ARTICLES

SUBSTANCE ABOVE ALL: THE UTOPIAN VISION OF MODERN NATURAL LAW CONSTITUTIONALISTS

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I. INTRODUCTION

Dare I suggest that we stop talking about judicial review and theories of interpretation? . . . The debates are still as unresolved, and as rancorous, as they have ever been. So instead of arguing over whether the Supreme Court was right or wrong to second-guess the legislature in a particular instance, let's start talking about substance: about what kind of a polity we want (and why), and what we need to do to get there.¹

At the law school where I teach, the front of the law building has inscribed on it various sayings about law and justice, the first of which reads: "Justice is a human enterprise."² I have come increasingly to think that constitutional theorists would do well to consider the truth embodied in this simple statement. Many theorists have become fixed upon the ideas of "justice" or of "rights" to the diminishment of awareness that our constitutional order must focus as well on the human nature of the enterprise by which we pursue our most important moral and political ideals. But if we pay insufficient attention to the human dimension of the problem in pursuit of our political ideals,

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2. Anon. Picture of law building available on request. Most of them are by famous people like Oliver Wendell Holmes, Jr. or Learned Hand. Oh well.

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we can easily wind up empowering our human frailties and, paradoxically, moving further away from our professed ideals, and perhaps most especially the ideal of the rule of law.

Nowhere are these concerns more powerfully illustrated than in the works of modern natural law constitutionalists. The debate over natural law constitutionalism which I engage here should not be confused with the debate over textualism, intentionalism, or, even more broadly, interpretivist versus noninterpretivist methods for construing the Constitution. This debate goes beyond the debate over interpretive methodology; it concerns the relationship between the Constitution and the idea of a moral reality. The modern natural law constitutionalists whose views I critique in this paper are those who assert that the Constitution, properly understood, includes a kind of general trump card in the form of a moral reality which provides (or is, at any rate, thought to provide) a measure of all positive legal acts—whether framed in terms of the values of natural equality, natural rights, or “simple justice.”

This idea of a moral trump card, or substantive measure of the legality of all acts (or omissions) of government, might be viewed as a straightforward requirement of an appropriate theory of jurisprudence, as implicit in the social contract of which the written Constitution is a partial integration, as reflected in the Declaration of

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3. Notice that “natural law constitutionalism,” as I describe it, does not refer to the idea that moral realism underlies, or to some extent informs, our constitutional design, or to the view that some of our constitutional provisions are value-laden norms to which we might do injustice if we limited their scope to the particular applications actually contemplated by the adopters. These claims would not be controverted by many modern constitutional textualists. Indeed, it is difficult to account for a constitution of the kind we have, that purports to rest on a theory of limited government, without presupposing the idea of moral limits on legitimate government power. See Steven D. Smith, Book Review, 10 CONST. COMMENTARY 489, 494-95 (1993) (reviewing NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992)).

Moreover, no constitutional historian worth his salt could question that the premise of a moral reality (or “natural law,” in the terms of the eighteenth century) which established limits on legitimate governmental power, was an article of faith for the founding generation. The historical question of relevance concerns the status of this natural law within the legal and constitutional order.

4. E.g., Mortimer Adler, Robert Bork: The Lessons to Be Learned, 84 NW. U. L. REV. 1121, 1124 (1990) (contending that Judge Bork should have been rejected for his positivism alone because it precluded him from judging correctly in the “cases that come before the Supreme Court in which it is not unconstitutionality, but injustice—the violation of human rights and liberties—that calls for rectification and redress”; also contending, however, that the founders were believers in natural law); Charles E. Rice, Some Reasons for a Restoration of Natural Law Jurisprudence, 24 WAKE FOREST L. REV. 539 (1989).
Independence or in the terms of the Ninth Amendment; as a central element in the constitutional design, and the intentions of the adopters, whether or not embodied in any text; or as a reflection of the general purpose of the Constitution as indicated by the Preamble's statement that the Constitution was to "establish justice."

In many hands, natural law constitutionalism is claimed to embody both a preferred constitutional jurisprudence and a more accurate interpretation of the original constitutional design—i.e., it is claimed to be both normatively and descriptively the best accounting of the American constitutional project.

This turn to moral philosophy as the key to addressing our contemporary debate over the foundations of our constitutionalism is perhaps natural if not inevitable. To the generation that responded to the quest for social justice in the civil rights movement (which was aided by a modern activist judiciary) and opposed the perceived immorality of the war in Vietnam, the moral idealism of natural law constitutionalism is bound to hold significant appeal. And after a long dark night of relative disinterest in (and even deep skepticism about) normative moral and political philosophy, this generation's renewal of active engagement in debate over "the good" and "the right" provides constitutionalists with plenty of fodder for the natural law constitutional grist mill.


8. E.g., Barber, supra note 7, at 75; Brennan, supra note 6, at 978-81. In general, I make no distinctions here between those who contend that they are describing the intentions of the founders and those who contend for a similar position based on either essentially non-originalist assumptions about the interpretive enterprise or a general natural law jurisprudence. For purposes of most of the analysis in this critique, the nature of the justification offered hardly matters.

9. This inclination, of course, is nothing new. As James V. Schall has observed, centuries ago St. Augustine "recognized that it is of the very essence of human nature to seek the best city,
To these considerations might be added that our generation has also renewed scholarly interest in the "higher law background" of the Constitution. And in a time in which many perceive the idea of source-based constitutionalism (whether textualist or intentionalist) as largely debunked, it is perhaps even more to be expected that many would be drawn to a methodology that promises a coherent vision of our joint constitutional project and the prospect of a principled choice other than judicial abdication or rule by judges. Moreover, as the statement by Professor Sherry which serves as a heading for this introduction reflects, there is a certain impatience with the never-ending debate over questions of authority and interpretive methodology. This undoubtedly enhances the attraction to the prospect of a constitutional discourse that appeals directly to moral ideals of justice and human rights.

My fear is that the understandable appeal and moral idealism that characterizes this pursuit will blind many to the dangerous implications of any systematic attempt to superimpose this substantive vision on the constitutional system we have inherited. There is no question that the pursuit of justice, and the vindication of the claims of natural or moral right, are among the important ends of constitutionalism, particularly as constitutionalism has been conceived in America. But our traditional constitutional thought has also rested on a consciousness of humankind's propensity for injustice and for the abuse of power, whether private or governmental, and a consequent awareness of the risks associated with granting limitless power to any one to pursue even noble goals (such as justice and natural right).

On this traditional view, the main substantive goals of the constitutional system are to prevent the worst sorts of abuses and injustices and to facilitate the progressive realization of justice and natural right over time without risking the destruction of tried and true methods by which these goals have been partially realized in the past. The most crucial feature of the Constitution, in this traditional way of seeing, is the system of deliberative democracy it establishes—a system that not only helps secure rights, but also furthers the fundamental value of collective self-determination.

the City of God, as he called it." James V. Schall, On Being Dissatisfied with Compromises: Natural Law and Human Rights, 38 Loyola L. Rev. 269, 294 (1992). But Schall also observes that Augustine "warned us not to look for this City in this world." Id.
I have elsewhere disputed the claim that the adopters of the Constitution intended that the text of the Constitution could be supplemented and/or supplanted in a general, and indeed open-ended, way as our legal culture progressed in its understanding of the norms of natural law and natural right. This article will explore why “trump card” natural law constitutionalism cannot by its nature adequately confront crucial issues of institutional design and democratic theory. In thus putting questions of moral substance ahead of crucial issues of authority, natural law constitutionalism appears to me to rest on a naive, utopian faith in the ability of judges trained in law to adjudicate competing claims of rights and justice while lacking due regard for human propensities toward hubris as well as injustice.

II. NATURAL LAW CONSTITUTIONALISM

A. THE FOCUS ON SUBSTANCE

Modern natural law constitutionalists insist that the crucial underpinning of our constitutional order is the premise that the validity of all positive enactments depends on their conformity to some particular principles of justice or natural right. A law’s conflict with moral realist norms invalidates that law, even if other proffered criteria of validity are met. The framers, according to this view, rejected the evils of positivism—the view that “might makes right” and that legal obligation can be purchased with the sword.


11. According to this natural law view of our constitutional order, a constitutional decision-maker (or “interpreter”) can never properly conclude her analysis after looking only at traditional sources of positive law—text, history, purpose, structure, precedent—nor even to ideas of tradition or developing consensus, because true legal and constitutional obligation can flow only if the rule that emerges from such sources does not contradict the requirements of natural justice and natural right.

12. For a sampling of modern proponents of natural law jurisprudence who describe positivism in these terms, see McAffee, Prolegomena, supra note 10, at 113; Vieira, supra note 7, at 1478 (arguing that “[l]egal positivism and American constitutionalism are irreconcilable”). It should be noted, however, that there are defenders of natural law who associate “positivism” with moral relativism and skepticism without necessarily advocating what I have here described as natural law constitutionalism. E.g., Schall, supra note 9, at 296.
Most natural law constitutionalists assure us that these were the views of the founders, or at least that this is the most coherent interpretation of the document they bequeathed us. For example, in tracing the authority of the Constitution to the doctrines of the Declaration of Independence, Professor Jaffa assures us that the founders’ constitutionalism gave priority to natural right even over popular sovereignty: “By their own understanding, [the American people] had every right to which [the laws of nature and nature’s God] entitled them, but no right to anything to which those selfsame laws did not entitle them.”

Consequently, although legitimate government rested on the “consent of the governed,” this referred to “intelligent or enlightened consent” and “not anything whatever to which men might agree.” The people would have no right to form a Nazi or Bolshevik constitution, nor the right to the institution of chattel slavery. For Jaffa, then, if we are to follow the intent of the framers, as modern originalists (at least) have asked us to do, we must comply with their view that constitutionalism gave priority to the morally acceptable “ends” of government—which includes protecting the rights of individuals—even over the authority of the sovereign people.

Similarly, Professor Sherry assures us that the founders fused the common law tradition of Coke with the social contract/natural rights philosophy of Locke. They thus conceived their constitutions as consisting of a mutable structure, or frame of government, and an immutable set of first principles consisting of natural rights that could not be altered even by the sovereign people. At a slightly higher plane

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13. JAFFA, supra note 5, at 22-24, 26-29, 35-42. See also Brennan, supra note 6, at 974; Mark Levison & Charles Kramer, The Bill of Rights as Adjunct to Natural Law, DET. C.L. REV. 1267, 1274, 1285, 1288 (1991); Macedo, supra note 7, at 33.
14. Brennan, supra note 6, at 980-81, 988; Jaffa, supra note 5, at 95.
15. JAFFA, supra note 5, at 95.
16. Id.
17. This at least appears to be the implication of all of Professor Jaffa’s published work on constitutional history and theory. At the symposium at which a version of this article was presented as a paper, Jaffa appeared to acknowledge responsively that, under the American system, the sovereign people are the final judges of the scope of their obligations to natural law. It is difficult to determine the extent to which this acknowledgment qualifies Jaffa’s prior claims about the original constitutional design.
18. Sherry, supra note 6, at 1133-34, 1146, 1160, 1165-66; accord, David Richards, Foundations of American Constitutionalism 220 (1989) (founders believed that “rights are not given by the Constitution” but that all republican constitutions reserved to the people “the wide range of inalienable human rights that could not, in principle, be surrendered to the state”); Massey, The Natural Law Component of the Ninth Amendment, 61 U. CIN. L. REV. 49, 79-80 (1992) (ascribing to the founders the view that, under Lockeian natural rights theory, government
of generality, Professor Barber contends that the Constitution can only be read coherently when its provisions are construed so as to implement its purpose to "establish justice" (meaning actual or "simple" justice and not positive or conventional justice)\(^{19}\) and that the authors of the *Federalist Papers* conceived the role of judicial interpreters as one of implementing moral ideals of justice and natural right.\(^{20}\)

Perhaps the most common argument in support of natural law constitutionalism is the one that relies on the text and history of the Ninth Amendment. Ninth Amendment theorists have contended that the amendment refers to a veritable cornucopia of natural rights that might serve as "exceptions" to the powers granted the national government\(^{21}\) and, eventually (after the bill of rights is incorporated), the state governments as well.\(^{22}\) In addition, it has been claimed that the powers are islands in a sea of individual rights, not a sea encompassing islands of enumerated liberties; *Van Loan*, *Natural Rights and the Ninth Amendment, in The Rights Retained*, supra note 5, at 149, 162-63 (contending that for the founders natural rights were inalienable, and this meant that "they were beyond the powers of government and could not be surrendered to it, despite even a written constitution to the contrary"; consequently they "required no constitutional protection" because any such provision "would only be 'declaratory' of their inviolability").

19. *E.g.*, Barber, supra note 7, at 72, 75, 78-80. Similarly, Professor Macedo asks us rhetorically: "Why should not interpreters simply take the preamble at its word, . . . and read the Constitution as an attempt to establish justice—not a fully specified historical conception of justice, but simple justice?" Macedo, supra note 7, at 32-33.


