

THE VIRTUE OF A NATURAL LAW READING OF THE U.S. CONSTITUTION

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Natural law was arguably fundamental to the U.S. Constitutional project: the Framers apparently assumed courts would interpret and apply unwritten natural law concepts alongside the enacted provisions of the document. However, since the early 19th Century judges have sought to ground all decisions on specific text in the Constitution. Not only is this inconsistent with the intent of the Framers, it makes for bad adjudication. Fortunately, I believe philosophy and custom can be marshaled on the side of re-introducing judicial appeal to natural law.

Philosophically, the fact that the positivist conception of law has no connection to ethics or natural law principles makes it ontologically bankrupt—unlike natural law, positive law has no ontological validity at its core. Natural law is also inherently primary to positive law—in the sense that moral imperatives shape positive law, and in the sense that interpreting positive law requires higher guiding principles. The existence of a long-standing custom of judicial appeal to natural law provides an ethical basis for judicial creativity in protecting rights that flow from natural law principles.

As to a model framework, I argue that judges are competent to apply a range of faculties in ascertaining our society's moral true north. I offer that virtue ethics, and specifically the venerable tradition of the middle path—the doctrine of the mean—can provide a framework which holds promise as a universal principle that can assist us in re-evaluating and re-creating our fundamental law as our social experiment in the United States develops.

INTRODUCTION

“It is flattering to human vanity to make man the creator of nature or its laws, but if we were to take this seriously, we should have to say that we also create our own ancestors and the biologic laws according to which we have come into this world.”

Morris Raphael Cohen¹

It would appear that legal positivism—a position that law is only those rules enacted by human beings with no necessary or inherent connection to morality²—has thoroughly dislodged natural law theory in the United States as the ideological basis for interpreting the supreme law of our Constitution. Classical concepts of natural law—the view that law is an outgrowth of ethical theory and based on universal, natural principles that human beings can discern through

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¹ MORRIS RAPHAEL COHEN, REASON AND LAW 210–11 (1950).

² BLACK'S LAW DICTIONARY, legal positivism 749 (abr. 8th ed. 2004) (“The theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law.”).

the use of reason³—are part of a long tradition of legal theory connecting ancient Greece to the words of the U.S. Constitution. However, fifty years after the constitutional convention in Philadelphia, positivist thought had unquestionably taken the reigns in the United States, and U.S. Supreme Court justices were endeavoring to look not to natural law principles, but to the written Constitution alone as the source of our “fundamental law.”⁴

While natural law theory certainly retreated into the shadows, it was not banished, and has in fact undergone something of a revitalization in the last half of the 20th Century due to influential thinkers like Ronald Dworkin, Lon Fuller, and John Finnis. These and other contemporary theorists all seem implicitly united by the idea that any “description and analysis” of law should be guided by political morality, or an ethics grounded on a “concept of human nature.”⁵ These theories are also compatible with “natural rights” theory (commonly referred to today as “human rights”), which has a historical tradition distinct from natural law,⁶ although in this paper I refer to natural rights as a logical outgrowth of natural law theory.⁷ Both concepts rely on unwritten principles to derive their enforceability under the rule of law, in this country and internationally. Natural law may also be seen as the basis of moral duties that correspond to their correlative natural rights.⁸

Legal positivism is not fundamentally inconsistent with natural law theory, but I submit that natural law inherently occupies a position of primacy, and in this paper I argue that natural law deserves reconsideration as an express basis for the interpretation of fundamental rights laid down in our Constitution. On a jurisprudential or philosophical level, natural law is ontologically more legitimate than positive law, because the latter is untethered by moral evaluation. As to judicial capacity in this arena, several scholars have elaborated how and why judges are well situated to interpret natural law principles applicable to human affairs—what I will refer to as our society’s *moral true north*. However, I posit that judges would better be able to “read” or discern the unwritten natural law principles animating our organic document if they had practice at tackling this exercise directly. I also argue that virtue ethics may offer the most useful theoretical framework for judges to use in this program, and that judges are suitably prepared to respond to the difficult challenge of applying a necessary range of faculties including logic, while not eschewing intuition or felt morality. While natural law principles may not seem to cast light on every Constitutional issue, I suggest that they provide a valuable moral compass. Perversely, no moral compass is apparently needed if one views the Constitution as mere positive law. I hope anyone holding this latter position will find reason to question it in this paper.

Part I of this paper is a brief examination of various theories of natural law. Part II argues that from a jurisprudential perspective, natural law is the most ontologically legitimate concept of law. Part III examines why natural law must be seen as fundamental and primary to

³ BLACK’S LAW DICTIONARY, natural law 866 (abr. 8th ed. 2004) (“A philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislation or judicial action; moral law embodied in principles of right and wrong”).

⁴ Suzanna Sherry, *The Founders’ Unwritten Constitution* 54 U. Chi. L. Rev. 1127, 1171–76 (1987).

⁵ CHARLES COVELL, *THE DEFENCE OF NATURAL LAW* 27–28 (1992).

