such a speaker saying what she said with rich semantic intentions. If she is directing her husband to go see what a well dressed man really looks like, then the properties she mentions fix who it is her husband is to meet, namely, anyone dressed as described. But typically, her semantic intentions are spare: one is to meet a certain person irrespective of whether he possesses the properties she has used to pick him out.

The common argument in linguistics for use of the realist theory of meaning is that typical speakers have only spare semantic intentions in most of their uses of language. 30 Thus, the best theory of word-meaning is one that is in accordance with these most typical semantic intentions.

Such an argument easily transfers to the use of realist semantics in legal contexts. Consider an example from the law of wills, provided by the "unborn widow" case under the rule against perpetuities, in Dickerson v. Union National Bank of Little Rock. 31 In simplified form, the will at issue in Dickerson left property to Martin for life, then to Martin's widow for life, then to such of their children who survived both Martin and his widow, having attained the age of 25 years. 32 At issue was the meaning of the phrase "Martin's widow." 33 If the testator used this phrase with rich semantic intentions, then whoever possessed the properties, being-married-to-Martin-when-he-died, was the person to take; if the testator wrote with spare semantic intentions, then he was referring to Mary (who was the wife of Martin when the will was written) irrespective of whether she ever became Martin's widow or not.

Wherever the law properly cares about the semantic intentions of the author of some legal text, and whenever one can discover that the

28. Id.
29. See supra note 18 and accompanying text.
30. Moore, A Natural Law Theory, supra note 4, at 341.
31. 595 S.W.2d 677 (Ark. 1980).
32. Id. at 678.
33. Id. at 680.
author actually had spare semantic intentions, then we have reason enough to use realist semantics in interpreting the legal text in question. In light of our moral views according property-owners freedom of testation, we care what sort of semantic intentions testators actually possess as they write their wills. If the testator in Dickerson intended to refer to Mary—using the phrase “Martin’s widow” only to capture a salient fact about her life estate, namely, that she had to survive Martin to take—then courts have very good reason to construe the phrase realistically, i.e., to give the property to Mary even if she has divorced Martin and Martin has married another person before his death.\(^{34}\)

Similarly for statutes, popular initiatives, and referenda, we have good reason to care about the semantic intentions of legislatures and the voting public, respectively. Our theories of representative and direct democracy justify such a concern. Such authors have practical authority over courts and thus courts have good reason to use semantics that is in accord with what those authors meant to say. On the general linguistic supposition that most speakers use language with only spare semantic intentions most of the time, this justifies the use of realist semantics in construing statutes, popular initiatives, and referenda.

The analogous argument for use of a realist semantics in interpreting the Constitution should be apparent.\(^{35}\) The normative part of the argument is to contend that the framers of our Constitution have at least the authority over contemporary judges possessed by contemporary legislators. This is because of the democratic nature of the Constitution’s adoption or because of the consent of the governed even two hundred odd years later. The historical part of the argument relies on the natural rights views of the drafters of the original Bill of Rights and the Civil War Amendments.\(^{36}\) Such believers in natural rights as Hamilton and Madison took themselves to be referring to entities (natural rights) that had a nature independent of theirs or anyone else’s thoughts about it. When believers in natural rights used phrases, such as “no one shall be subject to cruel and unusual punishments” or no one shall

\(^{34}\) In the actual case, the court assumed the testator used the phrase “Martin’s widow” with rich semantic intentions, and thus voided the gift under the rule against perpetuities (because Martin might marry a woman yet unborn at the time the will took effect and she might live more than twenty-one years beyond Martin’s death). \(\text{Id.}\)

\(^{35}\) I advanced this argument in 1988 at the annual public policy meeting of the Federalist Society on a panel chaired by Nino Scalia. The argument was targeted for the originalists who refused to be like their professed originals, Madison and Hamilton. See Moore, Do We Have an Unwritten Constitution?, supra note 4; Moore, The Written Constitution, supra note 4.

\(^{36}\) For a discussion of Madison and Hamilton’s moral philosophy and its dependence on the natural rights philosophy of John Locke, see Morton White, Philosophy, The Federalist, and the Constitution 27-29 (1987).
be "denied equal protection of the laws," their semantic intentions were to refer to rights whose nature was to guide meaning. They did not think their audience should apply such phrases to whatever happened to meet the definitions or exemplars they or anyone else had in mind; rather, such audience was to divine the real nature of the rights to a just punishment and to equality, and apply the constitutional phrases naming such rights accordingly.

This semantics-intention argument for use of realist semantics in constitutional interpretation is a history-based argument, but it is often mistaken for a different history-based argument, the one centered on "interpretive intent." "Interpretive intent" is Paul Brest's nice phrase for a very sophisticated intent a language user can have, even though most do not. An interpretive intent is a second-order intention about how one's first order intentions are to be used in interpreting what one has said. Legislators, for example, might intend tomatoes to be classed as fruits, not vegetables, in import duty statutes, and they might secondarily intend that the courts construe the words "fruits" and "vegetables" by their intention. This second order intention is an interpretive intention.

A well-known historical debate exists in constitutional theory about whether the framers of our Constitution actually had any intentions about how their intentions were to be used in interpreting the document. It is important to see that the semantic intention argument is unaffected by the outcome of this historical debate. The framers of our Constitution may or may not have had interpretive intentions; nevertheless, they certainly had semantic intentions. Every language user who isn't just making noise for its own sake means something by what he says. Our constitutional framers are no exception; thus, the only question is whether they possessed spare or rich semantic intentions. Given their natural rights beliefs, the historical evidence plausibly suggests they had spare semantic intentions to name such natural rights, and this could easily be true even if they gave no thought whatever to the question of how their intentions would be used in the interpretation of their language by courts.