21. This is the inference drawn from the statements opposing inclusion of a Bill of Rights on the grounds that it would not be possible to enumerate all the rights to which the people were entitled by nature and justice. See Brennan, supra note 6, at 998-99, 1005; Sherry, supra note 6, at 1163. James Iredell is often quoted as confirming this view in issuing this challenge to those who advocated a listing of their rights: "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 167 (1788) [hereinafter ELLIOT'S DEBATES]. See also Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 626 (1991) (citing James Wilson in support of the proposition that "a complete enumeration of [the natural] rights is simply impossible").

22. See, e.g., Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment, in The Rights Retained*, supra note 5, at 291, 335 (contending that Ninth Amendment rights should be applied to states, despite the lack of evidence of an original intent to do so, "because the theoretical understanding of the ninth amendment reservation" is to "vest these rights in the people, rather than in any government"); Norman G. Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 806 (1962). Indeed, some have contended that the Ninth Amendment, by its terms and its logic, applies directly and immediately to the states without regard to the incorporation controversy. Charles Black, Jr., *"One Nation Indivisible": Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 29 (1991);
amendment was drafted to serve as a rule of liberal construction, or, perhaps more accurately, as guaranteeing that the full scope of our natural rights can be implemented even in the face of ineptly worded textual provisions. 23 But wait, that is not all.

The Ninth Amendment not only equates natural and "inalienable" rights with constitutional rights, but also calls into question a received foundational theory of the Constitution—namely, that the authority of its provisions, including those stating limitations on government power on behalf of human rights, is rooted in their status as law adopted by popular will. 24 On this view, the constitutional status of natural rights is a reflection that they are part of the moral reality under which government must be justified; the consequence is that they cannot by their nature be limited by the terms of a particular formulation. They can be apprehended, and perhaps more effectively secured, but they can never be legislated or restricted by stipulation. 25

Bennett B. Patterson, The Forgotten Ninth Amendment, in The Rights Retained, supra note 5, at 107, 114-120.

23. Thus a number of Ninth Amendment commentators have also linked the Amendment to Madison’s argument to Jefferson that “there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained with the requisite latitude.” James Madison to Thomas Jefferson, Oct. 17, 1788, in 5 WRITINGS OF JAMES MADISON 271-72 (Hunt ed., 1904). E.g., John Hart Ely, The Ninth Amendment, in The Rights Retained, supra note 4, at 179, 180-81; Sherry, supra note 6, at 1163 n.155 (lending equivocal support to reliance on this particular statement of Madison as an argument leading to the Ninth Amendment).

As a critic of the natural rights construction of the Ninth Amendment, I have contended that there is no plausible evidence to link Madison’s concern about the breadth of language that could be obtained for a particular guarantee with the debate that produced the Amendment. McAfee, Ninth Amendment, supra note 10, at 1298-99. If this connection were accepted as advocated—the logic of which is at least plausible if one starts with the assumption that the Ninth Amendment is a general natural rights incorporation provision—the breadth of implications for constitutional decision-making would be profound. Under this reading the Ninth Amendment licenses not merely a search for rights beyond those enumerated in the text, but also an interpretive reformation of the text so that it always comports with the requirements of natural law, no matter the historically intended meaning. Moreover, given that this construction of Madison’s comments looking toward “liberal construction” of natural/constitutional rights seems to be driven by the remorseless logic that natural law is the binding source of constitutional law, and not the decisions adopted by a sovereign people, a further implication of this purpose for the Ninth Amendment is that enumerated rights would properly be ignored if they are found to create injustice or to be in conflict with the overriding rights of nature.

24. See Lawrence G. Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment, 64 CHI.-KENT L. REV. 239, 254-55, 258-59 (1988) (Ninth Amendment calls into question “majoritarianism” as a foundational account for the individual rights project of the Constitution; it shows that the provisions of the Bill of Rights must be seen as part of a larger project in political morality rather than as “disembodied acts of capricious will that somehow gained widespread support”).

25. See sources cited supra note 18. Thus Professor Sherry contrasts an older view that traced a constitution’s authority to its connection to “indubitable truths and time-tested customs” with an emergent view during the founding period that linked its authority to its “popular
With this understanding of "rights" being implicit in our constitutional design, the Ninth Amendment text states a simple truism that our natural rights cannot be fully and finally identified inasmuch as our unfolding comprehension might reveal new rights, or new dimensions of previously recognized rights, from time to time. Nor, for that matter, given this general theory, could any of the rights properly identified as natural rights, be restricted or cabined by a mere text, no matter the specific intent of the drafters of the text. This is merely a matter of putting first things first: the Bill of Rights is, after all, a mere "adjunct to natural law," for the written Constitution which contains the Bill of Rights "cannot limit those rights and should not purport to." 

In most cases, such views of the nature of "the Constitution" are accompanied by endorsement, or at least acceptance, of the doctrine of judicial review. The standard wisdom is that the case for judicial review of natural law constitutionalism stands or falls with the case for judicial review in general. Judicial review is well established as a crucial constitutional enforcement mechanism—whether based on arguments from text, intent, structure, practice, or professional training and inclination toward reasoned argument—and it follows that courts should enforce both the terms of the writing as well as the (we

origin or approbation." Sherry, supra note 6, at 1146. The Ninth Amendment is illustrative that the shift of emphasis to popular authority to adopt constitutions "was intended to complement, not to replace, the earlier tradition." Id. at 1157. The idea of natural rights was linked to the earlier tradition, and, according to Sherry, "[t]his separation of natural rights from positive law was more than mere rhetoric." Id. at 1132. This implied that fundamental law "might evolve, but not to the extent of depriving citizens of natural rights." Id. at 1133.

26. A concern about a Bill of Rights which has been linked to the Ninth Amendment is Edmund Pendleton's objection that "in the progress of things, [we may] discover some great and important [right], which we don't now think of." Edmund Pendleton to Richard Henry Lee (June 14, 1788), in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734-1803 532-33 (1967). See Sherry, supra note 6, at 1164 (also quoting Wilson on the idea that the law of nature is "immutable in its principles" but "progressive in its operations and effects"). But see McAfee, Ninth Amendment, supra note 9, at 1276 n.232 (providing alternative reading of Pendleton's argument). See also Brennan, supra note 6, at 1006-07 (collecting statements by various founders suggesting that understanding of our natural rights has been slow and continues to progress).

27. Levison & Kramer, supra note 13, at 1285. The reference to the Bill of Rights as an "adjunct to natural law" is taken from the title of the article.

28. See, e.g., Richards, supra note 18, at 226-28; Brennan, supra note 6, at 1021-23 (contending that Federalists assured ratifiers that laws encroaching on natural rights would present cases arising under the Constitution and would be invalidated by the courts); Macedo, supra note 7, at 36 ("[i]t is by no means obvious that there is any good substitute for the courts in fulfilling these aims"); Sherry, supra note 6, at 1227.

29. JOHN HART ELY, DEMOCRACY AND DISTRUST 40 (1980).
now understand illimitable) portions of the Constitution that are not stated explicitly. Not only is this understanding reinforced by the Ninth Amendment, which specifically prohibits "disparag[ing]" the unenumerated rights thereby secured, but judicial review on behalf of natural rights and justice is viewed as critical to legitimating the legal and political order.

B. Taking Natural Law Constitutionalism Seriously

In a recent important work on the common law, James Stoner observed that, despite Lord Coke's contributions to early modern discourse on the nature of law and to the American theory of judicial review in the form of Dr. Bonham's Case, his works lack anything that even approaches a complete constitutional, or even a political, theory. Similarly, most modern natural law constitutionalists do not construct anything like a complete theory of constitutionalism. In general they seem to view their task as completed once they have, by their own lights at least, debunked constitutional positivism and gotten us beyond any apparent limits suggested by the text of the Constitution.

But the logical implications of natural law constitutionalism are truly radical—far more radical than its proponents would like to admit. It would completely transform our legal order's traditional conception of the sphere of ordinary politics. Under natural law constitutionalism, all issues about the appropriate moral limits (and perhaps duties) of government would be decided according to legal principle and not as political questions to be resolved by a process of deliberation and accommodation. The natural law limiting principles,

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30. U.S. Const. amend. IX. This argument from the amendment's text is advanced by Barnett, supra note 5, at 18, and Massey, supra note 22, at 332, among others.
31. See Randy E. Barnett, The Ninth Amendment and Constitutional Legitimacy, 64 Chi.-Kent L. Rev. 37 (1988); Barber, supra note 7, at 75-76, 86-87; Macedo, supra note 7, at 36-37.
33. Traditionally it has been understood that the purpose of constitutional limitations is to remove some matters from the give-and-take arena of political decision-making in a democratic society and to affirm that they are to be decided instead by the application of controlling legal principles. E.g., West Virginia v. Barnette, 319 U.S. 624, 638 (1943) (purpose of Bill of Rights was to "withdraw certain subjects from the vicissitudes of political controversy," to "place them beyond the reach of majorities," and "to establish them as legal principles"); Michael W. McConnell, A Moral Realist Defense of Constitutional Democracy, 64 Chi.-Kent L. Rev. 89, 109 (1988) (removing certain issues from the domain of politics "is the very purpose of constitutional limitations").
after all, are viewed as binding on us even if they were never memorialized and as unalterable even by the sovereign people (because inalienable).

While the Constitution has long been thought to be "open ended" to a certain degree by virtue of the vagueness and generality of crucial texts, the brand of natural law constitutionalism under discussion necessarily constitutes "open-endedness per se." Many issues long thought to be either settled or as simply not presenting serious constitutional questions, would find their place as part of the landscape for constitutional debate. To illustrate, the entirety of the longstanding debate over laws relating to drugs, gambling, prostitution, sodomy, adultery, polygamy, suicide, and euthanasia, among other issues—would present serious constitutional questions, to be decided on the basis of relevant moral principles. Moreover, the traditional judicial responses to many such claims, that they have no basis either in legal texts or in the moral, political, and legal traditions of our people, would (at the moment of our agreeing on the natural law model) be nonresponsive to the real issue such cases present—i.e., whether the challenged law in fact violates the natural rights of people.

Each year my law students are a bit surprised to confront a further practical implication of equating natural law with the Constitution—it necessarily re-opens questions about the modern state's intrusion on economic rights that have been renewed by thoughtful and sophisticated commentators. This presents the prospect of the libertarian arguments of scholars such as Bernard Siegan, Richard Epstein, Stephen Macedo, Randy Barnett, and Roger Pilon being confronted on their merits by a predominantly conservative judiciary. After all, the Supreme Court's decisions withdrawing from the Lochner-era of intervention on such issues rested on its purported rejection of a natural law role; the Court thus eschewed any responsibility for the resolution of the underlying moral questions about rights and justice, not just the issues of public policy.

34. McConnell, supra note 33, at 91.


36. For my students who think all conservatives think like Judge Robert Bork, it is a rude awakening to discover that many constitutional religions march under the banner of natural law: old fashioned conservatives, members of the new right, libertarians, pro-life activists, Christian fundamentalists, law and economics folks, and defenders of the decision-making of the Lochner era stand arm in arm with Warren Court liberals and a sprinkling of progressives and socialists
Even more generally, questions which arise routinely throughout our system of law raise legitimate questions of justice and moral entitlement, even if they have universally been thought to be questions for legislative policymaking. Indeed, natural law thinkers could hardly preclude a priori the possibility of courts finding a natural right to affirmative government aid, such as to education and basic subsistence, even though this conception would no doubt have been foreign to the thinking of the founding generation. In addressing all these many questions, while courts might defer to legislative fact-finding and determination of broad questions of social policy, natural law constitutionalism should prompt an activist judicial role whenever judges are convinced that the central question concerns justice and natural right. Deference to legislative resolutions of such questions, even those reflecting a broad societal consensus, would properly be viewed as an abdication of the judicial function to declare what the law is.

Even fidelity to constitutional text, except perhaps in cases in which natural law principles are indifferent, would be contrary to the first tenets of the constitutional project. In this sense, the natural

(many of whom, after all, are after bigger game than the expansion of individual rights). This was the ironic charm, really, about the fears expressed about Clarence Thomas's profession of interest in natural law constitutionalism: to see the backtracking of proponents of unwritten constitutionalism, and the distinguishing of Thomas's views as more dangerous that all amounted to something like, "when we referred to natural law constitutionalism in opposing Judge Bork, this isn't exactly what we had in mind."

37. For example, a great many issues regarding the scope of tort and criminal law norms, from issues about the purposes of the criminal law and the justifications of punishment to standards defining legal violations and defenses, can easily be cast in terms of moral rights which government is duty-bound to secure or not to invade. Simply to illustrate, there are certainly plausible arguments to the effect that there is a moral, and then by hypothesis a constitutional, right not to be convicted of a crime by virtue of a mental condition that falls short of the predominant legal standards for proving an insanity defense. Any one who has ever taught the law school course in Bio-Ethics could testify to the extent that modern commentators already address many of our most pressing ethical dilemmas in constitutional terms as though they presented identical questions.