⁶ BRIAN BIX, *Natural Law Theory: The Modern Tradition*, in *HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY* 69–70 (Jules L. Coleman & Scott Shapiro eds. 2000).

⁷ Black’s Law Dictionary similarly acknowledges the modern conception of these connected concepts, defining “natural right” as “[a] right that is conceived as part of natural law and that is therefore thought to exist independently of rights created by the government or society. . . .” BLACK’S LAW DICTIONARY 1095 (abr. 8th ed. 2004).

⁸ See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 19 (1913).

positive law, especially with respect to the Constitution. Part IV describes how natural law apparently served as an important conceptual framework for the U.S. Constitution by its original authors, and how the Framers expected judges to rely expressly on unwritten principles of natural law to decide cases, particularly with respect to individual rights. Part V examines issues of institutional competence and judicial capacity with respect to interpreting unwritten, natural law. Finally, Part VI explores a virtue ethics perspective of natural law, and how judges interpreting the Constitution can employ this theoretical framework to better discern the moral true north of our society.

I. SHAPES OF NATURAL LAW

It is possible to define a natural law theorist as any thinker who “views values as objective and accessible to human reason.”⁹ However, even within the classical tradition, natural law may include a variety of concepts, viz. that moral principles are embedded in the universe itself; that moral principles are connected to human purpose; or that moral principles are inherently accessible to human beings.¹⁰ The central figure in the classical tradition is St Thomas Aquinas, who reconciled Aristotle’s metaphysics with the Christian tenets, and defined natural law as that part of the eternal order “discoverable by human reason.”¹¹ Natural law traditionally is not concerned with law as a human-made concept, but seeks to identify what is right and wrong on a more abstract or universal level. Aquinas discerned only one basic precept of natural law, from which all other principles may be derived: “[G]ood is to be done and pursued, and evil is to be avoided.”¹²

Modern natural law theorists sometimes labor within the classical tradition and focus on ethical theory, such as John Finnis and his “self-evident” basic goods: life, knowledge, play, aesthetic experience (or beauty), sociability (or friendship), practical reasonableness and “religion.”¹³ Other notable exponents of modern natural law are primarily focused on legal regimes and on responding to the claims of positive law.¹⁴ Specifically, Lon Fuller developed an argument that law is inherently good, but that a system of rules is more or less “legal” to the extent that the system adheres to the right *procedural* precepts.¹⁵ While not a self-styled natural law theorist, Ronald Dworkin fits the mold to the degree that he asserts that the true law can only be known via “moral evaluation.”¹⁶ For Dworkin, the thing is to arrive at the *best* interpretation of the available “institutional materials” (statutes, caselaw, etc), and the best interpretation includes using a “scale of moral value.”¹⁷

Any description of natural law today would be incomplete without examining the legal positivist tradition that has grown into the dominant Western view of law. Positivism as a legal theory began with Jeremy Bentham in the 18th Century, who defined law in a utilitarian manner, as a set of “commands and prohibitions” issued by the recognized sovereign.¹⁸ G.W.F. Hegel took the step of asserting that the sovereign (or state) was a “morally self-complete form of

⁹ BIX, *supra* note 6, at 64.

¹⁰ *Id.* at 65.

¹¹ COVELL, *supra* note 5, at 7.

¹² THOMAS AQUINAS, THE SUMMA THEOLOGICA, VOL. 2 106 (Fathers of the English Dominican Province, trans., 1911).

¹³ JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 86–87 (1980).

¹⁴ BIX, *supra* note 6, at 75.

¹⁵ *Id.* at 79.

¹⁶ *Id.* at 84.

¹⁷ *Id.* at 83.

¹⁸ COVELL, *supra* note 5, at 1.

human association,” serving as its own end.¹⁹ This laid the groundwork for the ultimate assertion of modern positivism, as voiced by H.L.A. Hart, that law and morality are separate concepts.²⁰ Hart conceded that a positivist would not be forced to disagree with the conclusions of a natural law theorist,²¹ and there is a modern tradition of *inclusive legal positivism* that allows that “moral criteria *can* but *need not be* part of the test for whether a norm is legally valid.”²² In other words, positive law can be entirely consistent with natural law; the debate comes in as to the source of validity of positive law. Natural law is more closely synonymous with *moral imperative* than with any form of “law”—legal obligations may require obedience even if they are not morally valid, and even if they create no *moral* obligation.²³ However, few natural law theorists can be interpreted as making the claim that even an unjust positive law creates no *legal* obligation.²⁴ Legal obedience may be required even if there is no moral imperative.

In this paper I adopt a view of natural law that is more or less harmonious with both the classical and modern tradition of natural law: that enacted, human law (positive law) is at best an “imperfect version” or an “approximation” of natural law.²⁵ Humans have *some way* of accessing or reasoning what is morally right, even if we will never fully understand the process by which we do so, and even if our enacted laws do not always “get it right” because of our limitations, the inherent defects of language, or other barriers. The human process of discerning principles of natural law is probably some indeterminate combination of logic and reason; felt truth; intuition; instinct; creativity; insight; empathy; and other possible modes or “methods of moral and intellectual inquiry.”²⁶ No human law will ever be in perfect alignment with higher ordered principles. However, despite the surety of imperfection, positive law should be as directly consistent with natural law principles as possible, with specific rules sourced from general principles.²⁷ Human law creates legal obligation, but not moral obligation, except to the extent that any given positive rule is aligned with the natural law rule.²⁸

With this basis for natural law as a starting point, I now turn to a lesser discussed argument that enacted law based on natural law may have a more solid theoretical basis than mere positive law without this basis, because of an ontological problem with positive law itself.