The problem for the argument from semantic intentions thus does not lie in its history. There is a real problem, however, in its normative assumptions. Despite our official mythology, very little

37. Moore, Do We Have an Unwritten Constitution?, supra note 4, at 130-35.
38. Id.
41. I noted this in my earlier exposition of this argument. See Moore, Do We Have
truth lies in the fiction that our Constitution is legitimated by the "consent of the governed." The representatives in 1787-1791 and 1868 were in no sense chosen by any person alive today, and so in no sense does their consent count as our consent. Further, unlike ordinary statutory law, we cannot overturn the handiwork of the founding generation by ordinary lawmaking processes, so that our failure to amend the Constitution hardly betokens our consent (implied in fact) to the authority of the framers. Nor can any acceptance of benefits, failure to revolt, failure to emigrate, etc. be taken as consent to the framers speaking for us when they wrote our Constitution's text.

The upshot is that there are no very good reasons for our judges today to concede authority to the framers of 1787, 1791, or 1868. There is thus no very good reason to care whether the framers had spare or rich semantic intentions, nor can one ground realist semantics in the historical fact that the framers by-and-large wrote with only spare semantic intentions.

Contemporary judges are loathe to question the authority of our constitutional text and thus they rarely even raise the question of whether that text is authoritative for them as judges because of the authority of that text's framers. They prefer statements like that often quoted from Henry Monaghan:

*The authoritative status of the written constitution is a legitimate matter of debate for political theorists interested in the nature of political obligation. That status is, however, an incontestable first principle for theorizing about American constitutional law. . . . For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration.*


Judges cannot in fact afford this kind of nonchalance about the authority of the Constitution for them as judges for two reasons. One is that both rationality and morality demand that deference to authority always be justified. If one is going to suspend one's own judgment in the face of some text, one had better have a good reason justifying this prima facie irrational and immoral thing to do. Second, judges cannot answer a question they all concede they must answer—the question of how they are to interpret the Constitution—unless they know why they are deferring to that text at all. They cannot answer the "how?" question without first answering the "why?" question, and this is as true for constitutions as for dreams, novels, military orders, promises, requests of friends, or whatever else they may be tempted to interpret.
If judges do ask this question of authority—or if we theorists ask it vicariously for them—it may well be that they or we can come up with good reasons justifying the authority of the constitutional text. Yet as mentioned earlier, those good reasons showing the text to be authoritative will not lie in the authority of those who drafted that text. The constitutional text does not possess authority because those who wrote it had authority, and in this, constitutional texts differ from wills, spousal directions, popular initiatives, and statutes. As a result, one cannot rely on the (spare) semantic intentions of the framers to ground realist semantics in constitutional interpretation, even if conceding that one can rely on such authorial intentions to support realist semantics in these other contexts. Some new argument must be found if realist semantics is to be justified in the constitutional context.

III. THE RIGHTS-BASED ARGUMENT FOR JUDICIAL REVIEW

To find an argument for the natural law theory of interpretation in constitutional contexts that does not rely on the semantic intentions of the framers, we need to look where the semantic intentions argument founders, namely, the theory of authority of the constitutional text itself. If the authority of the constitutional text is not based on the authority of those who drafted such a text, on what does it rest? Perhaps if we can answer that foundational question we can give some support for using the natural law theory of interpretation in constitutional contexts.

This use of a theory of authority for a text to support a theory for interpreting that text is the typical way to justify methods of interpretation of anything. Interpretive activities are by their nature a two-step dance.43 First, the would-be interpreter must justify why a given text is authoritative for her. Such a theory of authority of a text must answer the question of why an interpreter is justified in answering certain normative questions by reference to the meaning of that text. Interpretation as an activity is always somewhat paradoxical in its suspension of judgment by deference to some text, and a theory of authority must justify such deference. Second, the would-be interpreter needs to justify certain ways of interpreting whatever texts her theory of authority shows to be worthy of interpretation. Such a theory of interpretation must have some real bite to it—some content restricting judgment—else the supposed deference to the authority of some text is wholly illusory.44

43. For a description of the generic nature of interpretation, see Moore, Interpreting Interpretation, supra note 4.
44. For an examination of the charge that interpretation of the U.S. Constitution amounts to non-interpretivist review, see Moore, Do We Have an Unwritten Constitution?, supra note 4.
This generic account of interpretation of anything applies with full force to constitutional interpretation. An account of constitutional interpretation will thus include: first, an account of what gives a written constitution its authoritative status for judges in that legal system; and second, an account of how that text is best interpreted by those judges. The first of these questions boils down to the familiar question of how judicial review is to be justified in a democracy. After all, to say that a constitutional text is authoritative for judges is to say that they are justified in using it as the highest law of the land, that is, law that prevails when in conflict with ordinary law. Such use is that of "judicial review."

The general paradox about authority—that questioning the rationality or the morality of deferring judgment to a text—is heightened for constitutional texts. For such texts, judges are asked not only to suspend their own best judgments, but even more, to suspend the judgments of democratically elected legislatures that are their contemporaries, in favor of some text created by some past generation. Usually, the paradox about authority in this constitutional context is termed the "countermajoritarian difficulty" about judicial review. It is a genuine question in such democratic systems: why should judges regard constitutional texts as vesting them with the extraordinary authority to speak for the past against the present?

There are some tired old answers which I shall avoid here. One is to play fast and loose with the notion of democracy so that, in some richer, non-proceduralist sense of "democracy," one can say that judicial review is democratic. Another is to whine about the imperfections in democratic representativeness of most modern legislatures, or to extol the democratic selection of judges. I avoid these because they are simply evasions. The stubborn truths are that majority rule—the narrow, proceduralist sense of "democracy"—is something good and that modern legislatures tend to realize this good more fully than do modern courts. Thus, the question of what can be said to justify this breach of democracy is a real one.