38. As an example, though it jars modern assumptions, the highly influential natural rights figure, John Locke, propounded a rationale for private property that was subject to natural law constraints, including a duty of charity and a requirement that property be subject to the overriding values of social benefit and the public good. See, e.g., Richard Ashcroft, The Politics of Locke's Two Treatises of Government, in JOHN Locke, TWO TREATISES OF GOVERNMENT 14, 31, 37-39 (Edward Harpham ed., 1992). Stripped of its majoritarianism, Lockean natural law theory could as easily lend itself to constitutionalizing the welfare state as to justifying a more libertarian political theory.

39. There may be room in such a scheme for the granting of perhaps presumptive weight to such a prior determination of the content of the natural law, as in the doctrine of precedent, but such a presumption could not be a strong one if the Constitution is to be viewed as embodying natural law.
law is treated as a trump not only of ordinary legislation, but also of the people's own positive law Constitution. Natural law thus provides interpreters a wild card as well as a trump card; the Constitution ultimately means, not what the written document says or what an entire people agree upon even in the modern era, but whatever the authoritative "interpreter" believes natural law requires. After all, natural law is superior to positive law; all one needs after that is the logic of *Marbury v. Madison*.

Thus a judge who is convinced that the founding generation's derivation of a personal right to keep and bear arms from the natural right of self-defense was unjustified, and that the possession of such a right in the modern world directly conflicts with the right of all citizens to personal security, should logically feel obligated to treat the Second Amendment (as well as its state constitutional counterparts) as void. After all, "the U.S. Constitution defined the very legitimacy of political power in terms of respect for the inalienable rights of the person—both rights enumerated and unenumerated. . . ."42

Going further still, on these views courts would owe no fidelity even to a recently adopted constitutional amendment to the extent that they determined that the amendment conflicted with constitutionally protected natural rights. Thus, ratification of the flag burning amendment, or a constitutional amendment reversing *Roe v. Wade*, would be of no avail, provided only that the Supreme Court considered its position to be mandated by the superior natural law norm that defines "the Constitution." No positive enactment, even by the sovereign people who constitute the members of the social compact, can legitimately and (we are told) constitutionally deprive individuals of their natural rights.

40. As Professor McConnell observes, if the Constitution is comprised of the actual requirements of the moral order, and not a given community's shared understandings of that order, it follows that judges should "enforce principles the community expressly attempted to foreclose through constitutional language." McConnell, *supra* note 33, at 96.

41. Unsurprisingly, perhaps, many take this position in any event, though normally by manipulating the textual and historical materials to the end of denying that the Second Amendment means what it says. See, e.g., William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *Duke L.J.* 1236, 1243 n.19 (1994).

42. Richards, *supra* note 18, at 223. Similarly, McConnell observes that if the natural law principle of equality, derived from the Declaration of Independence, carried the implication of one person, one vote, in the view of judges seeking to be faithful to this charge, the Constitution's provision for equal representation of states of unequal population in the United States Senate could presumably be held to be unconstitutional. McConnell, *supra* note 33, at 96.
III. THE QUESTIONS NOT CONFRONTED: THE TWO SIDES OF CONSTITUTIONAL DESIGN

A. Substance and Authority

Without question the founding generation believed in a moral reality that was considered to be, in some sense, superior to positive law. But did these beliefs lead them to forget that a Constitution is in practice a form of positive law, drafted and implemented by fallible humans? Did their commitment to the idea of moral reality imply that their constitutional project included entrusting the entirety of the strictures of justice and natural law (so far as they held normative implications for government) to an unelected judiciary? Did they hold that the progressive identification and realization of the moral ideals that would be implemented in a just state could (and should) be enforced according to their terms against the beliefs and will of the people whose lives were to be governed by the Constitution? Just to state the range of implications that would flow from taking these sorts of views seriously, as we have just done, is suggestive of the answers.

Our skepticism about natural law constitutionalism does not come to us because sometime in the nineteenth century we were corrupted by skeptical, positivist views of law. It is because natural law at best speaks to only one dimension of the problem confronted by constitutional designers. The framers of any Constitution have to consider both the ends by which government is justified and limited (issues of substance) as well as the bases of legitimate decision-making power and the application of limiting principles (issues of authority).

The task is greatly complicated by the reality that the constitutional design must take account of the distressingly imperfect world in which we live. The framers had a keen awareness not only of human fallibility, but also of the impulse toward power that exists within virtually all humans. It was Madison, after all, who reminded us:

[What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable government to control the governed; and in the next place, oblige it to control itself.]

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Meaningful constitutional theory must provide a thoughtful accounting for the challenges that we face, as fallible humans, in determining the values that should govern our political life, defining and applying those values, and for implementing those values in practice. As an example, it is too easy to forget that establishing natural law-based adjudication, which permits judges to invoke moral values to override acts of government, does not establish natural law as our fundamental law. After all, the decisions will still be made by fallible humans. If judicial decisions are binding and final, and hence become the law within our constitutional order—which is the conventional view and the one natural law constitutionalists typically suppose—then it is the judges’ determination of the meaning and application of natural law that will actually take effect as law rather than the natural law itself. As Professor Soper observes, in these circumstances “the system remains positivist in the most significant sense, with the judge simply serving as the sovereign in place of the legislature.” This is why natural law theory can never be a complete legal or constitutional theory.

The institutional problem of judicial review, however, is only suggestive of the larger problem. Issues of substance and institutional authority are inseparably intertwined because the purpose of a Constitution is not merely to identify an ideal set of substantive ends, but to establish a practice that as nearly as possible accomplishes these ends. Constitutions containing the most wonderful human rights rhetoric may deliver little or nothing. In the real world, framers might choose to rely on various institutional devices and practical safeguards to secure natural rights rather than simply relying on a shared general principle that natural law controls positive law. After all, William Blackstone paid sincere lip service to the superiority of natural law even while embracing a view of Parliamentary authority that modern

44. Since all human law is eventually determined and applied by humans through the exercise of authority, there is a sense in which there is no avoiding positivism in practice. As Professor Soper has observed, even if we embrace the idea of natural law, we must confront that it “must ultimately be invoked and interpreted by fallible human institutions, judicial or otherwise. Since humans can always be wrong in making these judgments, fiat (in the positivist’s sense) will inevitably remain the last stop in any argument about what should be done from the legal point of view.” Philip Soper, Some Natural Confusions About Natural Law, 90 Mich. L. Rev. 2393, 2413 (1992).
45. Id. at 2415.
thinkers view as a virtual retraction of his verbalization of standard natural law doctrine.  

B. **The Challenge of Implementing a Substantive Vision**

Even if a community of people reached perfect agreement about the principles by which to establish and limit government, various considerations might prompt them to recognize that their task was not over. For one thing, they would want to make sure that this understanding could be maintained over time, especially in the face of the frailties of both the governors and the governed. At least this was the conclusion of the founding generation. As Jefferson wrote, “The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust drawing his teeth and talons after he shall have entered.”

As we sought to apply our substantive theories, we would have to be concerned with the susceptibility of our normative system to abuse by the rationalization of power-holders, to mistakes based on limited knowledge, to misuse by opportunists who lack genuine commitment to its ideals, and to its use as camouflage for cynically abusive decisions. One sort of response might be to rely on a written constitution, by which we could both specify important elements of the substance of our commitment and command government to act accordingly. The point of this practice would be, as it was for the American founders, to memorialize shared views of appropriate limits on government both to provide a civic education in republican values and to guide government officials, or even temporary majorities, as to scope of their authority. On this conventional view, the written

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49. It is particularly easy to understand the potential appeal to this approach if, like the early Americans, our experience had been that the unwritten nature of the English constitution had lent itself to a process of avoidance of the substantive values once thought to be embodied there. *See*, e.g., McAffer, *Social Contract Theory*, supra note 10, at 273-74 (explaining how the American colonists concluded that Britain lacked a meaningful constitution and resolved to establish an American Constitution with fixed rules and principles essential to preserving liberty and organizing power).

50. *See*, e.g., *RICHARDS, supra* note 18, at 222, 228 (citing to views of framers about the civic educational value of stating constitutional limits); *Letters from a Federal Farmer*, reprinted
Constitution takes certain substantive questions out of the domain of ordinary politics.

In the process, we might well perceive that to the extent that the shared understandings we embodied in the writing turned out to vary from the dictates of moral reality, we would risk entrenching a morally defective vision. Nevertheless, we would also realize that to bequeath what we think we know to our children, and to realize a practical ideal of limited government, we may need to choose between our commitment to the idea of justice and natural right and our commitment to a relatively concrete vision of those concepts. Especially in the light of historical experience, the alternative of stating only our generalized commitment to abstract norms such as "rights" and "justice" might well be deemed too easily abused or evaded. Indeed, we might well conclude that the achievement of most of our substantive ideals, including many relating to justice and rights, might be more successfully pursued indirectly through our political practice than by delegating all the substantive issues to the courts for resolution.

Natural law will not dictate the answer to these sorts of questions, despite the temptation to use its logic to argue that substantive values specified in written fundamental law are "illegal" because violative of natural law. Constitutional designers might appropriately respond that the possibility of human error, and hence departure from natural law norms, is a feature of any constitutional system, but that this particular design seems most likely to realize natural law values in the long term. Even more directly to the point, the only way to avoid the problem of specifying and applying natural law norms in human law, which includes the risk of error, is to resort to the endorsement of constitutional anarchy where each individual decides the questions of natural law obligations for herself. But avoiding that outcome, in which each individual becomes a judge in her own case, was a central

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in 2 THE COMPLETE ANTI-FEDERALIST 214, 324-25 (Herbert Storing ed., 1981) (leading Antifederalist author stating view that value of constitutional guarantees lies in "the effect of education" which they "impressed upon the minds of the people," showing them the importance of maintaining their rights).

51. We might do this even while hedging our bet through a provision for amending our constitution.

52. For a thoughtful exposition as to some of the "dilemmas" posed by the law's formality, and its strategic function, particularly in a world occupied by individuals who will "remain fallible in applying our political and moral principles," see Larry A. Alexander, Painting Without the Numbers, 8 U. DAYTON L. REV. 447, 460-62 (1983).

53. For a description of this sort of approach, see Soper, supra note 44, at 2416-17.
feature of the social contract theory that framed the constitutional project for the founders of the American republic. 54

Decision-making about the degree of specification of the norms might be affected as well by further, equally practical decisions about the precise role these norms should play within the legal system and the assignment of responsibility for implementing or enforcing the norms. As an obvious example, the declarations of rights of the early state constitutions included numerous provisions that can only be described as restatements of generally shared ideas about the philosophy of government; such statements fit within those fundamental law documents almost precisely because there was little thought that they might be enforced by ordinary courts. With the assumption of judicial review as one of the devices for enforcing the federal Constitution, however, such general restatements of governmental philosophy were omitted from the amendments proposed by Congress. 55 These decisions also can hardly be dictated by the natural law itself, but involve pragmatic judgments, based largely on experience and prophecy, about the long-term implications of competing models for mixing substantive norms and institutional arrangements.

C. WHEN WE DISAGREE ON SUBSTANCE

In a society like the one we live in we face the further challenges presented by the reality that we will disagree as to what substantive

54. See, e.g., John Locke, Two Treatises of Government ¶¶ 89-90 (Morley ed., 1889) (purpose of entering civil society is to set up a judge so as to “remedy those inconveniences of the state of Nature which necessarily follow from every man’s being judge in his own case”; to not have a common judge is to be in the state of Nature). It is noteworthy that Locke provides the single most influential source for natural rights thinking that influenced the American founders. Yet he embraces a strong form of majoritarianism, in the form of a legislative sovereign subject only to a right of revolution in the case of severe abuse, and does not contemplate natural law adjudication at all. This hardly shows that the founders followed Locke on the issue at hand, but it certainly suggests that natural rights social contract theory and natural law adjudication have a contingent, rather than a necessary, relationship.

Indeed, it seems rather clear that a number of the Federalists who opposed inclusion of a bill of rights would have been contented with a constitutional model which relied hardly at all on the attempt to incorporate substantive limitations into the fundamental law. A standard objection of opponents to inclusion of a bill of rights in the federal Constitution was that such a focus was unhelpful precisely because the state declarations of rights consisted mainly of “aphorisms” which “would sound much better in a treatise of ethics than in a constitution of government.” Federalist No. 84, at 579 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

55. See Mcafee, Social Contract Theory, supra note 10, at 303-04 (explaining why such statements of political philosophy were probably omitted from subsequent amendments to the Constitution).
rules or principles should be memorialized. A central question concerns how to resolve the issues involved as well as the process by which the norms would become authoritative and binding on officials within the legal system. The decision in Marbury v. Madison, and the weight of the evidence concerning the views of the founders, indicates that the ultimate source of constitutional authority in America was thought to be the sovereign people. The founding generation started with the premise that, whatever the appropriate limitations the people should impose on their own power to rule in daily affairs, the sovereign people remained the ultimate judge of those limitations—with authority to definitively resolve such issues for purposes of the legal order—rather than any organ of government (including courts).