II. NATURAL LAW AS PROVIDING ONTOLOGICAL VALIDITY

In his article *Hiding the Ball*, Pierre Schlag points out that the ontological identity of what we think of as “law” is not easy to pin down, and that the ontological structure of law is such that inquiry into law’s *identity* is diverted by questions of epistemology, normative aspects, or technicalities.²⁹ There is a “pre-interpretive something” that *is* law, but legal thinkers are inherently discouraged from thinking about the “beingness” of law at all.³⁰

Schlag posits that the ontological black hole at the core of the law is the result of the fact that law is always simultaneously many things at once. For example, our Constitution is at once

¹⁹ *Id.* at 11.

²⁰ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

²¹ BIX, *supra* note 6, at 95.

²² *Id.* at 97–98.

²³ BIX, *supra* note 6, at 70–71.

²⁴ *Id.* at 71.

²⁵ *Id.* at 66.

²⁶ See Robert F. Nagel, *Rationalism in Constitutional Law*, 4 CONST. COMMENTARY 9, 13 (1987).

²⁷ BIX, *supra* note 6, at 71

²⁸ *Id.* at 71; COVELL, *supra* note ____, at 7 (“[T]he moral validity of the positive law established within any state was underwritten by . . . universal principles of natural law.”).

²⁹ Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1718 (1996).

³⁰ Pierre Schlag, lecture at the Univ. of Colo. Law School (Feb. 11, 2010).

a historical text; a charter; a political event; a contract; an amalgam of practices and intentions; etc.—and its identity changes according to the identity of the reader or interpreter.³¹ When taken to be any one thing or part, the meaning of the law changes from what its meaning might be if taken to be a different thing or part.³² Thus, Schlag believes that much energy is wasted in debate about the nature of the Constitution, because various positions are talking past each other, none talking about the same Constitution.³³ Each debater is starting with an assumption of what the Constitution is, and each debater is probably right that the Constitution is that, *in part*. But it is merely a rhetorical exercise of metonymy to claim that the identity of Constitution is the same as the identity of one part of itself.³⁴

The problem is not resolved by attributing our lack of knowledge about *what* the Constitution is (ontologic problem) to our *inability to know* what the Constitution is (epistemic problem), as legal scholars seem to hope by analogizing to the story of the six blind men trying in vain to describe an elephant.³⁵ In the story, there really is an elephant, but each blind man can only describe the part he is able to touch.³⁶ Schlag points out that the Constitution is nothing like an elephant. In the context of law there is nothing that could be adequately described as a unified object or concept, if only some person could open his eyes and see it. Schlag submits that there is no determinate *there* there.³⁷ There is no single thing/identity/concept “at the core” of the Constitution—there is only a periphery or penumbra of identifiable concepts.

I argue that to the extent there is an ontological black hole at the core of our Constitution, and to the extent this is a problem, legal positivism seems to make this problem more acute. On the other hand, natural law theory may provide a salve in that one can make the argument that there *is* something there at the center of the apparent black hole. To the question “What is the law?” an answer may be given: the law is our best understanding of the moral imperatives or principles of nature. The Constitution may still have a variety of meanings, dependent on its reader—but its core is a derivation, an analogy, of something ontologically substantive. There may be an epistemological problem for humans in knowing what natural law is, but there is not necessarily an ontological problem: natural law is an objective, universal order. As the natural law relates to human affairs, it offers real principles that demand (subtly) adherence. The project of interpreting our society’s moral true north is a program that can be carried out rightly or wrongly. The Constitution, as law, is this program. As discussed in Part IV, *infra*, the Framers of our Constitution probably subscribed to a version of my definition of natural law. But there are further reasons to reinvest our judiciary with the program of interpreting natural law, as I will explore.

III. NATURAL LAW AS INHERENTLY PRIMARY

As introduced at the beginning of this paper, natural law (moral imperative) seems inherently primary to all positive law (legality), because natural law is everywhere informing positive law. Legal obligation and moral obligation are distinct concepts that may or may not be united by a particular enactment by a lawmaking body, such as a legislature or constitutional convention. If a legislature has not enacted law in harmony with moral duty, it may be up to courts either to establish that the common law negates an immoral legislative act, or to affirm (in

³¹ *Id.*; Schlag, *supra* note 29, at 1688–92.

³² Schlag, *supra* note 29, at 1688–92.

³³ *See id.* at 1699–1700.

³⁴ *Id.* at 1707.

³⁵ *Id.* at 1692–96.