In this section, I shall focus on one particular answer to this question, what I shall call the rights-based justification for judicial review. In a nutshell: judges' regarding a written constitution as authoritative (so that they use it to overturn ordinary legislation) is justified by the likelihood that such judges would give greater protection of natural rights than would the legislature.

45. See id.
47. See, e.g., Dworkin, Freedom's Law, supra note 26, at 31; Samuel Freeman, Constitutional Democracy and the Legitimacy of Judicial Review, 9 Law & Phil. 327 (1990).
Despite the conceptual distinction between the theories of authority and interpretation, it should be obvious that the content of each influences the content of the other. As we have seen, if one believed that the American founders were divinely inspired or in some other way extraordinarily wise, and if one thought the United States Constitution was authoritative for United States judges as an expression of the wisdom of its framers, then prima facie the right interpretive method would be one seeking to divine the original intentions of those framers.

Alternatively, if one adopted an historical consent view of the authority of the United States Constitution, then prima facie the right interpretive method would be one seeking the original understanding of those who consented (by drafting or by ratifying) to the text; a contemporary consent theory of the document's authority, by contrast, prima facie yields some "deep contemporary consensus" mode of interpreting the text.

The general influence of an authority theory on an interpretation theory remains if the conclusion is the skeptical one—that the text has no authority save that bootstrapping created by judicial oaths to it. Such skepticism about the legitimacy of judicial review generates extremely restrictive interpretive theories, such as those of Robert Bork or John Hart Ely. Where a text is thought to have little or no authority, it is no surprise that it is mostly put aside by such restrictive theories of interpretation as these.

A rights-based justification for the authority of a constitution should similarly influence the method of its interpretation. Indeed, my motivation for examining this familiar question lies in the ability of a rights-based answer to bolster the natural law theory of interpretation sketched above.

The rights-based argument (for judges regarding the Constitution as authoritative for them in their role as judges) is a consequentialist argument. The argument does not proceed from some promise, oath, consent, obligation of gratitude, duty of fair play, obligation of reciprocity, etc., often used in political philosophy to ground legal obligations. Rather, the argument for the authority of the Constitution builds on the good consequences thought to follow from


50. I say "prima facie" advisedly because one can argue that ultimately, epistemic justifications of authority do not yield intentionalist theories of interpretation. See Heidi M. Hurd, Interpreting Authorities, in Law and Interpretation: Essays in Legal Philosophy 405 (Andrei Marmor ed., 1995).


52. Ely, supra note 48.
the Constitution having such authority. Specifically, those good consequences are the enhanced protection of natural rights caused by judges exercising the power of judicial review.

The argument is thus not aimed at (or capable of producing) what H.L.A. Hart and Joseph Raz dubbed "content-independent" reasons for judges.\(^3\) Instead, the argument crucially depends on constitutions having a certain content before they should be granted the authority for judges, which we call the power of judicial review. More specifically, a constitution would need to include a bill of rights (and one whose clauses refer to a relatively complete list of basic human rights) before one should grant such a constitution authority on this basis.

There are two ways to make this content-dependent, consequentialist argument. I shall call one the parochial version; the other, the universalist version. The parochial version of the argument is most typical. Proponents of this version immerse themselves in American legal history to make an empirical observation: judicial review in America, particularly as exercised by the United States Supreme Court, has on the whole been a good thing because natural rights have been protected.\(^4\) The observation is based on landmark decisions like *Brown v. Board of Education*,\(^5\) *Gideon v. Wainwright*,\(^6\) *Baker v. Carr*,\(^7\) *Griswold v. Connecticut*,\(^8\) and *Roe v. Wade*—decisions that protected rights of equality, liberty, and fair procedure.

I call this the parochial version of the argument because of its dependence on the peculiarities of the American experience with judicial review. Even if the empirical observation is well supported, the argument without more cannot support the authority of constitutions and bills of rights in other countries that do not share the peculiarities of the United States. It was of little consequence in the Charter 88 debate in the United Kingdom, for example, that judicial enforcement of the American Bill of Rights had on the whole protected basic human rights.\(^9\) It should be of equally little consequence in the current discussion in Australia regarding the adoption of an explicit bill of rights with judicial enforcement.\(^1\)

\(^{7,8}\) 347 U.S. 483 (1954).
\(^{9,10}\) 372 U.S. 335 (1963).
\(^{11}\) 369 U.S. 186 (1962).
\(^{12}\) 381 U.S. 479 (1965).
\(^{13}\) 410 U.S. 113 (1973).
\(^{15}\) For comparatively recent use of judicial review to protect fundamental rights in Australia, even under a constitution lacking a bill of rights, see Leslie Zines,
For the argument to be of interest to anyone outside the United States, it needs to be generalized. We need to strip away the peculiarities that may make the American experience with judicial review unique. We do this if we can find more universal features that explain why we should, in general, expect greater protection of natural rights from courts applying a written constitution with a bill of rights than we would expect from legislatures with or without such a constitution in front of them.

Thus, I shall focus on what I call the universalist version of the argument. The basic idea of the universalist version of the argument is to make a three-way comparison between rights, courts, and legislatures. More exactly, the comparison is between certain general features we may plausibly suppose natural rights to possess and certain features distinctive of courts versus those features distinctive of legislatures. The question pursued is whether we have any reason to expect that courts generally will protect natural rights better than the legislatures if one rather than the other is given the last word on what those rights are or when they are violated.