This traditional commitment to the doctrine of popular sovereignty reminds us that judges who purport to be bound by the requirements of natural law over a provision of the written Constitution would not be establishing natural law as much as they would be privileging their judgment of the scope of natural law above the views of the sovereign people. Perhaps there are good reasons for privileging the views of judges on the fundamental moral questions relating to a just political and legal order over the decisions of the people embodied in their constitutions, but I have not been persuaded by anything I have seen to date. It is certainly not a view that courts have ever explicitly adopted and defended in this country, notwithstanding that

56. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (referring to the people's "original right to establish" the "principles as, in their opinion, shall most conduce to their own happiness;" asserting that this right "is the basis on which the whole American fabric has been erected"); James Wilson, Speech before Pennsylvania State Ratifying Convention (Nov. 24, 1787), in 2 The Documentary History of the Ratification of the Constitution 361-62 (Merrill Jensen ed., 1967) (stating the "truth" that "in our governments, the supreme, absolute, and uncontrollable power remains in the people," and the idea that just as constitutions are superior to legislatures, "so the people are superior to our constitutions"); Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 474-81 (1994) (summarizing evidence from ratification materials and the early state constitutions demonstrating founders' commitment to the "incontestable, unalienable, and indefeasible" right of the people both to institute and to alter and reform government); Stephen A. Conrad, Book Review, 4 Const. Comm. 383, 390 (1987) (reviewing Stephen Macedo, The New Right v. the Constitution (1986), and Gary J. Jacobsohn, The Supreme Court and the Decline of Constitutional Aspiration (1986)) (underpinning the American republican government is the precept that "the 'supreme,' 'definitive,' and 'originating' political authority resides in the People," and "[n]othing in Our [sic] late eighteenth century Founding compromised this article of faith"; concluding that "article V institutionalized this view"); McAfee, Social Contract Theory, supra note 10, at 274-76.
such morally objectionable provisions as those supporting slavery have found a home in constitutional text.\footnote{57}

Even if all the agreed-upon norms of justice and natural right were specified, there would remain the problem of their application to concrete situations in the real world; constitutional framers would have to determine the appropriate institutional framework for implementing the agreed-upon ideals. And given the difficulties associated with discovering, agreeing upon, and specifying the content of the issues of substance, we might well decide that the best way to realize our ideals in practice would be to rely to a large extent on various features of institutional design—as examples, we might consider popular elections, separation of powers, checks and balances, and the mediating features of an extended republic—for accommodating competing values of pursuing the public interest, safeguarding rights, and

\footnote{57. If we start with the framers' premise that the constitutive power of the people included authority to bind interpreters by their judgments as to particular limits on government to be included in the Constitution, as required by their view of natural law and natural right, it is difficult to make any sense out of the natural law interpretation of the Ninth Amendment described above. If the people's judgment about inclusion of a limitation, based on their views of natural law, are considered binding, it is difficult to fathom why their views about exclusion of a proffered limitation based on a similar judgment would not be equally binding. Yet the natural law reading of the Ninth Amendment invites courts to incorporate additional limitations on government even in cases where it is clear that such limitations were considered and rejected during the constitution-making process.

For example, a favorite technique of Ninth Amendment commentators is to search writings contemporaneous with the Constitution, including the state constitutions and declarations of rights and the proposals for amendments by the state ratifying conventions, for evidence of widely accepted fundamental rights beyond those listed in the Bill of Rights. These, we are then told, are (presumptively at least) among the unenumerated rights contemplated to be secured by the Amendment. E.g., Barnett, \textit{supra} note 4, at 35-37; Jeff Rosen, \textit{Was the Flag Burning Amendment Unconstitutional}, 100 YALE L.J. 1073, 1076-78 (1991). An example of a perfect candidate for inclusion as an "unenumerated" right is the right of conscientious objection to serving in war, which had been recognized in some states, proposed by some state ratifying conventions, and included in Madison's draft bill of rights. Brennan, \textit{supra} note 6, at 1003.

But the historical evidence supports the view that the first Congress considered the right of conscientious objection and ultimately rejected its inclusion in the Bill of Rights; it appears partly on the basis of the views that it was not a natural right and that the question was better left for resolution by legislative bodies. See 1 \textit{ANNAIS OF CONG.} at 780 (Aug. 17, 1789). \textit{Cf. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY} 1154 (showing Senate's amendment of Second Amendment to exclude conscientious objector limitation as had previously been proposed). For discussion, see Sherry, \textit{supra} note 6, at 1165. In permitting courts to rediscover and impose precisely such rights, the modern reading of the Ninth Amendment has the effect of privileging the decision of courts over the conflicting, deliberate judgment of those who considered the question whether to limit governmental authority to compel the bearing of arms and chose not to do so. It is difficult to conceive that the founders of the Constitution intended to leave such questions open to judicial revision based upon an open-ended constitutional provision. (For the evidence that they did not so conceive the purpose of the Ninth Amendment, see McAfee, \textit{Ninth Amendment, supra} note 10.).}
preventing injustice and arbitrary government. In so doing, we might choose to limit the substantive constitutional and legal limitations on governmental authority in the Constitution to those matters that we deemed most important and about which we were in general agreement.  

The quest for justice and natural right, on this way of viewing the matter, might frequently be mediated by a willingness to make a firm commitment to institutions and practices that, even if imperfect, seem to have served the ends of moving us in the direction of these goals. Many constitutional positivists, including those sympathetic with natural law thinking (or moral realism, as we tend to say now) would thus sympathize with the view of many of the founders that the lessons of experience could well prove more important in these kinds of deliberations than the voice of reason. At the Philadelphia convention, John Dickinson reminded his colleagues that “[e]xperience must be our only guide” because “[r]eason may mislead us.”

IV. BEYOND NATURAL LAW: CONSTITUTIONALISM IN AN IMPERFECT WORLD

The burden of Part III was to establish that the invocation of the superiority of natural law to positive law doesn’t tell us much about realizing moral ideals in constitutional practice. When human nature and human fallibility are taken into account, it no longer seems obvious that natural law constitutionalism is the only, or even the most plausible, route to achieving the ends of just government or preventing the worst sorts of political immoralities. I believe that the sort of deliberative democracy established by the founders—a system which utilizes a combination of popular control, institutional safeguards, and only somewhat open-ended textual limitations on the exercise of government power—facilitates our confronting the realities of human nature and the inherent difficulties and ambiguities of pursuing moral values in political communities more effectively than could natural law constitutionalism.

58. For evidence that this is in fact what the founders decided, see infra note 66 and accompanying text.
59. 2 The Records of the Federal Convention of 1787, 278 (Max Farrand ed., 1911).
A. CONSTITUTIONAL DEMOCRACY, HUMAN NATURE, AND AMERICA'S PLURALISM

Dean Bennett has observed that, "[w]ith Churchill, most of us believe that the inadequacies of democracy seem insignificant when one examines the alternatives, including wide-ranging judicial governance."\(^{60}\) This preference for democracy can be explained in part in terms of relative institutional competence, inasmuch as legislative bodies generally possess much greater information-gathering capacities than courts, as well as the ability to respond more effectively to the concerns of the governed.\(^{61}\) But the grounding of this preference goes deeper.

Democracy, including American constitutional democracy, is best understood, and best justified, when it is grounded in a realistic assessment of human propensities and possibilities. As the theologian and political theorist, Reinhold Niebuhr, argued in *The Children of Light and the Children of Darkness*, the defense of democracy requires neither the moral cynicism that refuses to acknowledge the existence of any sort of higher law nor the naivete that underestimates the power of self-interest.\(^{62}\) The human tendency toward preference of self is apt to manifest itself both at the level of identifying moral norms relevant to addressing many dilemmas of social and political life, as well as at the point of grappling with the many difficulties involved in applying relevant moral principles and implementing agreed-upon norms.

Consider Niebuhr's assessment of reliance on principles of natural law for reconciling the claims of individuals and communities, which is the central dilemma in constitutional thought:

Because reason is something more than a weapon of self-interest it can be an instrument of justice; but since reason is never disassociated from the vitalities of life, individual and collective, it cannot be a pure instrument of the justice. Natural-law theories which derive absolutely valid principles of morals and politics from reason, invariably introduce contingent practical applications into the definition of the principle. This is particularly true when the law defines not merely moral but also political principles. It is easier to state a moral, than a political, principle in generally valid terms... But

\(^{61}\) Id.
political morality must be morally ambiguous because it cannot merely reject, but must also deflect, beguile, harness and use self-interest for the sake of a tolerable harmony of the whole.

The principles of political morality, being inherently more relative than those of pure morality, cannot be stated without the introduction of relative and contingent factors. In terms of pure moral principle one may contend that the ideal possibility of community is that every vital capacity should find its limit and its fulfillment in the harmony of the whole. In terms of political morality one must state the specific limits beyond which the individual cannot go if the minimal harmony of the community is to be preserved, and beyond which the community must not go if a decent minimal individual freedom is to be protected. But every precise definition of the requirements and the perils of government is historically conditioned by the comparative dangers of either a too strict order or of potential chaos in given periods of history.63

One of the great strengths of the framers of the Constitution, in my view, was their sensibility to the need for striking a sort of balance between faith and realism, as advocated by Niebuhr. These men were neither cynical politicians, nor moral prophets; they were statesmen with a practical political sense, looking to find effective ways to create a stable system of government that promoted the moral ideals by which political practice is justified.64 As I have shown elsewhere, the debates over the federal Constitution, and in particular over inclusion of a bill of rights, reflect a keen awareness of the need to provide ample “energy” in government, so that it might accomplish its important ends, including protecting members of civil society from each other, while also making provision for harnessing that energy with limitations essential for securing liberty.65 Quite appropriately, in my

63. Id. at 72-73. At bottom, Niebuhr’s outlook rests on a plausible thesis about human nature, rooted in the Christian doctrine of the fall. As Michael Zuckert describes this sort of view, “[t]he fall has produced a vitiated nature and a vitiated humanity; we see moral truth, but ‘only through a glass darkly.’ ” Michael P. Zuckert, Book Review, 10 Const. Comm. 273, 274 (1993) (reviewing Graham Walker, Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects (1990)).

64. Obviously their success with respect to the latter goal was partial at best, as the constitutional compromises with respect to slavery demonstrate. But their failures do not cancel out their successes; notwithstanding the immorality that infected the legal order that sustained slavery and created a legacy of war and racial division, America became a beacon for liberty and democracy to the present day in large part because the achievements that are in many respects the result of the adoption of the United States Constitution. The attitude which insists that we pronounce the constitutional achievement of the founders as either “evil” or “good” is itself utopian; their achievement was decidedly human, both evil and good.

judgment, their goal was to insert in the Constitution only the most essential principles for qualifying democratic authority so as to permit the political organs of government, with the input of the people, to be the main actors in striking the balances between the claims of individuals and the community, between the competing values and interests of various groups, and between liberty and order—according to times and circumstances. 66

Despite their declarations of rights, early American constitutions, whether state or federal, in fact had little to say about the legitimate ends of government, and less than many would imagine about its limits, and much of what they did say would surprise modern liberals and libertarians alike. 67 As Professor Forte has suggested, for example, the “eighteenth century values of natural rights never totally supplanted the seventeenth century American belief in a community held together by substantive values reflected in moral legislation.” 68 The collection of people who declared their commitment to natural rights

66. Id. The determination to include only essential limitations is clearly reflected in Madison’s presentation of his draft bill of rights to Congress in June of 1789. In his speech, Madison emphasized that Congress should “proceed with caution” so as to make the “revisal” of the Constitution “a moderate one.” 1 ANNALS OF CONGRESS 450 (June 8, 1789). Madison thus proposed in general to support inclusion of constitutional safeguards “against which I believe no serious objection has been made by any class of our constituents,” and he then pledged only to offer amendments which he believed could be passed by the requisite super-majorities in each of the houses of Congress. Id. To these ends, he had looked to “those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power.” Id.