³⁶ *Id.*

³⁷ *Id.*

a particular case) a newly recognized, positive legal duty where there was no prior written law on point. I believe this is exactly how our legal system is designed and expected to operate—courts strike down illegal/immoral legislation as well as create new law. Both functions require interpretation of moral imperatives in addition to interpretation of written law.

As to the enterprise of creating new law, a court performs this function very differently than a legislature, as the latter relies exclusively on majoritarian political processes. Judge-made common law is fundamentally rooted in *custom*,³⁸ and while an in-depth discussion of common law and custom is beyond the scope of this paper, I take the position that common law, in part because it is so deeply rooted in history, is fundamentally and generally informed by natural law concepts, if not any specific tradition of natural law theory. While a court may rely primarily on interpreting case law or settled doctrine to discern the common law, at base the common law represents unwritten, natural law precepts. Go back far enough and judge-made law is nothing other than interpretation of moral imperative.

As to the judicial function of providing a check on positive lawmaking bodies, this also involves interpretation of moral imperative. In constitutional adjudication, courts are to refer to the text of the Constitution to discern specifics of law and for aid in understanding the basic moral principles and moral conclusions of our polity. But 200 years of constitutional doctrine shows us that interpreting the Constitution is no simple task, and often requires looking beyond the four-corners of the document. Hence, constitutional interpretation can be effectuated by citation to a historical record of the Framers' purposes, or other sources which can help illuminate meaning. How does a court decide between the well-known modalities of constitutional interpretation? Should a court give priority to history, textualism, structural concerns, precedent, moral concerns, or pragmatic concerns?³⁹ There is no textual basis in the Constitution providing a court with a definitive method in any instance. Rather, moral imperatives are lurking just behind the curtain, giving their commands as to how courts should interpret provisions of the text—e.g., consider structural concerns to protect these people's interests, but pragmatic concerns when these other interests are at risk, etc. The task is legal interpretation, but the method is determined by unwritten imperatives; legality cannot be determined without a working moral imperative. In other words, natural law theory has been backgrounded, but moral imperative is still functioning in how courts pursue interpreting the Constitution. This should be recognized explicitly—otherwise no one can be confident as to how constitutional adjudication is functioning.

But what result if the Constitutional Framers themselves enacted law at odds with moral imperatives? Certainly the Framers were no more infallible than any other lawmaking body. Do courts have the authority to reference natural law to override Constitution itself? Almost certainly not, because courts acquire the sum total of their authority from the Constitution, and cannot use this authority to unseat the basis of the same authority. If the Framers really got it wrong, it will require amendment or revolution to address or fix the mistake. And what basis other than moral imperative will drive such fundamental changes? For the same reason that courts cannot, with authority, subvert the Constitution—legal duty cannot be the basis for alteration of our basic legal charter.

Perhaps in order to avoid unnecessary amendment (or abandonment) of the document, the Framers left room for moral imperative to guide legal decisions. Constitutional provisions are

³⁸ BLACK'S LAW DICTIONARY, common law 232–33 (abr. 8th ed. 2004) (defining common law, in part, as the development of judge-made law as “evolved from custom”).

³⁹ The various common modalities of constitutional interpretation are defined and explored in PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–22 (1991).

substantively distinct from other laws in that they are often open-textured and general, especially when “generality is valuable.”⁴⁰ Thus, in the areas where moral imperatives may demand certain legal results, the Constitution is largely amenable to variation in law (as courts and legislatures struggle to get it right) without undermining the country’s charter. Individual rights are the most relevant and important example: some fundamental rights are expressly recognized (note: not *granted*, as if by positive law) by Amendments I through VIII. These rights are enforceable in court, and are subject to interpretation according to moral imperatives as described above. But the Ninth Amendment recognizes that there are other, non-enumerated rights retained by the people.⁴¹ As discussed in Part IV, *infra*, there is dispute over whether non-enumerated rights should be enforceable by courts. However, the Supreme Court has in fact enforced many non-enumerated rights. This judicial innovation is supported by the Ninth Amendment and the moral imperatives of Fourteenth Amendment “due process” interpretation. Perhaps the Framers included the Ninth Amendment to encourage adjudication through appeal to moral imperatives, a logical standpoint given that it is impossible to use the Amendment as a substantive basis for legal decisions. While the Supreme Court may claim that it finds (and has found) unenumerated rights enforceable based on “the Anglo-American tradition and basic American ideals,”⁴² I suggest that this language is merely camouflaging the Court’s implicit deference to moral imperatives of natural law theory.

Instead of unconsciously or surreptitiously drawing on natural law concepts, courts should explicitly recognize natural law as a component in the interpretation of positive law. By obfuscating the true basis of legal decisions or remaining unaware of the fact that legal reasoning is based directly on moral imperatives, the system is less than transparent and justice is more liable to be perverted. Alternatively, better decisions will result from clear reasoning, unfiltered by empty deference to legal positivism. Furthermore, courts would better be able to “read” or discern the unwritten principles of natural law if they tackled the program head on and had practice using natural law as an express basis of adjudication and interpretation. The idea of courts basing decisions on nebulous natural law concepts is a unnerving proposition to many, including this author. However, hiding our heads in the sand is an immature and ultimately self-defeating reaction to any challenge. Legislatures and executives heed only political imperatives—moral imperatives may or may not be manifest in acts of political will. Only courts can (and therefore must) acknowledge and reference moral imperatives directly in their actions without fear of political consequence.