There are a number of assumptions we must make in order to get such a three-way comparison off the ground. (Such assumptions no doubt cut into the universality of the argument, but the aim is to make them as uncontroversial as possible to keep the appeal of the argument as broad as possible.) To begin with, we have to assume that there are such things as natural rights. There are quite a few items loaded into this assumption. First, I assume that moral entities and qualities exist independently of anyone or any group believing that they exist. This is the assumption of philosophically realist meta-ethics, as opposed to skeptical or relativist meta-ethics. Second, we should assume that among the moral entities or qualities that exist are those distinctive moral entities we call rights. While virtuous traits, dispositions, duties, supererogatory qualities, etc., may also exist, one’s moral ontology includes these distinctive entities we call rights. Third, such rights are natural in the sense that they are pre-legal and even pre-conventional. The law or social convention may name such rights, but they exist independently of such laws or...
conventions. Fourth, such rights are natural in the further sense that persons have them simply by virtue of their being persons. This is usually designated by calling such rights "fundamental" or "human rights," as opposed to rights one has by virtue of what one has done ("desert rights").

One assumption not being made here is about the content of such rights. Jeremy Waldron has urged, against the rights-based argument for judicial review, that what rights people have will be controversial. Thus, the rights-based argument will be of limited appeal. Against the parochial version of the argument, Waldron's point is well taken, for one does have to take a position on the content of natural rights in order to ascertain how well the United States Supreme Court has done in protecting them. The aim of the universalist version of the argument, however, is to sidestep Waldron's objection. The question I ask is this: whatever content there may be to natural rights, might courts better protect them than democratic legislatures?

A second set of assumptions has to do with the institutions being compared in their rights-protecting capacities. We used some specification of what a court is and what a legislature is in order to begin such a comparison. By a court, I mean to refer to an institution: (1) separated in its law-applying function from another institution called a legislature, the legislature having the law-making function; (2) limited in its law-applying function only to particular disputes and lacking control over which of such "cases and controversies" come before it, and when; (3) steeped in the tradition of the "judicial virtues"—even-handedness in procedure, freedom from bias, prejudice, prejudgment, etc.; (4) insulated from political pressures, both in the selection procedures for judges and in the job security afforded them; and (5) obligated both to listen to opposing arguments of the parties before it, and itself to give reasons for its decisions. The contrasting picture of a legislature is of a body: (1) entrusted with making major social decisions in the form of laws; (2) free to range in its law-making over any social issue needing attention, but with no capacity to decide particular disputes; (3) steeped in the tradition of representation, meaning that each member does his job best by representing the constituents who elected him; (4) responsive to political pressures by the discipline of frequent elections so that each member's selection and job security depends entirely on her political success; and (5) skilled in the art of compromise necessary to allow law to emerge from conflicting factions.

64. It is because natural rights exist without law that bills of rights can refer to them without creating them in the act of reference.
67. See id. at 19-20.
These institutional assumptions detail many ideas familiar in our ideals of the rule of law, the separation of powers, and representative democracy. They no doubt restrict the argument to western-style democracies, but with the increasing hegemony of this form of government, the assumptions are less and less parochial. Characteristics of the personnel occupying the institutions described are not assumed. In particular, it is not assumed that judges are drawn from social or educational classes different from the classes from which legislators are drawn, nor is it assumed that judges are possessed of any greater wisdom, kindness, or charity than are legislators. It is true that in defense of judicial review it is not uncommon to encounter rather heroic assumptions about judges—that they as a class are possessed of Olympian wisdom and stern but just moral fiber. I intend not to rely on any such pictures of judges. We should not picture the famous portrait of Oliver Wendell Holmes—in full robes, with white mantle—when we think of judges, including Justices of the United States Supreme Court. Rather, as Thomas Grey has said, we do better to picture them as members of a public utility commission rather surprised at the good fortune of their elevation to high judicial office.68

With these assumptions about rights, courts, and legislatures, we are ready to begin our comparison. The following chart summarizes the six reasons courts may plausibly be thought better at the business of natural rights protection than democratic legislatures.

68. See Grey, supra note 54, at 24-25.
I shall pursue these six attributes of natural rights *seriatim*.

**A. The Agent-Relative Nature of Natural Rights Norms**

Natural rights views are part of the tradition in ethics that regards moral norms as categorical. A categorical norm is commonly said to be one imposing duties on actors to do or not to do certain actions irrespective of those actions’ consequences. We each have a right not to be killed, and the correlative duty on others not to kill applies even when killing one would save many lives.

This characterization of the categorical nature of some moral obligations needs refinement because it leaves open the following possibility. In 1985, four Soviet diplomats were captured by Middle...
Eastern terrorists, who then made certain demands on the government of the former Soviet Union. To make the demands credible, the terrorists killed one of the diplomats. The KGB, unable to get to the terrorists themselves, but knowing who they were, found and killed the brother of one of the terrorists, letting it be known that they would do likewise to other relatives of the terrorists if the three remaining diplomats were not released. Given the likelihood that the KGB would do exactly what it threatened, the terrorists released the remaining three diplomats, and no Soviet diplomats were ever kidnapped again.

From what has been said thus far, the KGB could say it protected natural rights. True, it violated the right of one innocent Arab, the brother, but by doing so it prevented the violation of the rights of the three Soviet diplomats and probably of many other Soviet citizens in the future. The KGB then could truthfully claim to have minimized the violation of natural rights. Each person’s right not to be killed being equal, it thus protected natural rights to the maximum extent possible in this situation.

Yet none of the human rights-protection community nominated the KGB for an award for this behavior. The KGB probably did indeed minimize rights-violations by its killing of the innocent Arab, yet the categorical nature of such rights demanded the opposite. The innocent Arab’s right not to be killed was categorical in the sense that the duty not to kill him existed even when his being killed would minimize killing. This right, although no more important than others’ rights, nonetheless is not to be traded off in some social summing of rights. Often, this is termed the “agent-relative” feature of natural rights, because each agent treats his duties as applying to him individually; he cannot violate his duty now in order to prevent even more violations of that exact same type of duty by others. Morality enjoins each of us to keep our own moral house in order, and is in that sense relative to each agent.