While Madison clearly was most anxious to avoid wholesale structural amendments, those that might endanger the constitutional project to strengthen the hand of the national government, even a cursory comparison between the amendments proposed by Madison and those proposed by the states demonstrates that he also consciously omitted a significant number of non-structural popular and individual rights proposals. A reasonable inference is that he erred on the side of including the most essential and the least controversial rights so as to maximize chances for ratification and to avoid the risk of unduly hampering government.


in the revolutionary era state constitutions embraced a wide range of political ideologies; there is a tremendous diversity of views about the purposes of government among such figures as John Adams, Alexander Hamilton, James Wilson, James Madison, Patrick Henry, and Thomas Jefferson, to name but a few. None of these people would have imagined that the natural rights statements of these constitutions would end democratic debate over the morally appropriate uses of government or delegate all such questions to an elite group of interpreters of natural law.69

There was among them, I believe, a recognition that the problems and prospects for government, and especially self-government to which they all subscribed (in their own fashion), were not to be resolved once and for all. Politics was for them a practice by which differences in perspective, both of policy and of principle, are debated and, with luck, satisfactorily resolved. Even though their quest was for freedom, justice, and equality (in some sense), the founders as a group would have been quite satisfied if their efforts created constitutional systems which specifically secured rights as to which there was consensus and otherwise facilitated a tolerable accommodation among the competing claims of astute thinkers with respect to these somewhat ill-defined political and legal ideals.70

By contrast, in Niebuhr's terms, advocates of natural law constitutionalism are "children of light" who do not serve well the cause of both fashioning law in light of moral values while imbuing our thinking about morality with a sense of the limits of law, because they

69. As a general matter, the historical evidence suggests that the founding generation would have concurred with Justice Holmes' assertion in his famous Lochner dissent that the Constitution "is made for people of fundamentally different views." Lochner v. New York, 198 U.S. 45, 76 (1905).

70. In a recent essay in which Professor Post offered reflections on the limits of normative legal scholarship, he suggested that, in a democratic system such as ours, the most distinctive function of legal practice is "to accommodate and reconcile the[] competing policies and purposes which constitute our political differences, without thereby losing the fact of these differences." Robert Post, Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship, 11 Const. Comm. 185, 194 (1994). Moreover, while acknowledging the traditional legal realist insight that law serves to reflect and accomplish political purposes, he suggested that in a democracy like ours the ends of law are not matters as to which scholars as such can have any special claim of relevant expertise. Id. While his comments were not directed specifically at scholarship about the aims of the Constitution, they suggest an important implication of traditional understandings of American constitutional democracy.
underestimate the ambiguities inherent in political life. Consequ-ently, these contemporary moral realists “encourage a degree of confidence in our access to moral reality that goes beyond what the uncertainties and ambiguities of moral issues as we experience them would justify.” Deluded by their own degree of confidence in moral reasoning, they opt for a kind of absolutism in the pursuit of the holy grail (of justice, rights, equality, or some other moral ideal)—the absolutism of unfettered judges empowered to pursue the ideals directly, apparently without concern for the likelihood of their own fallibility or even for the practical limits of their own authority.

At the most basic level, then, natural law constitutionalists are like the political theorists who Niebuhr accused of perceiving “an easy solution for the problem of anarchy and chaos” which potentially faces all communities. The nation we inhabit is an even more pluralistic community than the nation which ratified the 1787 Constitution, one which “does not reflect a coherent and shared set of basic moral principles,” at least to any degree that can enable us to easily resolve our political differences. Such a community of necessity “will be based in large measure on compromises, truces, tacit forbearances, and mutual accommodations.” A judiciary bent on imposing its views of moral reality could undermine the “fragile foundations of

71. I thus agree with Professor Tushnet, who has argued that the conception of a prophetic role for courts, which is inevitably what natural law constitutionalism entails, rests on a naïve vision of society “in which all participants have unalienated relationships and self-understandings; in short a vision of a community” which he suggests is lacking. Mark V. Tushnet, Legal Realism, Structural Review, and Prophecy, 8 U. DAYTON L. REV. 809, 829 (1983). Tushnet concludes, moreover, that “none of us—judges, scholars, or citizens—has greater warrant to the prophetic mantle than any other.” Id. at 830. One need not fully embrace Tushnet’s epistemological skepticism to acknowledge that an open-ended natural law jurisprudence, of whatever stripe, enforced by the Courts, may be particularly unsatisfying when imposed on a political culture as pluralistic as this one.

72. Zuckert, infra note 63, at 274 (describing another author’s views).

73. Natural law constitutionalists are thus a species of utopian legal scholars as described recently by Professor Robert Post. While Post credited utopian legal scholarship for “the intensity and clarity of its moral purposes,” Post, supra note 71, at 193-94, he also suggested that its “weakness inheres in its arrogance, in its potentially despotic desire to impose its own agenda on those who do not share it.” Id.

74. NIEBUHR, supra note 62, at 11.


76. Id. Smith observes that although one might attempt to extract a “public philosophy” describing the community’s common ground, in fact “that philosophy will almost surely be composed of gracious but ambiguous and even empty affirmations and of strategic silences.” Id.
democratic community;” despite its motive of serving the higher law, it could thereby unravel the ties that bind us together.\textsuperscript{77}

B. THE MORAL LAW’S INDETERMINACY AND THE JUDICIAL ROLE

In their apparent confidence about the content of the binding principles beyond those found in the text, natural law constitutionalists are like William Roper, Thomas More’s impetuous son-in-law in \textit{A Man for All Seasons}.\textsuperscript{78} Roper insists that More arrest a political enemy for treachery, despite his having violated no positive law, on grounds that he had violated “God’s law.” In the play, More explains that he “knows” only “what’s legal not what’s right,” and Roper immediately accuses him of setting man’s law above God’s.\textsuperscript{79} More responds: “No, far below; but let me draw your attention to a fact—I’m \textit{not} God. The currents and eddies of right and wrong, which you find such plain sailing, I can’t navigate. I’m no voyager. But in the thickets of the law, oh, there I’m a forester.”\textsuperscript{80}

As Justice Iredell (a constitutional founder who was deeply committed to the idea of natural rights) pointed out almost two hundred years ago, there is no fixed standard for judges to use to determine violations of natural law.\textsuperscript{81} This concern need not rest on any form of deep moral skepticism; the problem is more epistemological than

\textsuperscript{77} Id. at 192. A metaphor of the paths which natural law constitutionalism could take us down is the impact on our democratic community of the last forty years of Supreme Court decisions on the religion clauses. In attempting to play the decisive role in the debate over the relationship between religion and politics, partly to the end of preventing political strife along religious lines, the Court has, according to several commentators, managed only to exacerbate the political tension over religion and politics. “In retrospect, the Court seems to have undertaken the enforcement of principles calculated to avoid remote or nonexistent evils and in doing so has helped bring those evils into being.” Smith, \textit{supra} note 75, at 191-92. \textit{See id.} at 192 n.44 (citing other authorities in support of this proposition). The political division the nation has experienced in the abortion debate could be the tip of the iceberg of the divisions that could come from decisions by a Court determined to impose its moral vision on the political community.

\textsuperscript{78} ROBERT BOLT, A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS (1960).

\textsuperscript{79} Id. at 65.

\textsuperscript{80} Id. at 65-66. More then teaches his nephew that, if we trample over the law to pursue the evils we perceive in the world, we may find ourselves standing alone against the howling winds of oppression that may blow across the landscape that is now devoid of the shelter which law provides.

\textsuperscript{81} Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); \textit{see also} ELY, \textit{supra} note 5, at 48-54 (arguing that natural law theory is too indeterminate to provide sufficient guidance for constitutional decision-making); Richard A. Posner, \textit{Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights, in The Bill of Rights in the Modern State} 433, 445-46 (G. Stone et al., eds., 1992) (describing “holistic” approaches, such as natural law theory, under which “the only constraints on constitutional decisionmaking are good
ontological, for the question concerns how we can establish claims of moral truth more than it concerns whether there are any.82

This is why we live in such a pluralistic society in the first place. But without an adequate epistemology, if a court recognizes a previously unknown right purportedly based on natural law, but with no specific antecedent in positive law, the legal tradition, or societal consensus, what is the rationale for why the judges' beliefs about the "facts" of the moral reality should prevail over conflicting beliefs of the legislature, or even of the litigants?83

Skepticism about natural law constitutionalism includes an element of court skepticism as well, though more as to whether Supreme Court justices are especially qualified to perform the role called for than because of any deep seated antipathy to the Court as a decision-maker in general.84 A great many legal scholars, and not just conservative originalists, share deep reservations about constitutional theories that "would make of judges political philosophers with wide ranging authority to redress imbalances they find in the way that individual and social prerogatives have been reconciled in the political process."85 Indeed, there is much to be said for the idea that the arguments" and contending that "the embarrassment is the number and strength of good arguments on both sides—on many sides—of the hot issues"; concluding that such approaches would prove themselves to be unacceptable because any "comprehensive theory of constitutional law is apt to step on the toes of many deeply held commitments without being supportable by decisive arguments"). For an especially lucid and rich exposition of the variety of levels at which natural law theory is likely to prove too indeterminate to meaningfully guide constitutional interpreters, see R. George Wright, Is Natural Law Theory of Any Use in Constitutional Interpretation?, 4 S. Cal. Interdisc. L.J. 463 (1995) (contained in this issue).


83. Waldron, supra note 82, at 180-82. The question is not simply whether we have reasons to think there is a moral reality or the means for discovering it. It is also that "the content of morality, especially as it is applied to real cases in the real world, is too complicated for the Court, or anyone else for that matter, to articulate in a manner at all consistent with what we demand of the Court in its justifications for its actions." Ronald J. Allen, Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty, 88 Nw. U. L. Rev. 436, 442 (1993).

84. As Professor McConnell suggests, our choice, after all, "is not between natural right and majoritarian rule. It is between one set of human institutions and another, none of which is infallible." McConnell, supra note 33, at 96.

85. Bennett, supra note 60, at 203; see Tushnet, supra note 71, at 828-29 (raising concerns not only whether judges are capable of the sort of prophetic role which morality-based constitutionalism requires, but also whether widespread acceptance of such a role would not unleash reactionary forces which are largely restrained at present because of limited conceptions of the judicial role); Allen, supra note 84, at 456 (contending that "[n]o small group possesses the necessary wisdom to govern a society such as ours" and that "governance has to come from the bottom up, not the top down").
issues of political morality are simply "too important to let a small group of people have a virtually unamendable monopoly on the answers."\(^{86}\)

In *Marbury v. Madison*, Justice Marshall built the case for judicial review around the expertise of judges in declaring the law; it seems a much more difficult task to build the case that judges are "especially good at discerning and following moral truth."\(^{87}\) For one thing, while judges often address value questions as a necessary part of the task of deciding cases, virtually none of them have either the training or disposition to assume the responsibility of developing and applying a comprehensive theory of political morality. Commentators have noted that in modern cases potentially raising the most challenging political-moral questions that the Supreme Court has faced in the modern era—especially those on abortion, homosexuality, and the right to die—the Justices' treatment of the core moral questions have been unenlightening at best.\(^{88}\) What we know about the workload of the Court, and of its deliberative process, confirms that it is an unlikely place to center hopes for meaningful and systematic moral dialogue.\(^{89}\)

A commonly held view is that, even if the case for natural law constitutionalism is overstated, there is little to fear from it, since the theory grants to courts only the authority to grant us more expansive rights against government through the explication of unenumerated natural rights. But the argument assumes that more rights invariably translates into more freedom, which can only be good. But nothing comes without a cost.\(^{90}\) It seems clear enough, for example, that the rights of some may be purchased at the cost of great harm to the community as whole; government does not typically circumscribe rights solely for its own benefit.

Claims of right, moreover, often clash with each other, so that the recognition of a new right for one will often work the deprivation of a

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86. Allen, *supra* note 84, at 441.
87. Smith, *supra* note 3, at 492. A number of scholars have observed, for example, that the Court's historic record when moral questions predominated is not all that stellar. For every favored decision, "there are a dozen cases like *Dred Scott* or *Plessy v. Ferguson.*" Allen, *supra* note 84, at 441.
89. See *id.* at 1537.
90. *See* Lino A. Graglia, *Judicial Review, Democracy, and Federalism*, 4 Det. C.L. Rev. 1349, 1350-51 (1991) (rights are not "costless benefits," but serve to create new benefits to some interests while diminishing others; trade-offs "are necessarily involved").
claimed right by another. If the Court chooses poorly, its decisions could work an injustice and even work against the political ideal of liberty, properly understood. As Professor Michael Perry has observed, “[i]f the Court can serve as an instrument of moral growth, it can also serve as an instrument of moral retardation.” 91 There is no way to preclude a priori that liberty and justice will not be the ultimate victims of the activist imposition of unenumerated natural rights. Professor Michael McConnell writes:

If rights are wrongly conceived, they can be as inimical to justice, and even to liberty, as any recognition of state power. Enforcement of the unenumerated right to own slaves precludes emancipation. Enforcement of the unenumerated right of freedom of contract precludes minimum wage laws. Enforcement of the unenumerated right to abort overrides the right to life. Enforcement of the right of voluntary associations to control their own membership makes it more difficult for the community to eradicate race and sex discrimination. Enforcement of children’s rights against parental control conflicts with parents’ rights to control the family. The point is not that any or all of these rights are wrongful, but that the recognition of unenumerated rights is likely to conflict with plausible assertions of right on the other side. 92

C. POPULAR SOVEREIGNTY AND THE VALUE OF COLLECTIVE SELF-DETERMINATION

As shown above, the historical evidence suggests that the people’s commitment to popular sovereignty and republican government was the starting point for the deliberative process that occurred in Philadelphia 200 years ago. 93 The framers realized that some form of republican government was the only one available at that moment in American history. And the idea that the people rule by right, at least in the sense that they are empowered to establish the limits and the ground rules of our politics, continues to be an important part of the American ethos. Even the harshest critics of originalism as a general

91. Michael Perry, The Constitution, the Courts, and Human Rights 115 (1982). At the time of the quoted statement, of course, Professor Perry nevertheless advocated a fairly expansive role for the courts in developing a system of human rights in the name of the Constitution. While Perry has in no sense abandoned the moral seriousness which has informed all his insightful scholarship, it should also be noted that he has come to argue on behalf of an originalist approach to constitutional interpretation that is difficult to square with the natural law constitutionalism under discussion here. Michael Perry, The Constitution in the Courts 28-53 (1994).