Some legal historians claim that the Framers of our Constitution indeed expected courts to acknowledge and utilize natural law principles in adjudicating cases and interpreting our founding document. These historians also claim that the Constitution embodies natural law principles, and is meant to complement them. I will now examine these claims.

IV. NATURAL LAW AS FUNDAMENTAL TO THE U.S. CONSTITUTIONAL PROJECT

While not undisputed, there is ample evidence suggesting that natural law served to undergird the U.S. Constitution as written and adopted in the late 18th Century.⁴³ The debate has played out in at least two relevant arenas: whether the Framers intended for courts to reference

⁴⁰ David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L.J. 1717, 1736 (2003).

⁴¹ The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

⁴² See *infra* note 66 and accompanying discussion.

⁴³ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 55 (2004) (“[T]he evidence both that the founding generation were committed to natural rights, and that this commitment is reflected in the words of the Ninth Amendment, is so overwhelming that few deny it.”).

natural law principles in adjudicating Constitutional questions, and whether the Ninth Amendment embodies the concept that unwritten rights are enforceable in courts. I examine these issues in turn.

A. *Did the Framers Intend Courts to Reference Natural Law?*

Suzanna Sherry asserts that one of the innovations of the constitutional convention was the concept that, in writing the country's organic document, the Framers were not merely listing a "declaration of first principles," but were enacting a new form of positive, fundamental law.⁴⁴ However, she asserts that the founders did not intend that this new document would be the "sole source" of fundamental law, but that it would complement an acknowledged tradition of appeal to natural law, particularly in adjudication.⁴⁵

Through research into the records of law lectures and other extrinsic writings by the Framers, Sherry concludes that the Framers regarded natural law principles as preceding, and complementary, to a written Constitution:

All of these men clearly thought that certain rights existed whether or not they were declared . . . [and] thus envisioned a source of fundamental rights beyond the written document, suggesting . . . that the Constitution was not intended to reduce to writing all of fundamental law.⁴⁶

Consistent with their acknowledgment of unwritten fundamental law, the founders apparently expected the judiciary to protect natural rights, even those that are not enumerated in the Constitution. Sherry claims that the courts were expected to "keep legislatures from transgressing the natural rights of mankind,"⁴⁷ and that the first generation of American judges referenced natural law principals with respect to cases that involved individual rights.⁴⁸ Despite a conventional view that unwritten natural law was never used to overturn legislation, Sherry claims that there is no case during the first three decades after adoption in which the courts upheld any act "contrary to natural law on the ground that the law was not in conflict with any constitutional provision."⁴⁹ Instead, most early Supreme Court Justices tended to rely on the written Constitution "primarily in deciding allocation of power questions," while relying on unwritten, natural law in questions regarding the "rights of individuals."⁵⁰

Thomas Grey lends further support to Sherry's assertion that natural rights theory is "deeply embedded" in our nation's origins, and that the Constitutional Framers never tried to "completely codify" the higher law in a document, opting instead to identify a non-comprehensive list of natural rights principles and enact these into positive law.⁵¹ Grey also

⁴⁴ Sherry, *supra* note 4, at 1146. Sherry indicates that the U.S. Constitution was a *sui generis* form of positive law in that it was a new kind of constitution with "self-referential enforceability" (as opposed to inherently enforceable as "accretionally derived from natural law and unchallenged legislative acts") and of "extra-legislative origin" (existing as fundamental law because enacted through ratification by the people themselves). *Id.*

⁴⁵ *Id.* at 1127, 1156–57.

⁴⁶ *Id.* at 1164–65.

⁴⁷ *Id.* at 1177.

⁴⁸ *Id.* at 1167–68.

⁴⁹ *Id.* at 1167.

⁵⁰ *Id.* at 1167–68.

⁵¹ Thomas C. Grey, *Do We Have and Unwritten Constitution?* 27 STAN L. REV. 703, 716–17 (1974-1975).

echoes Sherry that in the 18th Century it was “widely assumed that judges would enforce as constitutional restraints the unwritten natural rights”⁵²

Of course, not all legal historians agree about the character of natural law conceptions held by framing generation. Raoul Berger puts it in no uncertain terms: “By expressly providing in Article IV that the Constitution ‘shall be the supreme Law of the Land,’ the Framers left no room for judges to supersede the instrument in the name of natural law.”⁵³ Helen Michael asserts that the natural law tradition embraced by the Framers was a “democratic or egalitarian theory of natural law, which granted *to the people* the sole power to make law and categorically denied the judiciary the power to alter the people’s law based on the judges’ subjective conceptions of ‘natural justice.’”⁵⁴ While she grants that this theory was one of two competing natural law traditions, Michael attempts to bolster her view by asserting that the democratic theory (as opposed to the “Cokean theory” which endorsed “noninterpretivist” judicial review) is represented by early state constitutions which endowed legislatures “with expansive powers and concomitantly limited the judiciary’s powers severely.”⁵⁵ Michael also attacks Sherry’s use of certain cases as showing that early U.S. courts did assert the power to review legislation according to natural law.⁵⁶