This necessary focus of an ethics of natural rights upon the individual—both on the holder of the right and upon the holder of the correlative duty—makes courts a more congenial home for natural rights protection, for what courts do is decide particular cases involving particular people. If courts are tempted to create or enforce

---

71. See id.; Hijazi, supra note 69.
72. On the agent-relative nature of the obligations correlative to basic human rights, see Michael S. Moore, Torture and the Balance of Evils, 23 Israel L. Rev. 280 (1989), reprinted in Moore, Placing Blame, supra note 3, at 669 [hereinafter Moore, Torture and the Balance].
73. See id.
some generally desirable social policy, they can do so only through imposing the costs of such a policy on the flesh-and-blood litigants before them. If it is tempting to sacrifice the rights of some innocent individuals so that the rights of others will be left inviolate, a court must stare into the eyes of that innocent person as it sacrifices his rights.

Legislatures, by contrast, face no such discipline. Indeed, it is natural to think that the legislative role is necessarily consequentialist about rights. There being no particular person whose rights are at issue before a legislature, it is natural to regard all person's rights as fungible, meaning some can be sacrificed in order to minimize rights-violations in total.

This rights-consequentialist view can pay no more than lip service to the agent-relative character of natural rights. It can say what the American company, Jiffy Lube, said to its customers in a recent advertisement: "We service thousands of cars each day, but the most important is yours." Such statements belie a recognition that each individual is unique and special, yet efficient rights-protection in general (like efficient car service in general) is inconsistent with the kind of special attention to the individual demanded by the categorical nature of natural rights.

B. The Welfare-Trumping Nature of Natural Rights

Separate from the categorical or agent-relative nature of natural rights is the feature here examined, namely the opposition of such rights to other intrinsic goods like welfare. The categorical nature of natural rights has to do with the question of whether an agent should aggregate rights in some maximizing function. That question involves no trade-offs with other goods besides natural rights. Here, the question is different in that it does involve such trade-offs.

We can get at the question this way. A well-known economist was once asked where in his system (of efficient resource allocation) any room for rights existed. "Rights?," he said. "I recognize rights. Rights are important in my system precisely to the extent people prefer them." To philosophers, this is a joke, for a second essential attribute of a natural right is that it not be confused with a preference for a right by the putative holder of such a right, no matter how strong such a preference is taken to be. Rights not being violated is itself an intrinsic good, not a mere instrument for the satisfaction of preferences. Satisfaction of preferences may also be an intrinsic

75. For exploration of the intrinsic good/instrumental good distinction, and its contrast with the categorical/consequentialist distinction, see Michael S. Moore, Justifying Retributivism, 27 Israel L. Rev. 15 (1993), reprinted in Moore, Placing Blame, supra note 3, at 153.
good, but that not at all diminishes the distinct claim of the natural rights theorist (about respecting rights as another intrinsic good).

Moreover, the satisfaction of natural rights is not only an intrinsic good along with the satisfaction of preferences, it is also a more weighty intrinsic good. What this means is that when satisfaction of natural rights conflicts with satisfaction of preferences, rights win.\textsuperscript{76} One cannot maximize utility at the expense of rights. In an example long-used in ethics, if one can satisfy five people’s extremely strong preferences not to die of various organ failures only by cutting out the organs of one perfectly healthy victim, one may not violate the rights of the one to maximize the welfare of the many.\textsuperscript{77} As preferences, it may be five to one, but the great weight given to rights “trumps” the maximization of preference.

Utilitarians are defined by their theory that there is but one intrinsic good, welfare in some sense (either hedonic pleasure, happiness, preference satisfaction, or some material proxies for these psychological states). Natural rights theory is thus necessarily anti-utilitarian, for two reasons: one, natural rights not being violated is put forward in natural rights theory as another intrinsic good, not reducible to utility; and two, when the two goods conflict, utility loses. It is thus no accident that utilitarians like Bentham proclaimed the idea of natural rights to be, not just simple nonsense, like the idea of a right generally, but “nonsense upon stilts.”\textsuperscript{78}

Democratic legislatures not only tend towards consequentialism, as we have seen, but they also tend towards that kind of consequentialism known as utilitarianism.\textsuperscript{79} There are several reasons for this. One stems from the character of the institution as one of political compromise. In reaching the accommodations of conflicting points of view necessary for legislation, it is helpful to have a common metric to be used in the standards set for negotiation. Utilitarianism supplies such a common metric, in the sense that there is but one thing intrinsically good for a utilitarian—welfare. Not only does this surmount apples and oranges comparisons in political compromise, but it also reduces disagreements to matters of fact, not value or principle. Compromise is easier to achieve if the yielding party sees himself yielding only on disputable matters of fact, not on a matter of principle.

\textsuperscript{76} In Dworkin’s well-known terminology, rights “trump” utility. Ronald Dworkin, Taking Rights Seriously xi (1977).
\textsuperscript{77} See, e.g., Katz, supra note 17, at 35.
\textsuperscript{78} Jeremy Bentham, Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution, in ‘Nonsense Upon Stilts’: Bentham, Burke and Marx on the Rights of Man 46, 53 (Jeremy Waldron ed., 1987).
\textsuperscript{79} A consequentialist believes that an action is right if productive of more intrinsic good than its alternative; a utilitarian is a consequentialist with a monistic theory of what is intrinsically good, namely, welfare.
Second, there is an easy slide from majoritarianism to utilitarianism. Majoritarianism is an idea inherent in a democratic legislature: the majority’s right to rule is the rationale of the institution. It is easy to move from this idea to the thought that morality itself is satisfied when the majority’s preferences are satisfied. Utilitarianism, in a word, seems democratic. It maximizes the preference of all people, each counting for one but only one, in Bentham’s famous phrase.\textsuperscript{80}

This way of arriving at utilitarianism is of course fallacious. The right to rule of the majority includes the right to be wrong in one’s rules; morality is not necessarily congruent with majoritarian preference. What makes the case for majority rule is not that a majority cannot be wrong. Utilitarianism is thus not a corollary of democratic political theory. Even so, we are here interested in causal tendencies, not in logical implications. What matters is the empirical fact that believers in majoritarianism tend—rightly or wrongly—to be utilitarians.