92. McConnell, supra note 33, at 103-04.

93. See supra note 56 and accompanying text.
theory of constitutional interpretation, who recoil at the thought of being ruled from the grave, have tended to acknowledge that we are bound by a contemporary amendment to the Constitution.\textsuperscript{94}

Moreover, the framers of the Constitution realistically perceived that effective power resides in the hands of the greater part of the community; as individuals committed to achieving limited government, they were more interested in harnessing and, by agreement limiting, the power of the community than in denying its ultimate authority.\textsuperscript{95} As a recent commentator describes it, "[p]olitical accountability, federalism, the separation of powers, and institutional checks upon the exercise of power were the constitutional instruments chiefly relied upon by the framers for the 'preservation of liberty.'"\textsuperscript{96} Speaking descriptively, then, it seems difficult to contest the view that, for the founders, the point of our constitutional practice was to start with popular consent and republicanism, and then to determine the ways in which that commitment might be qualified to avoid as much as possible the potential for evil to arise in republican government.\textsuperscript{97} And this idea of self-government, of the people's right to chart their own course, remains a fundamental assumption about our constitutional order even today.\textsuperscript{98} Natural law constitutionalism reverses this priority, and thus it presents us with the prospect of rule by judges.

There is still another reason our constitutional project should have been conceived in terms of self-government, apart from historical necessity or comparative advantages in achieving valued political ends. The founding generation saw the collective right of self-determination as itself an important dimension of political freedom.\textsuperscript{99}

\textsuperscript{94} E.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.C.L. REV. 204, 228-29 (1980).

\textsuperscript{95} In fact, the Federalist supporter of the proposed federal Constitution believed that the real task for preventing arbitrary government lay in other directions than in the attempt to specify enforceable constitutional limitations. Alexander Hamilton, for example, contended that "whatever fine declarations may be inserted in the constitution respecting [liberty of the press], must altogether depend on public opinion, and on the general spirit of the people and of the government." The Federalist No. 84, at 514.


\textsuperscript{97} A common theme among the Federalists defending the Constitution was that the goal was to provide remedies to the perceived defects of democratic government that were nevertheless consistent with its underpinnings—the notion of "republican remedies" for the "diseases" associated with republicanism. See, e.g., The Federalist No. 10, at 84 (James Madison).

\textsuperscript{98} See, e.g., Laurence Tribe, God Save This Honorable Court 96-97 (1985) (concluding that a Supreme Court nominee who held the view that the Court could ignore a recent amendment would properly be excluded on that ground alone).

\textsuperscript{99} McDonald, supra note 67, at 160-61.
founding generation would resonate to Judge Learned Hand’s famous statement that he would not want to be ruled by Platonic Guardians. As Professor O’Fallon has reminded us, Hand’s concern went beyond his professed ignorance about how to choose such rulers. “If they were in charge,” Hand wrote, “I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.”

Liberal political theory recognizes that moral growth in individuals requires some toleration for the possibility of their making wrong choices. We may be justified, for example, in tolerating the holding and expressing of ideas we consider to be immoral partly because we recognize that it is such choices that provide the opportunity for the individual to grow and develop, perhaps even through embracing, and then hopefully discarding, error. The same basic idea may apply to a political community as well. It may well be that popular authority is a prerequisite to collective growth.

Democracy should partly be about public deliberation over issues of political morality, including issues about justice, rights, and equality. Authority to address these questions should not be taken wholesale from the process of political debate and exchange and given over to unelected officials. Yet that is the implication of natural law constitutionalism. Some have contended that the modern Court has already attempted to preempt too much of that debate, while others contend that the modern Supreme Court’s individual rights decision-making has contributed to a desirable public dialogue on political morality. Even assuming that the Court’s decisions have facilitated such dialogue, this does not imply that if a little’s good, a lot’s better; the value of such dialogue is necessarily related to the idea of popular authority. The wholesale rejection of popular authority over issues of political morality in favor of an unrestrained judicial role would in the long run only “debase and impoverish republican government.”

102. Professor McConnell has observed, for example, that Supreme Court decisions often provide legislators, as well as proponents of controversial moral claims which the Court adopts, with the opportunity to avoid engaging in serious moral dialogue in the political arena. McConnell, supra note 33, at 1537. A classic illustration of the point was provided in the 1988 Presidential campaign when Governor Dukakis defended his veto of a flag salute law by reference to an advisory opinion from a court rather than in terms of fundamental American moral values. Id.
103. McConnell, supra note 33, at 108.
D. Self Government and the Capacity to Bind Ourselves

Paradoxically, the American founders also understood that if the goal is to reconcile the idea of popular government with the need to avoid tyranny, including the majoritarian kind, one of the most important powers for a society to recognize and preserve is the power of the people to make decisions to restrain their own power. Professor Tribe aptly explains constitutional limits on majoritarian governance by drawing a parable from experiments in which pigeons were trained to exercise impulse control by the making of self-limiting decisions, so as to realize a delayed, and yet ultimately greater, reward. Just as individuals might empower themselves to accomplish higher goals by self-disciplining rules with respect to shorter term desires, constitutionalism seeks to enable a community to enhance its life by establishing self-limiting rules. If the purpose of establishing government is to protect society's members against the private abuses of their fellows without visiting worse abuses on them by government, we need the capacity to limit government and, in effect, to bind ourselves to settled rules and principles.

Trump card natural law constitutionalism establishes this "agreement" at such a high level of generality—in terms of "rights," "equality," and/or "justice"—that it constitutes virtually no agreement at all in practice. In attempting to bind us to "more"—more rights, more justice, more morality—the natural law constitutionalists manage to bind us not at all. By insisting that "the Constitution" establishes the idea of limits on government based on moral norms, but that the writing itself can tell us nothing definitive or binding about the content of those norms, natural law theorists preclude the possibility of establishing relatively permanent demarcations of permissive government action. Yet the goal of establishing such boundaries is a main point of having a written constitution.

These theorists bargain for more substantive content, but they wind up with little more than judicial discretion and therefore, in the long run, less secure limits on potentially arbitrary government power. In all likelihood, such commentators implicitly rely in part on the likelihood of self-restraining behavior by judges, behavior with roots in

104. Laurence H. Tribe, American Constitutional Law 10-11 (2d ed. 1987); cf. Graglia, supra note 90, at 1351 (referring to view that constitutional limitations are designed to restrain the people in their moments of passion as the "Ulysses theory," alluding to the tying of Ulysses to his ship's mast to protect him against the Sirens' song).
their professional training and the perceived craft norms of their profession. Yet the restraining professional norms upon which we might rely reflect in part the assumptions of a limited judicial power and a limited constitutional sphere. It is prophecy, at best, to speculate at the long-term impact of the rejection of the underpinnings of these norms on judicial decision-making, or for that matter, on the process of selecting judges.\(^\text{105}\)

Clearly natural law constitutionalism contributes to the desire of many for flexibility in constitutional interpretation and decision-making. But what we gain in flexibility, we lose in the inability to govern ourselves. What is ultimately at stake is the rule of law, understood in the down-to-earth conception of John Adams and other founders—the ideal of being governed, to the extent practicable, by preestablished rules rather than by occasional, and possibly arbitrary, human edicts. Some may be drawn to natural law constitutionalism by the hope of grounding our fundamental law in objective moral truth, but the discretion they would grant could easily point us away from morality and law.

To use just one possible scenario, if judges were truly armed with (and indeed socialized to hold) the conviction that their charge is to implement politically relevant fundamental moral values, according to their own best lights (without any special regard to history, precedent, convention, or consensus), the prospects for judicial decisions at an extreme variance from societal convictions would necessarily rise tremendously. But the net result could easily be a withering away of the authority of the Constitution itself, particularly if some of those decisions proved to be disastrous to society.\(^\text{106}\)

V. PUTTING THE GENIE BACK IN THE BOTTLE—NATURAL LAW, CONSTITUTIONALISM, AND THE RULE OF LAW

At some level natural law constitutionalists understand that they must explain how it is that their theories do not amount to “radical

\(^{105}\) Professor McConnell observes, for example, that this sort of constitutional vision could easily bring a dramatic politicization of the judicial appointment process, with the ultimate outcome being the loss of an independent judiciary. McConnell, supra note 33, at 1538.

anti-constitutionalism,"\textsuperscript{107} at least by traditional ideas of what constitutionalism entails. The natural law adjudication implied by their starting premises seems to call into doubt the constitutional legitimacy of all morally controversial enactments of positive law, including provisions of our written Constitution (even ones recently adopted by an aroused public). It also appears to establish a virtually limitless judicial power to act in the name of justice and natural right. Such power placed in the hands of a single, unelected branch of government seems difficult to reconcile with the idea of limited government, especially given the range of "rights" that could conceivably be imposed.

In the writings of natural law theorists, then, the first task is to establish natural law as the law of the Constitution; and the second task, addressed to some extent by virtually all such theorists, is to explain why this move doesn’t of itself overthrow the more mundane goals of constitutionalism, such as the notion of limited government and the idea of the rule of law. The purpose of Part IV is to review some of the recurring strategies for avoiding the implications that seem to follow from the premises of natural law constitutional theory as outlined in Part I above.

A. Denial by Definition

Perhaps the most charming, if quixotic, response to the "anti-constitutionalism" difficulty was offered by Professor Barber. While Professor Barber has gone further than almost any other commentator in making the arguments that yield the anti-constitutionalism critique, he objected strenuously to Professor McConnell’s claim that his theory licenses judges to disregard "the institutional and substantive limits of the so-called positive law [of the Constitution]."\textsuperscript{108} Barber insisted in response that in fact "I hardly appeal from law to justice in any matter of constitutional meaning, whether involving rights, powers, or questions of institutional competence."\textsuperscript{109} Barber’s response, however, is equivocal: on one reading, it is simply false; on another, it is only trivially true in that it amounts to little more than a play on words that does not deny the substance of McConnell’s claim.\textsuperscript{110}

\textsuperscript{107} McConnell, supra note 33, at 97.
\textsuperscript{108} Sotirios A. Barber, Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell, 64 Chi.-Kent L. Rev. 111, 125 (1988).
\textsuperscript{109} Id.
\textsuperscript{110} I leave to one side the possibility that Barber is simply being non-responsive. McConnell argues, and uses specific examples to illustrate the point, that Barber’s stated principles for constitutional decision-making entail that specific decisions embodied in constitutional text
Read straightforwardly, Barber's statement seems indefensible. In his critique of Barber's views, McConnell relied upon crucial premises of Barber's own description of his constitutional theory. As an initial matter, Barber had rejected conventional views of popular sovereignty as the foundation for the authority of the Constitution because they rest on an “assertion of community power to define the most basic standards of right and wrong,” a view which would “conflict with the presuppositions of ordinary moral experience.”111 Additionally, Barber had claimed that the Ninth Amendment embodies not simply rights in addition to those enumerated in the text, but the view that the Constitution “hold[s] the community and its agent-government responsible to real standards of political morality.”112 The philosophy of the Ninth Amendment thus “presupposes standards of political morality to which government is responsible despite their nonreducibility to positive legal formulas.”113

With these premises as starting points, it was clear for Barber that the attempt by John Ely and others to “close” the Ninth Amendment by identifying appropriate “sources” from which to derive the unenumerated rights constituted a fundamental “error” inasmuch as “open-endedness is part of the very logic of [the] provision.”114 The “best interpretation” of the Ninth Amendment, then, “would have to conform to the two undeniable facts of our common moral experience: the defeasibility of our conceptions of justice and the sense that could legitimately be overridden despite the clearly intended meaning of the text. Id. at 118-20. Barber conceivably could be saying something like, “I have never referred to an occasion such as McConnell outlines in which, as a judge, I would find a specific textual provision to in fact be unconstitutional.” Id. But if this is all Barber's response means, it simply fails to address McConnell's claim that, whatever Barber's own position might be on current textual provisions, judges would in principle be empowered by his theory to reverse the decisions of the people embodied in constitutional text. McConnell, supra note 33, at 89-90.