Debate of this kind is useful only to a point. It is unlikely that a single coherent theory of adjudication or interpretation animated the actions of every Framer, ratifier, and judge or justice in the adoption and post-adoption period, and the presence of debate suggests that there was no overwhelming majority adhering to one theory or the other. What does seem clear is that natural law principles played a part in the intellectual project of forming a new nation under the rule of law, and that various customs existed of judicial appeal to natural law in deciding cases. Such customs imply that judges at least *could* be seen as having authority to enforce rights that accord with relevant principles of natural law. Customary judicial application of natural law, existing to any extent, represents a key to avoiding the stifling dispute regarding the Ninth Amendment: whether unwritten rights are enforceable or not.

B. Does the Ninth Amendment Demand that Courts Enforce Unenumerated Rights?

The debate over what rights are protected by law, and how they are protected, goes to the heart of the tension between natural law and legal positivism, a tension felt most acutely with respect to the meaning of the Ninth Amendment. The text of the Amendment seems to represent an obvious embodiment of the principle that individual rights exist in some form beyond those enumerated as positive law. What the Amendment means or provides as a *legal text*, however, is far from obvious. Are the unenumerated rights it refers to enforceable in a court of law? If so, how is a court to know whether the claimed right is enforceable or not? Indeed, the Ninth Amendment has almost never been invoked by the Supreme Court; it has been considered practically useless as a textual provision, with no substance of its own.⁵⁷

⁵² *Id.* at 716 (Grey attests that “[t]he practice of the Marshall Court and of many of its contemporary state courts, and the writings of the leading constitutional commentators through the first generation of our national life, confirm this understanding.”).

⁵³ Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508, 1525 (1994).

⁵⁴ Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of “Unwritten” Individual Rights?* 69 N.C. L. REV. 421, 490 (1991) (emphasis added).

⁵⁵ *Id.*

⁵⁶ *Id.* at 448–57.

⁵⁷ ERWIN CHEMERINKSY, CONSTITUTIONAL LAW 817 (2d ed. 2005) (“[T]he Ninth Amendment is not a repository of rights or even a provision that is itself interpreted . . .”). Justice Goldberg’s concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965), is a unique example of judicial reliance on the Ninth Amendment.

Legal historians have lined up for battle over the import of the Ninth Amendment.⁵⁸ Raoul Berger is one of the most outspoken critics of judicial enforcement of unwritten rights. Taking a restrictive view of the Constitution through textual analysis, Berger asserts that the “retained” rights are patently “outside” of the Constitution and federal jurisdiction.⁵⁹ Berger claims that that federal judges are therefore “not authorized by the Ninth Amendment nor by Article III to fish for cases in the pool of unidentified rights”⁶⁰ Berger also argues that the judiciary is a branch of government, and that because the Constitution was designed to limit governmental power, the Ninth Amendment cannot be read as conferring “unlimited federal judicial power to create new rights.”⁶¹ By contrast, Randy Barnett attempts to use records of deliberations, draft bills, and speeches by primary bill of rights drafter James Madison in order to mount the argument that the concept of “retained rights” in the Ninth Amendment was meant to enshrine natural rights,⁶² and that these were “to be treated the same” as Constitutionally enumerated rights.⁶³

It is unlikely that widespread agreement as to the strict legal meaning of the Ninth Amendment will materialize among academics or courts⁶⁴—and while a custom of judicial appeal to natural law may provide a way beyond this theoretical gridlock, any such custom has been largely forgotten. Despite its roots as an ancient and widespread understanding regarding the source of law, and its likely prominence as the basis and complement of our written Constitution, appeals to natural law fell out of favor early in our nation’s history. Sherry asserts that by the 1820s, the Supreme Court was endeavoring to ground every decision in specific Constitutional provisions, “even when doing so stretch[ed] the language to the limits of credibility.”⁶⁵ Grey submits that the tradition of natural law gave way under pressure from a variety of influences, including “the growth of legal positivism, ethical relativism, pragmatism, and historicism.”⁶⁶ Irrespective of why, it is clear that Constitutional interpretation became almost entirely constrained to considering only textual provisions in the written Constitution as the basis for our fundamental law; natural law is not considered at all in modern judicial efforts to interpret the provisions of the text or as a basis for limiting legislative power. When the Supreme Court does find reason to protect rights not textually rooted in the Constitution, it grounds this by reference not to natural law, but to “the Anglo-American tradition and basic American ideals.”⁶⁷ It is especially ironic that current Supreme Court jurisprudence relies heavily on originalism, yet ignores what seems to have been part of the original intent of the Framers. As Sherry puts it, the Constitution was “never intended to displace natural law; the modern Court’s insistence on textual constitutionalism as the sole technique of judicial review is . . . inconsistent with the intent of the founding generation.”