Third, democratic legislators individually tend to have a view of the role defining their office that collectively makes them act as a body like utilitarians. The view I refer to is the view that the job of a democratically selected legislator is to represent the views of her constituents. Rather than acting on her own views about proposed legislation, on this view, she does her job best by representing the views of her constituents on the issues at hand. When each legislator acts in this representative way, the result tends to accord with that justified on utilitarian grounds. More intense preferences tend to receive more intense political expression by voters, and more intense political expression by voters tends to generate more intense representation by legislators; legislation emerging from such a process will often accord with what “the most most prefer,” i.e., with utilitarianism.

Such utilitarianism in a legislature is incompatible with natural rights protection. By contrast, courts are non-representative in their functioning. Courts are by design insulated from politics in order not to represent the majority will. Moreover, majoritarianism does not lie at the heart of the rationale for courts, as it does for a democratic legislature; therefore, courts are not tempted by the slide from majoritarianism to utilitarianism. Finally, courts are not agencies of compromise and thus have less need of the kind of common metric offered by monistic theories like utilitarianism. On the contrary, courts are used to non-utilitarian forms of reasoning involving seemingly conflicting norms. The bread and butter mode of reasoning for courts lies in the application of legal rules; the move to similar reasoning about moral rules is a small one.

\textsuperscript{80} Bentham, \textit{supra} note 78, at 29-30, 37-38.
C. Natural Rights are Matters of General Principle

Natural rights are by their nature general, in two senses. First, they apply generally to persons. We all have such basic human rights simply by being persons. We don't have to do anything to earn them, and thus there is an equality in their distribution that survives the obvious inequalities that exist between persons with respect to their efforts, their natural endowments, or their social advantages. It is in this sense that natural rights philosophies are egalitarian in character.

Second, the content of natural rights—what we have a right to—is a matter of principled generality. If I have a right to speak freely, and if the exercise of that right only makes moral sense when I have an audience to whom I am speaking, then my right to speak freely includes my right to get together ("associate") with other people. Like-wise, my right to speak freely must include my right to write freely and to disseminate my writings to others, for there is no morally relevant difference between oral and written communication.

Courts are organized as institutions to realize these twin goods of equality and generality. If justice, as Rawls tells us, is the "first virtue of social institutions," formal justice is the first virtue of judicial institutions, i.e., courts. Formal justice is blind in the sense that the numerical distinctness of persons is irrelevant to legal outcomes. The judicial virtues include freedom from bias against particular parties.

Formal justice demands more than that the numerical distinctness of persons be ignored by courts. It also means that cases that are alike in all morally relevant respects—not just in the personhood of the parties—be treated alike. This ideal forces courts to generalize, so that not every difference can justly make a difference in the way litigants are treated.

Justice Holmes famously told the tale of a Vermont justice of the peace with whom he was familiar. The justice of the peace had to decide a case where the defendant had maliciously broken the butter churn of the plaintiff. The good justice pored over his casebooks and his statute books, but finding no cases or statutes dealing with butter churns, gave judgment for the defendant.

Holmes' little tale usually draws snickers of amusement when told to judges, particularly judges from common law jurisdictions. What causes the amusement is the obvious failure of generalization. The justice of the peace fails at a task definitional of judging, the generalizing from broken plow cases (for example) to broken butter churn cases. Judges well understand that it is the job of courts to

81. This is Justice Douglas' example in Griswold v. Connecticut, 381 U.S. 479, 483 (1965).
83. Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 474-75 (1897).
generalize from particular doctrines and decisions about broken plows to matters of general principle, such as that protecting *property* (butter churns as well as plows) from malicious destruction.

Such an equality-respecting, generalizing tradition of courts fits well with the equality with which natural rights are held and with the generality in the content of such rights. By contrast, legislators do not feel bound to realize equality and general principles in their decisions. This is partly due to their adjusting to political realities: in the face of conflicting views when the "whole cake" is not to be had, they think it better to get some piece of the cake rather than none. Thus, even if a legislator thinks all women should have an unqualified right to an abortion, he may push for a more circumscribed right, one excluding young women without parental consent, women in later stages of pregnancy, or women at fault for nonuse of contraceptives. Alternatively, some of this tendency is due to legislators' view of their job as representative. Such a representation view of the job may make it seem right, not just expedient, to get only a part of the cake. Such a legislator may think it proper to reflect divisions in society about what rights we have with partial legal protections of those rights. On this view, for example, a legislator facing dissensus on the issue of abortion might limit the right of the woman to cases of rape and incest, even while holding a broader view of her natural right.

In any case, whether for reasons of expedient compromise or principled representation, legislators do not have the traditions of equality and generality that are the hallmarks of courts.

**D. Rights are the Products of Reasoned Deliberation**

The American Declaration of Independence states that the possession of natural rights is "self-evident." Despite this seeming trust in intuition and revelation, the natural rights tradition is one based on reason. Natural rights are an Enlightenment idea in which knowledge of such rights is likened to knowledge of mathematics. This is in marked contrast to the older natural law tradition, much of which was based on faith and revelation.

The "self-evidence" of which the Declaration speaks was Jefferson's rendering of Locke's foundationalist epistemology. In such an epistemology, one begins with indubitable ("self-evident") premises, such as Locke's premise that we each own our own bodies. From such premises one then deduced further conclusions, such as a

---

84. At some point even legislators become embarrassed by what Dworkin calls "checkerboard solutions," such as abortions for every third applicant. Ronald Dworkin, *Law's Empire* 179 (1986).
85. The Declaration of Independence para. 2 (U.S. 1776).
86. On Locke's moral epistemology, see White, *supra* note 36, at 20-22.
87. See Locke, *supra* note 63, at 283, 305.
88. See *id.*
natural right to property in material things. The entire process is one of tightly reasoned justification.