111. Barber, supra note 7, at 75. Since these particular statements by Barber were offered against Judge Bork's originalist theory, Barber might have complained that his real target was Bork's moral skepticism as a rationale for community authority. But in his response to McConnell, a moral realist, Barber confirmed that he rejected the view that the Constitution “is authoritative because it was ratified by the people,” Barber, supra note 108, at 116, quoting McConnell, supra note 33, at 99, arguing that this would entail separating “the reason for the Constitution's authority from the reason for its persuasiveness [its accordance with natural right].” Barber, supra note 108, at 117. Subsequently he characterized McConnell's reliance on conventional ideas of popular sovereignty as based on “a model of majoritarian willfulness.” Id. at 124. Rather than “an act of majoritarian empowerment,” says Barber, the Constitution is properly viewed “as an expression of an aspiration to achieve an intrinsically admirable condition.” Id.

112. Barber, supra note 108, at 76.

113. Id. at 79.

114. Id. at 80.
we can distinguish better from worse conceptions."\textsuperscript{115} According to McConnell, since these statements described a conception of the Constitution not as a "rule for the government of courts," but as "a delegation of authority to courts . . . to act according to their own conception of moral reality," it followed that in any clash between a constitutional text and the judicial conception of moral reality, the latter would prevail: "it would be contrary to the tenets of [Barber's theory] for the judges to be bound by [the] handiwork [of the framers]."\textsuperscript{116}

McConnell's basic point seems irrefutable. If the purpose of the Ninth Amendment is to bind us open-endedly to real standards of political morality, in part because even the "sovereign" people are not properly viewed as empowered to define, let alone violate, these standards, it would seem to follow in principle that courts should reject specific constitutional provisions that they determine to conflict with the higher, binding law. Given his own logic, it seems that Barber should be pleased, rather than insulted, at the suggestion that he appeals from law to justice inasmuch as "law" in such a context can only refer to positive law (including a constitutional text) which purports to establish a rule which we have stipulated to be unjust (and thus, on Barber's theory, unconstitutional). In any event, readers of Barber's thoughtfully presented argument for natural law constitutionalism, particularly enthusiastic ones, have grounds for demanding, "why haven't you appealed from law to justice?"

McConnell also relied upon a concrete hypothetical of a judge invalidating the federal Constitution's provision for equal representation of the states in the United States Senate based on the conviction that the principle of "one person, one vote" amounts to a binding principle of political morality, as well as an unenumerated right secured by the Ninth Amendment.\textsuperscript{117} It would be difficult to construe the text of the written Constitution as not providing for such equal representation in the Senate; this appears to be one case where the meaning of the provision is quite clear. Barber might disagree with our hypothetical judge on the merits of the question of political morality, but does he have an argument that the written Constitution has

\textsuperscript{115} Id. at 81.
\textsuperscript{116} McConnell, supra note 33, at 98.
\textsuperscript{117} Id. at 96. The hypothetical is hardly farfetched. The Supreme Court has imposed this very standard on the states in the reapportionment cases. Moreover, at the Convention Madison contended for proportional representation in both houses of Congress on the basis of a theory of democratic government that was rooted in his considered views of political morality.
resolved the question or that the judge simply lacks the authority to ask and answer that ultimate question? It appears not, and this example illustrates that in just such a case Barber could not object in principle to the judge's appeal from law to justice with respect to a matter of constitutional meaning.\footnote{Barber himself supplied a hypothetical that goes virtually as far as McConnell's. He posited the possibility of withdrawal of constitutional protection for unenumerated natural rights when a court subsequently determined that their earlier recognition had been "mistaken." Barber, supra note 7, at 82. He also considered the question of a similar determination being made about a textual right, such as freedom of speech, and concluded that its textual status "counts as an argument that is not available" to the unenumerated right; in such a case, he suggests that courts might properly honor a "minimal" conception of free speech, out of deference to the values we derive from honoring positive law generally, but concludes that they might also put free speech "on the course of ultimate extinction," as Lincoln proposed for slavery, and that it might thus remain "a positive right for a time." Id. At the end of this last-mentioned course of development, if not at the point when we simply redefined the free speech right, the basis for such decisions would surely be an appeal from law to justice. And notice that this hypothetical involves only the determination that recognition of a right had been a "mistake." Barber does not specifically take up the more demanding question raised by a textual right directly clashing with another, perhaps nontexual, fundamental right—one we believed to be morally far more compelling. Can there be any question which way his constitutional theory points for resolving the conflict, or whether it would entail an appeal from law to justice in giving meaning to the Constitution?}

It is also possible, as noted above, that Barber's response to McConnell's objections along these lines amounted to little more than a play on words. Barber approaches constitutional interpretation in the same manner that he approached the question of interpreting "the meaning of the Bork episode" for the American public.\footnote{His treatment of how the rejection of Judge Bork's nomination should be understood is found at Barber, supra note 7, at 71-76.} At the end of the analysis, Barber finds that "[t]he question of what the authoritative public approves thus becomes indistinguishable from what the public would approve if it wanted to remain worthy of normative authority and if it were in a position to give the matter full and fair consideration."\footnote{Id. at 74.} Similarly, for Barber "the meaning of the Constitution" becomes the meaning that will best promote the Constitution retaining "normative authority" within the American community.\footnote{See id. at 81-82 (contending that natural law constitutional vision is essential because any other approach is "either simply untenable, or untenable with us," because it will always rest on the denial of "the presupposition of moral truth," which is an incoherent position, or because it contradicts our societal commitment to the moral ideals of the Constitution).}
such an appeal from law to justice. If so, at a practical level the response would mean nothing, inasmuch as McConnell's original objection posited an unequivocal decision by the American public to embody a morally deficient rule in constitutional text. Even if the best interpretation of "the Constitution," in light of the Ninth Amendment and other provisions, entails refusing to implement the morally deficient rule (at least as it was contemplated by the people who adopted it), the crucial point is that Barber's theory gives priority to a norm of political morality over the decision people thought they had embodied in positive constitutional text. This is all McConnell means by his claim that Barber's theory unhinges constitutional law from the written Constitution and invites judges to appeal from (even constitutional) positive law to justice.

B. NATURAL LAW AS AN INTERPRETIVE AID AND THE USES OF POSITIVE SOURCES FOR INTERPRETING THE (DECIDEDLY) OPEN-ENDED PROVISIONS OF THE CONSTITUTION

Despite invoking the core ideas that make up natural law constitutionalism as defined above, commentators often imply that they are advocating only a methodology that adds an additional dimension to the judicial repertoire. For example, Professor Macedo assures us that his natural law constitutionalism rests on the view that "principles of political morality" are "relevant to the task of interpreting [our constitutional] law."122 The relevance of such principles becomes clear as soon as we focus on morally-laden constitutional provisions, let alone when we confront the implications of the Preamble, the Declaration of Independence, and/or the Ninth Amendment.123 The attempt to understand our constitutional norms, to interpret them, without reflecting on the actual content of moral norms, is to bring our own agenda to the table, to demand that law be a set of hard "rules" rather than an attempt to explicate moral values that we aspire to realize through the Constitution.124 The implication of all this, we are told, is

122. Macedo, supra note 7, at 29. Professor Macedo's title, Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters, which was itself a kind of response to Raoul Berger, Natural Law and Judicial Review: Reflections of an Earthbound Lawyer, 61 U. CIN. L. REV. 5 (1982), reflects a recognition that the burden of advocates of a natural law-based constitutionalism is to show that their theories can be reconciled with a meaningful idea of the rule of law.

123. Macedo, supra note 7, at 32-34.

124. Id. at 35-37. The reader will recognize the influence of Ronald Dworkin in this line of thought.
that we need a constitutional theory that "admits some role for critical moral judgments."\(^{125}\)

According to Macedo, perceiving the Constitution as rooted in, and indeed embodying moral values, does not amount to a limitless delegation to judges to impose their political morality on the rest of us. Why not? Because, we are told, this understanding need not imply that judges are simply on their own to engage in "unstructured philosophizing."\(^{126}\) Rather, like Professor Dworkin's famous Herculean judge, they are to "critically" consider "constitutional text, precedents, and history" to find interpretations "that both fit received materials . . . reasonably well and show them in a good light, as valuable and worth carrying forward."\(^{127}\) In this process, judges are called upon to analogize from existing constitutional rights—relying perhaps, as Justice Douglas did in \textit{Griswold}, on "penumbras and emanations"—so that "‘higher law’ principles are not yanked from the sky and slung onto constitutional hooks."\(^{128}\) The search is for "the principles that seem to underlie [the document's] specific phrases and larger structures, principles that help justify the document’s more specific aspects."\(^{129}\) In the process, we are told, the "norms of fidelity to legal materials and judicial craft will filter and temper our moral differences" even though they will not eliminate them.\(^{130}\)

But Professor Macedo's suggestion that judges will be constrained by an interpretive process that must confront received materials and judicial craft runs directly counter to the weight of his

\(^{125}\) \textit{Id.} at 38.

\(^{126}\) \textit{Id.} We are assured that "judges are not simply cut loose in the field of moral philosophy." \textit{Id.} at 40.

\(^{127}\) \textit{Id.} at 39. Macedo claims that this will amount to "principled interpretation" that "gives due weight to the demands of both fidelity to text, precedent, and history, as well as the Constitution's own aspirations to moral rightness." \textit{Id.} at 40. The necessary moral judgments "will be disciplined and tempered by the encounter with the constitutional text and inherited materials and traditions of debate." \textit{Id.}

\(^{128}\) \textit{Id.} at 40.

\(^{129}\) \textit{Id.} This formulation is particularly troublesome. If the goal is to implement simple justice and real natural rights, as Macedo elsewhere asserts, it is conceivable that "the document's" particular provisions, and perhaps even its larger structures, might run afoul of those justifying principles. See, e.g., \textit{supra} note 42 (postulating view that the Constitution's provision for equal representation of the states in the Senate might conflict with the individual right to an equal vote). Macedo supplies us with no reason to presume that the Constitution's "more specific aspects" will invariably comport with its larger purposes, and hence fails to justify an interpretive strategy that looks for the principles underlying those specifics.

\(^{130}\) Macedo, \textit{supra} note 7, at 41.
constitutional theory.\textsuperscript{131} These concepts are drawn from a universe of thought that perceives at least the possibility of divergence between positive constitutional law and (the judge's conception of) moral reality, one in which judges appreciate that in such cases their professional role demands their allegiance to the law rather than to their conception of moral reality.\textsuperscript{132} But Macedo's foundational theory rests instead on the claim that the Constitution, properly understood, embodies not just morally-laden provisions that can only be construed by reference to background moral principles, but the entirety of moral ideals relevant to political practice, such as justice and natural rights, ideals which positive law might "declare" but can never override.\textsuperscript{133} It also rests on the stated view that these ends of constitutionalism are best policed by courts, or at least that there is no good substitute for the courts in fulfilling these aims.\textsuperscript{134}

\textsuperscript{131} Thus Macedo never really attempts to explain to us why it would be that, in the constitutional universe to which he would fling us—one in which the Constitution "establish[es] justice," \textit{id}. at 33, not as a description of a goal to which its various structures and provisions will hopefully lead, but as a kind of super-norm by which we are to construe every provision, including supposedly open-ended rights provisions—we should value traditional ideals of "fidelity to legal materials and judicial craft." \textit{Id}. at 41. It is as though Macedo senses that no one would want a legal system in which judges behaved like philosopher kings, so he is anxious to assure us that in his system they would not so behave; but if judges are to enforce "the Constitution," and the Constitution consists of an open-ended system of moral norms, it seems incongruous (to say the least) to demand their fidelity to something else.

\textsuperscript{132} By contrast, Macedo speaks the same language of identity between moral and constitutional universes advocated by Sartorius Barber, to whom he acknowledges an important intellectual debt. \textit{Id}. at 32-33. Tracking Barber's view, Macedo contends that we ought to read the Constitution as an attempt to establish justice, "not a fully specified historical conception of justice but simple justice." \textit{Id}. at 33.

\textsuperscript{133} Thus Macedo reminds us that the Declaration of Independence "is as much a part of our political creed and as much a founding document as the Constitution." \textit{Id}. at 33. Presumably the implication is that our constitutional project is properly understood as including the "inalienable rights" which individuals may not in principle cede to the state. Consistent with this starting point, in a separate article Macedo confirms that, notwithstanding his advice to judges to begin by at least analogizing to constitutional text, the Ninth Amendment "does not limit unenumerated rights to those implied in the rest of the document, or those supported by values prominently represented in the Constitution's text." Stephan Macedo, \textit{Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson}, 64 CHI.-KENT L. REV. 163, 168 (1988).

If Macedo is correct that the purpose of the provision was to incorporate the very idea of natural rights, as stated in the Declaration of Independence, the Ninth Amendment must be read to bind American government to the actual moral rights we hold as persons, "not a fully specified historical conception of [natural rights]," but the actual rights themselves. Macedo, \textit{supra} note 6, at 32-33. (The bracketed material in the quotation above refers to the preamble's statement that the Constitution was to "establish justice"; the point is to suggest that Macedo's overall logic should lead him to the same conclusion as to rights as he reaches as to justice).