⁵⁸ For a bibliographic essay discussing the conflicting views on the Ninth Amendment, see THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 507–10 (Patrick T Conley & John P Kaminski eds., 1992).

⁵⁹ Berger, *supra* note 53, at 1535.

⁶⁰ *Id.* at 1512.

⁶¹ *Id.* at 1510–11.

⁶² See BARNETT, *supra* note 43, at 55.

⁶³ *Id.* at 252

⁶⁴ See, e.g., Raoul Berger, *Suzanna and—The Ninth Amendment*, 1994 B.Y.U. L. REV. 51, 51 (“A count of noses cannot settle so important an issue . . . [W]hat makes a thing true is not who says it, but the evidence for it.”)

⁶⁵ Sherry, *supra* note 4, at 1176 (“By approximately 1820 . . . the reliance on natural law was waning, disappearing entirely within a few years . . . [T]he Supreme Court since 1937 has made a consistent and . . . partially successful attempt to link all of its decisions to specific clauses of the Constitution . . .”).

⁶⁶ Grey, *supra* note 51, at 716.

⁶⁷ *Id.* at 717.

Notwithstanding its dormancy, to the extent that a custom of judicial appeal to natural law principles was passed down to early U.S. courts from Britain, this custom could serve as a basis of authority for re-expanded judicial protection of individual rights, and to reawaken us to the usefulness of judicial transparency in this regard. The custom may be widely forgotten, but the Ninth Amendment captures its spirit, perhaps providing an ethical basis for judicial creativity in protecting rights that flow from natural law principles. I maintain the custom actually remains strong, but is undeclared or works only in the judicial subconscious. Bringing it out of the shadows is not shameful, but rather may serve to strengthen both the function and legitimacy of the rule of law.

My thesis assumes, of course, that judges are sufficiently competent to be entrusted with the program of interpreting natural law. Given that human knowledge of natural law is necessarily imperfect, and that there is not even an understood or accepted method of discerning what natural law is, what are the implications of this for our program of enacting morally correct law (and striking down immoral law) through interpreting the Constitution? If natural law is an appropriate lens to view the authority and mandates of our Constitution, at least with respect to fundamental rights, who is the appropriate authority to appeal to this unwritten law? I will now attempt to address this issue.

V. JUDICIAL CAPACITY TO INTERPRET UNWRITTEN LAW

The practical difficulties of appeal to natural law are legendary. As Justice Iredell stated it: “The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject.”⁶⁸ However, there are several modern theories that may support the thesis that judges *do* have the capacity to “interpret” unwritten moral imperatives: the theory of institutional competence, and theories put forth by Ronald Dworkin and Thomas Grey.

C. Ronald Dworkin: a “Moral Reading” of the Constitution

Ronald Dworkin’s theory of a “moral reading” of the Constitution provides possible validation for judicial capacity to discern what I am calling the moral true north of our society as captured in the Constitution. Dworkin posits that the Constitution lays down core moral principles that judges use to concretize abstract rights, and that judges are particularly able to interpret the core moral principles not because they have a heightened moral sense above other citizens, but because judicial decision making occurs within the dual constraints of history and constitutional integrity.⁶⁹ As to the first, Dworkin means that an examination of legal history allows judges to understand *what* principles the Framers intended to lay down.⁷⁰ As to the second, Dworkin uses “integrity” to mean that judicial understanding of moral principles is narrowed or filtered by the prior interpretations that have been made of the Constitution—a moral judgment that does not “fit” with settled American legal understandings is an incorrect or inappropriate interpretation.⁷¹

Dworkin’s framework is appealing, on two levels, as providing hope that judges are in a good place to carry out the program of this paper. First, it describes a deference to understandings of moral principles as discerned by many people over a long period of time,

⁶⁸ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798).

⁶⁹ RONALD M. DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996), reprinted in *MODERN CONSTITUTIONAL THEORY* 37–43 (John H. Garvey et al eds., 5th ed. 2004).

⁷⁰ *Id.* at 38–40.

⁷¹ *Id.* at 42.

which is most likely to approximate true natural law as applicable to human affairs. While no one individual is likely to have the capacity to home in on our society's moral true north with accuracy across a variety of subjects broad and deep, our collective minds have a better shot. Dworkin essentially advocates tapping into a human brain trust—a long-term, collective sense of ethical theory as laid down in our society's legal tradition.

Second, Dworkin illustrates how judges have familiarity and practical experience with historical texts and legal tradition, and are thus in a good position to best interpret the contents of this collective brain trust, and to use it as a compass. Collective moral understandings clearly remain imperfect—consider, for example, the acceptance of property rights in human beings in the Constitution and in historical practice—but a judge and student of the Constitution is in the best place to have a vision of the overall landscape of our moral/legal universe, and to employ this vision in re-orienting us on our course as new situations arise and demand a re-thinking of the tradition.