Such reasoned justification of rights is more at home in courts than in legislatures. Courts are in the business of justifying their decisions, often with opinions at the appellate level. Parties who argue in courts are similarly used to the process of justifying a decision in their favor by use of reasoned argumentation. Furthermore, the judicial virtues include attributes conducive to such reasoned justification of conclusions about rights. Judges are supposed to remain aloof from the fray, free of prejudgment of the issues as much as of actual personal bias against one or more parties. Judges are to keep an "open mind" on the issues before them in order that reasoned argument can carry the day.

However, we expect something different of legislators. Passionate commitment to a point of view is quite consistent with the legislator's job. Moreover, legislators do not justify their votes, about rights or about anything else. If one's job is to represent the views of one's constituents, such independent justification of one's conclusions about rights would seem beside the point. A legislator who seeks to represent his constituents has reason enough for his vote if he votes in line with his constituents' wishes. Seeking to find where the truth of the matter lies is not his job, on this representative view of the legislator's role. Thus, the job accepted by many legislators is less compatible with the reasoned justification needed to protect natural rights.

Of course, legislators may attempt to reproduce what they understand to be the justifications offered by their constituents for the views of those constituents. Yet such regurgitation of the views of others is a third person exercise in sociology, not an engaged, first person exercise of trying to figure out some moral issue. Such sociology of other's views usually produces wooden recitals of the shibboleths of others; by failing to engage the emotions and commitments, (which failure is typical of a mere sociology), such exercises fail to utilize our best heuristics for discovering moral truths. 90

E. Rights Protection Ultimately Involves a Convinced Citizenry

Despite entrusting to courts the job of protecting the rights of minorities against the majority in America, in the long run minority rights can be protected only when the majority becomes convinced that there are such rights. Otherwise, a determined majority can elect legislatures and executives that appoint and confirm judges that share the majority view of minority rights. In a democratic society, where

90. See Moore, A Natural Law Theory, supra note 4, at 392-93, 396.
judicial appointments ultimately rest with the people's representatives, courts can be no more than a temporary bulwark against majority oppression. (Although, as I shall argue in the next subsection, courts are a necessary bulwark even if temporary.)

Any institution entrusted with the protection of rights can thus do its job better if it has certain educative capacities. Courts have an advantage over legislatures here. It is no accident that standard philosophy of law and political theory texts in America include court opinions amongst their readings. They do not include legislative committee reports or legislative findings.

Part of this is due to a fact touched on earlier, that courts are in the business of reasoned justification. Court opinions are thus of a piece with philosophical argument in more standard educational materials. Also, it is partly due to the fact that court opinions are about particular sets of facts, certain real persons being treated a certain way. Our imagination and our emotions are grabbed by the particular. Particular cases of manifest injustice move us more than general truths ever can. Our capacity to learn and to grow morally is heavily dependent on such emotional experiences. Real cases join our individual experiences, and join those vicarious experiences presented to us by great literature, as the harbingers of moral insight. Courts thus have a large advantage in educative capacity because of the true stories their opinions tell.

A more contingent feature of American courts also enhances their educative capacity. This is the mystique that often attaches to judicial office. The robes, the wigs, the elevated bench, the courtroom decorum, the trappings of immediate power (in the form of bailiffs with guns), the actual power of contempt, all do a pretty good Wizard of Oz number on citizens. This has been particularly true in America, which adopted the rule of law as its civil religion: "in America the law is king," Tom Paine told us, and we have believed it ever since.

Legislatures, by contrast, tell no stories and weave no myths. They look like what they are, places for political compromises to be achieved in a business-like manner. They thus capture the popular imagination less than courts, and have as a result less capacity to educate a citizenry in the long run about the moral rights of people.

**F. No One Should be a Judge in Their Own Cause**

Lord Coke instructed us in *Bonham's Case*\(^{93}\) that it is the first precept of the natural law that no one should be a judge of their own

---

91. This is probably more true in America than in countries with more restrained judiciaries.

92. Grey, *supra* note 54, at 18 (quoting Thomas Paine, Common Sense and Other Political Writings 32 (N. Adkins ed., 1953) (emphasis omitted)).

cause. The reason is obvious enough: no matter how hard one tries, self-interest can delude judgment—and everyone knows this, so that even when judgment is truly impartial, it will not look impartial.

These general observations apply with full force to the issue of what natural rights we have and how they should best be protected. Our rights matter most when we are the minority on some issue. If we are part of a majority, democratic processes in the legislature should allow us to prevail eventually; thus, it is when a majority disagrees with our position that our rights become important. They are our bulwark against majority oppression.

The last place to put the determination of what rights we have would be in the very majority against whom we claim those rights. Such a majority would truly be the judge in its own cause, because it is the majority which holds duties correlative to our rights. A minority right against the majority, when the content and mode of enforcement of that right is up to the majority, is no right at all. Such a “right” is least effective when most important.

Here, the representative nature of the legislature works against it as the repository of rights protection. In a democratic society the legislature represents the majority, and the more democratic the society the more clearly that is true. The majority’s representatives should not be determining the duties of the majority vis-a-vis some minority’s rights, any more than the majority itself should do so.

Some non-representative institution like courts is needed. By virtue of their nonpolitical selection and their job security, judges are better situated not to represent the majority’s view of the minority’s rights. It is of course true that judges can abuse this power, for whoever has the final say about rights can exercise that power badly. The relevant question, however, is which institution is more likely to abuse the last say on rights—courts or legislatures. Given their insulation from majoritarian pressures, at least in the short run, courts are better suited to the task.