\textsuperscript{134} Macedo, \textit{supra} note 7, at 36.
If these premises of Macedo's constitutional theory are correct, it is difficult to see why courts thus charged should give any substantial weight to history or practice at all, let alone propound a requirement (however minimal) of "fit" with "received materials." If the Constitution provides for the establishment of justice and the vindication of natural rights, directly and not via a filter of a sovereign people's judgment about the meaning and application of those values, our method should be to look for the best sources for explicating moral reality, not the best sources for explicating our historical practice.135 Our historical practice, after all, has proceeded ostensibly on the basic assumptions of legal positivism at least since the early nineteenth century, even according to natural law constitutional theorists and historians. The whole point of reinvigorating the Ninth Amendment is precisely to radically reorient our constitutional project—indeed, according to its proponents, it is to finally get it right.136 As with Professor Barber, however, Macedo wants to insist that the Constitution somehow binds its interpreters to rejecting legal positivism and implementing instead an open-ended range of actual moral values, but also to engaging the conventional lawyerly skills of achieving fit with received legal materials.137 This is a back and fill operation, however, that in the end seems

135. *Id.* at 30-31. Macedo is clear that every constitutional theory, from originalism onward, stands or falls "on grounds of political morality." *Id.* at 31. The question is necessarily whether a particular approach presents "the best way of construing and carrying forward our complex political system." *Id.*

136. See Sager, supra note 24, at 261 (Ninth Amendment makes it "reasonable to wonder whether we have bungled the business of constitutional interpretation in some chronic, endemic way," whether we have "been getting it wrong all these years").

137. In practice, Macedo seems less than half-hearted about the commitment to a requirement of "fit" with received materials. In addressing the problem which slavery presents for a general natural rights reading of the Ninth Amendment, Macedo carefully elaborates a "prudential" justification for accepting the injustices of slavery, at least for a time, "for the sake of overriding values, such as peace and union." Macedo, supra note 133, at 168. But he quickly assures us that such arguments would be "unavailable to those who today oppose the protection of, for example, marital privacy." *Id.*

Notice, first, that Macedo draws from his own prudential argument for slavery the implication that the Constitution, understood in the light of the Ninth Amendment, is an "aspirational" document, such that, even in cases such as the slavery example, subsequent interpreters would be positioned "to advance the project of discerning and protecting constitutional rights" such as freedom from slavery. *Id.* at 169. While the implications might be clearer, a reasonable inference is that judges would have been empowered by the Ninth Amendment to invalidate the institution of slavery at the earliest moment that they determined that the prudential justification no longer held. If so, the received legal materials, including text, intent, and well-established practice, would have been simply swept aside by the mere existence of the moral aspirations deemed to be implicit in the Ninth Amendment. Every hypothetical suggested elsewhere in this paper for overriding clear text and long-established moral and legal tradition would be easy sliding if the Ninth Amendment thus empowers judges.
simply to increase judicial discretion at the cost of any coherence possessed by the original theory.

C. FIDDLING WITH JUDICIAL REVIEW

Another route to limiting the revolutionary effects of natural law constitutionalism is to propose a gap between “the Constitution” and the body of constitutional law appropriately developed by the courts; the Constitution itself embodies all relevant moral reality, but this does not necessarily mean that the judiciary is empowered to implement the Constitution to the full extent.\textsuperscript{138} Thus some who offer the historical claim that the founders were committed to natural law constitutionalism acknowledge that it is far less certain that they anticipated a judiciary empowered to implement all the strictures of natural law.\textsuperscript{139} More importantly, it is posited that some ideals which should be seen as part of our fundamental law do not lend themselves to effective judicial enforcement to the fullest extent; as a functional matter, courts should implement only a portion of the body of our constitutional norms, and there is thus a “thinness” to our constitutional law.\textsuperscript{140}

Professor Sager has presented us with an especially interesting and sophisticated, as well as rather fully elaborated, form of this sort of argument for a virtually limitless Constitution qualified by practical

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\textsuperscript{139} E.g., David N. Mayer, The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee, 16 S. ILL. U. L.J. 313, 323 (1992).

limits on the exercise of judicial power. Sager offers what he calls a “pragmatic-justice” account of the Constitution, by contrast to the “positive account” that sees the Constitution as “merely a rather unusual statute.” For Sager, the key to justifying the reality of the gap between the Constitution’s moral norms, as he understands the Constitution, and the body of constitutional law, is that popular participation in the ongoing project of attaining justice serves important values. In particular, with respect to certain areas involving especially “complex institutional arrangements and social options,” as well as difficult issues of cost-spreading—including issues about minimum welfare entitlements, rights to the repair of structurally entrenched injustices (such as the legacy of slavery), and affirmative rights generally—Sager contends that, notwithstanding that the questions involved have a constitutional core, “their satisfaction requires a welter of social decisions” that belong, as a matter of principle, “to the institutions of popular politics.” The judicial role is thus restrained even though it remains clear that popular will is not the ground of political justice and that the entirety of our constitutional project, including the portion pursued in the political arena, proceeds “under the umbrella of constitutional interpretation and authority.”

Sager’s work is both subtle and profound, and it would be beyond the scope of this article to address it fully. There is even room for doubt whether his constitutional theory fits within the scope of natural law constitutionalism as defined in this article, inasmuch as it justifies a body of constitutional law that in effect authorizes departure from the demands of substantive justice based on a construction of the decisional strategy embodied in the Constitution (or at least seen as a valid part of the constitutional project). Even so, Sager’s theory does

141. Id. For a related work that fills out Sager’s constitutional theory to a large extent, see Lawrence G. Sager, The Incorrigible Constitution, 65 N.Y.U. L. Rev. 893 (1990).
142. Sager, supra note 141, at 415.
143. Id. at 418.
144. Id. at 421.
145. Id. at 419. Sager’s theory thus recognizes something akin to the distinction between “substance” and “authority” developed within the body of this article; he distinguishes between the ground and the procedure of the political choice. According to Sager the ground of the Constitution is political morality, and constitutional decisions are necessarily “judgment” rather than “preference” driven, but there still remains the question of the appropriate “procedure” for realizing the ideals of the Constitution. See id. at 418. The most puzzling ingredient of Sager’s foundational account, however, is that whereas the framers saw themselves as centrally concerned about defining the “procedures” of governmental decision-making, Sager in effect places them in the position of delegating the crucial questions about the procedure for realizing an open-ended substantive agenda to the discretion of an unelected judiciary in working out the scope of judicial review.
identify "the Constitution" and its essential project with substantive justice, and his theory does lend itself to the argument that positive law violates the Constitution even if it does not run afoul of the constitutional law developed by courts. In any event, Sager's efforts to add plausibility to a non-positive, "pragmatic justice" account that identifies the Constitution with "political justice," is worth addressing as one sort of proposed answer to the "anti-constitutionalism" difficulty raised about natural law constitutionalism in general.

Perhaps the most striking thing about Sager's accounting for the "thinness" of constitutional law—as reflected in the gap between political morality and the content of judge-made constitutional law—is the very "thinness" of his model of judicial restraint.¹⁴⁶ Sager's treatment was a contribution to a symposium on the work of James Bradley Thayer, and sought to explicate Thayer's recognition of a potential gap between the arguable content of constitutional norms and legislative errors grievous enough to require judicial correction. But for Sager, unlike Thayer, the gap does not proceed from a presumption in favor of democratic governance or a recognition of the limited domain of the Constitution, but merely from the recognition that there may be some ultimate boundaries to judicial efficacy and competence.¹⁴⁷ At least as developed by Sager, then, most of the objections to a virtually unlimited judicial power embodied by natural law constitutionalism continue to apply, qualified only slightly by the recognition of a few small limits to the judicial role.¹⁴⁸

Perhaps equally problematic, because Sager's theory proceeds from functional considerations alone and not from any theory of the Constitution itself, it seems especially vulnerable to evasion by judges who feel strongly enough about a particular social agenda. After all, Sager himself acknowledges that his proposal qualifies a more general view that the judiciary is "well suited to the project of identifying and implementing the elements of justice over time."¹⁴⁹ A judge bent on stretching Sager's functionally based limits would have plenty of rhetoric to draw on, as, for example, Chief Justice Marshall's inquiry as to

¹⁴⁶. For a similar assessment, see Allen, supra note 83, at 438-39.
¹⁴⁷. For a treatment of this profound difference between not only Thayer and Sager, but indeed between virtually all accounts of the Constitution offered prior to the Warren Court revolution and the sort of theory expounded by Sager, see Sandalow, supra note 96, at 462-63.
¹⁴⁸. Professor Allen accurately suggested that Sager's work presented "an extremely subtle and somewhat indirect argument for a judicially imposed moral regime." Allen, supra note 83, at 438.
¹⁴⁹. Sager, supra note 140, at 419.
which portions of the Constitution judges are forbidden to inquire into. Sager’s argument for judicial restraint has a “soft” quality about it, in the sense that a judge can easily contend that her greater allegiance should be to the Constitution and its norms rather than to an extra-constitutional theory of the most appropriate scope of the judicial role. Such a judge could argue as well that if such limits on the judicial power were intended to qualify the extent of the Constitution’s commitment to realizing its ends, it surely would have been included in the text of the Constitution itself. In the end, Sager’s limiting theory seems to call for a sudden streak of modesty on the part of judges that the balance of his constitutional theory does little to reinforce.

D. Moral Certainty

If various important truths of political morality were so clear as to preclude genuine controversy, the anti-constitutionalism critique would have less force. In fact, some commentators appear to justify their conclusion that a general commitment to natural law constitutionalism is not problematic on the ground that the content of natural law is sufficiently clear to provide the unmistakable limits to judicial discretion. The approach is illustrated in the exchange between Professors Ledewitz and Jaffa. Thus Ledewitz criticized Jaffa for combining reliance on natural rights and the Declaration of Independence with an approach to interpreting the Declaration that treated its natural rights implications for constitutional law as limited by the document’s historical meaning—a view that Ledewitz characterized as viewing natural rights theory as “frozen in time.” As an illustration, Ledewitz observed that, notwithstanding Jaffa’s commitment to natural rights, he had precluded the possibility that the death penalty is unconstitutional based exclusively on constitutional text and history.

In response, Jaffa began by denying the charge that his reliance on the views of natural law expressed by the framers reflected any worship of the past; indeed, he contended that “the Framers’ intent is


151. Bruce Ledewitz, Judicial Conscience and Natural Rights: A Reply to Professor Jaffa, in JAFFA, supra note 5, at 109, 114. Such an approach constitutes “an archaeological dig into the remnants of natural law” that is not “true to the tradition of natural law.” Ledewitz, supra, at 115.

152. Ledewitz, supra note 151, at 115-17.
authoritative for no other reason than that it is true.”153 Accordingly, Jaffa’s response went beyond text and history, at least in a sense, in defending the constitutionality of the death penalty. In language that is most striking, Jaffa argues: “The rights proclaimed in the Declaration are rights which we are bound to respect in others only insofar as others respect them in us. The right to life which we are bound to respect is, as such, a right to innocent life.”154 While Jaffa subsequently asserted that this view of the nature of the “right to life” is “rightly approved” by the American people today, his argument for that claim proceeds against a backdrop assumption that the truths of natural law and natural rights are embodied in their fullness in the social contract theory expounded by the founding generation.155 Jaffa thus easily concluded that an attempt to argue against the constitutionality of the death penalty from original intent, even understood broadly by reference to the principles of the Declaration of Independence, is “without foundation.”156

Surely, however, Ledewitz is correct both that there are moral arguments against the death penalty that are not answered by any analysis of the Declaration of Independence as a historical document and that a true natural law jurisprudence would necessarily rise to a level of generality beyond merely explicating the premises of historical documents—even ones restating historical natural rights theory. If it is true, as Jaffa elsewhere acknowledges, that the framers adopted reason rather than tradition as their guide, it follows that they intended to bind us not merely by their principles, but by the very principle of moral limits on government itself. From that perspective, a great deal more would have to be said to answer opponents of the death penalty than providing evidence that there is no foundation for the view that Jefferson and his contemporaries would have viewed it as immoral or unconstitutional. Justifying the death penalty becomes inherently more controversial as a matter of moral reasoning than when the same argument is based on tradition, consensus, or a theory that rests on the original understanding of the Eighth Amendment.

153. Harry A. Jaffa, Judicial Conscience and Natural Rights: A Reply to Professor Ledewitz, in JAFFA, supra note 5, at 237, 244.
155. Jaffa challenged Ledewitz “to find anywhere a document of the thought of those who framed and those who ratified the Constitution, disagreeing with the foregoing definition of legitimate political power, a definition itself derived from the right to life.” Id. Subsequently he claimed that according to Madison and Jefferson, “the doctrines of Locke and Sidney,” were the doctrines “approved by the American people.” Id.
156. Id. at 248.