This completes what I have called the universalist version of the rights-based argument for judicial review. The argument aims to establish that courts have an incremental advantage if they, rather than the legislature, are assigned the business of rights protection. If established, this conclusion argues for courts treating a written constitution with a bill of rights as the “highest law of the land,” that is, as authority to overturn legislation inconsistent with it.

The argument is hardly conclusive. Those who value participatory democracy highly, such as Waldron, can still retort that court-enforced constitutional rights cost us something we should value more, namely,

94. Id. at 652.
95. See Ely, supra note 48, at 76-77.
the right to determine by majority vote what rights there are. We thus must balance this loss in democratic determinations of foundational issues against the gain in the protection of rights promised by judicial review. For what it is worth, I find the balance easy. Morgan Forster once said that two cheers for democracy is quite enough, three being out of the question. Basic human rights, however, deserve a full three cheers, and any institutional arrangement that furthers their protection ought to command our respect.

IV. THE RIGHTS-BASED ARGUMENT FOR THE NATURAL LAW THEORY OF CONSTITUTIONAL INTERPRETATION

It remains to sketch the connection between the rights-based nature of our Constitution's authority for judges, and the realist theory of that document's interpretation. The connection is almost as straightforward as the injunction that if you want to hit something, it is best to aim right at it.

I see the connection this way. If the authority of at least the rights-conferring clauses of our Constitution for judges is based on the incrementally greater protection of natural rights, then the right theory of interpretation for judges to use is one maximizing the protection of natural rights. Subject to the cautioning caveat below, the realist theory of interpretation does this. Such a theory enjoins our judges to see all constitutional rights language as referring to underlying natural rights—rights that (in the language of William Douglas adopted by former Senate Judiciary Chairman Joseph Biden) are older than our Constitution. On this view, judges are to identify the legal rights named in our Constitution with pre-existing natural rights.

With such an identification, the task of finding the meaning of some constitutional right is the task of discovering the nature of the underlying moral right. This is a theory-soaked process, because only with a moral theory of the natural right to speak one's mind, for example, can one arrive at any conclusions about the nature or contours of such a right. Such nature cannot be derived from contemporary or "original" views about that nature, but is independent of them.

The realist theory of interpretation thus directs judges to protect natural rights by regarding them as also being constitutional rights. This is the seemingly obvious way to maximize the protection of natural rights via a theory of constitutional interpretation. The only caveat to this exists if one regards the realist theory of interpretation

as a decision-procedure for judges, as well as a description of what makes constitutional decisions correct. A decision-procedure is a recipe for how one is to decide something. The contrast is with the right-making characteristics of a good decision. For example, take vacations. Where one should go on vacation is a matter of the right-making characteristics of a good vacation. How one should decide where to go is a different question, as different as the route one should follow. One may do best in deciding where to go by applying the right-making characteristics of a good vacation, but one may not. My good friend Herb Morris tells me he always does better in following a simple rule (always go to Northern Italy).

As a decision procedure, it may not be maximally protective of natural rights for judges to aim directly at their protection via the realist theory of interpretation. It is possible that the psychology of judges is such that they would do better to focus on something else, such as Alexander Bickel’s “consensus on the march,” or Antonin Scalia’s “narrowest social tradition.” Sometimes, such indirect decisional strategies are surely best. When shooting an arrow in a steady crosswind, the best way to hit a target is not to aim at it.

The question is whether there is any reason to think that judges’ decisions about natural rights would be better if they made such decisions in the guise of deciding something else. One reason that suggests itself is the discomfort people are often thought to feel in confronting judgments of justice directly. The Model Penal Code, for example, shies away from “justice” tests for proximate causation, insanity, and other hard-to-define elements of criminal liability, on the ground that jurors may be so uncomfortable with the responsibility for decisions on these moral criteria that they do worse than if they were given known-to-be-incomplete-or-inaccurate factual criteria. The thought is that by focusing on “facts” like “loss of substantial capacity to control one’s behavior” or “foreseeability of the harm,” jurors’

---


101. Some legal examples: if those in extremely life-threatening situations characteristically favor their own survival over that of others, a rule prohibiting killing absolutely may better maximize truly justified killings than a rule allowing a “balance of evils” to guide actors; likewise, if state interrogators regularly undervalue the rights of terrorist suspects vis-a-vis the rights of future victims of terrorism, a rule prohibiting torture may better maximize truly justified torture than a rule allowing a “balance of evils” to guide actors. *See* Moore, *Torture and the Balance*, *supra* note 72, at 733.


103. On the complete vacuousness of foreseeability tests, see Michael S. Moore,
intuitive moral sense will better come in to play than if they focus directly on moral issues, such as whether someone is too crazy to justly be held responsible, or whether an effect is too remote to have a just bearing on the actor’s responsibility.

For my own part, I doubt the psychology that justifies indirect decision strategies for moral decision. As Edmond Cahn said years ago, in criticizing Learned Hand’s flight from ethics to sociology, judges do better confronting the responsibilities of decision directly.\footnote{104} Only then are judges “in session with [themselves] and prepared to answer for the [consequences].”\footnote{105} Only then do judges engage their full faculties, including their emotions, to answer questions of justice and natural rights.

In any case, my interest in the realist theory of interpretation has never primarily been an interest in judicial decision procedures. Rather, the realist theory was propounded as an answer to the question, “What makes a constitutional interpretation right?”, not necessarily an answer to the secondary question of how judges could best arrive at those right answers.\footnote{106} A constitutional interpretation is correct on the realist theory when it takes constitutional rights to be natural rights. Thus, protecting natural rights by the power of the judiciary is a direct implication of the rights-based justification for why courts should engage in constitutional interpretation at all.

\footnote{104}{Edmond N. Cahn, Authority and Responsibility, 51 Colum. L. Rev. 838, 851 (1951).}
\footnote{105}{Id.}
\footnote{106}{See Moore, A Natural Law Theory, supra note 4, at 396 n.218.}
Notes & Observations