Criticism of the ability of Dworkin's dual constraints to work together at a theoretical level has been mounted⁷²—however, I have a different problem with Dworkin's framework, in that I find it incomplete without a direct link to ethical theory. Dworkin attempts to transcend the natural law/positivism debate by elaborating a third, so-called “interpretive” view—positing in effect that the Constitution is a conversation among an interpretive community.⁷³ But limiting a judge's vision of our collective moral true north by demanding that this vision “fit” within the strict confines of American legal and historic traditions is a form of cultural relativism. It is unlikely in the extreme that the U.S. Constitution and the American tradition represent the *only* source of core principles, worldwide and across all time, that can inform a judge as to the moral true north of all humanity, or even of our citizens in this country (who, incidentally, represent many cultures at this time, even if not at the time of the constitutional framing).

Even if one could posit the assumption that one particular culture has “gotten it right,” cultural relativism, such as Dworkin seems to appeal to, is deeply suspect philosophically and a poor model for law because it is a baseless system of ethics.⁷⁴ If morals are grounded *solely* on what amounts to cultural custom, there is no criticism possible, inter- or intra-culturally.⁷⁵ Reform is philosophically impossible, because anything that deviates from custom is simply criminal. Finally, cultural relativism also denies moral progress, allowing only for moral *change*. Cultural relativism is mainly incompatible with natural law. While the Constitution is our law *relative* to the law of other nations, I believe we should be looking at how we can best elaborate an ontologically extant fundamental law (going beyond cultural divisions), and use that to craft the best law and illuminate existing Constitutional provisions. Interpreting law as the best law possible *is* Dworkin's position, but I believe his theory requires an extra component.

D. Thomas Grey: Beyond Interpretation

Thomas Grey also advocates that judges have the capacity to properly decide cases using methods beyond the “pure interpretive model”—his term for the attempt by judges to base

⁷² Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1270 (“One would expect the Dworkin of *Fit* to attack the Dworkin of *Right Answers* for the latter's lack of respect for the distinctive qualities of judging within the American tradition (what he calls elsewhere ‘integrity’), and the Dworkin of *Right Answers* to charge the Dworkin of *Fit* with sacrificing ‘principle’ to ‘history.’”).

⁷³ *READING DWORKIN CRITICALLY* 9–12 (Alan Hunt, ed. 1992).

⁷⁴ See JUDITH A. BOSS, *ETHICS FOR LIFE* 136–41 (3d ed. 2004).

⁷⁵ *Id.*

decisions solely on the text of the Constitution (and through interpretation of that text).⁷⁶ Grey outlines three reasons why judges are in a good position to tackle the challenge of discerning and reifying our society's "most basic contemporary values," despite the fact that this requires insight into unwritten fundamental law. First, the judiciary has been notoriously considered "the least dangerous branch," but it can produce practical results. Second, common law adjudication has always been a program according to which judges apply "generally accepted social norms" (which are written nowhere) to specific cases. Third, as I elaborated in Part IV, *supra*, Grey believes that at the time of the Constitution's adoption, judges were assumed to have the authority to enforce even unwritten natural rights. As to this last point, Grey indicates that, in the era of the framing, judges were seen by some as uniquely capable of applying unwritten fundamental law in service of protecting *legal* rights, because these were seen as products of the "artificial reason" of the law.⁷⁷ Although these legal rights "were commonly regarded as dictates of natural law, it was a natural law more accessible to the legally learned than to the commonsense intuition of the laity."⁷⁸

To the extent that common law adjudication sometimes resembles a process of deriving moral principles through an array of modes of human inquiry, I believe Grey's three reasons—especially the second, comparing unwritten law to common law—sufficiently legitimate the practice of placing judges in a position to ascertain and announce the moral true north of our society. However, as I have noted, judges would better prepared for this task if this program were expressly undertaken, and if a common framework were to be accepted. I take up the question of a possible framework (based on virtue ethics) in Part VI, *infra*.

E. Institutional Competence

A third theory supporting judicial capacity to interpret natural law principles is less about judicial capacity *per se*, and more about the judiciary as the appropriate institution to consider and apply moral imperatives, specifically because the judiciary is politically insulated. What I will term the argument from political independence, is based on the idea that politically accountable institutions, such as the legislature or executive, are unlikely to make unpopular decisions or to address the concerns of "relatively few, marginal—and perhaps marginalized—citizens."⁷⁹ As I claimed in Part III, *supra*, courts are the *only* institution situated to consider natural law, because political imperatives are alone certain to guide legislation or executive action, while courts are politically insulated enough to hand down unpopular law. Because courts can function independently, I argue that they should do so when moral imperative demands. To the extent that there is a fear of judicial tyranny, impeachment or other remedial measures are politically available.⁸⁰ To me, such fears do not outweigh the importance of appeal to moral imperatives by the only institution that might reliably do so.

Despite the attractiveness of the above theories, many may still question whether the judiciary is the institution best situated to pronounce moral imperatives or cultivate social virtues, especially in the arena of constitutional adjudication, which is considered to be where

⁷⁶ Grey, *supra* note 51, at 714–17.

⁷⁷ Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought* 30 *Stan. L. Rev.* 843, 892 (1977–1978).

⁷⁸ *Id.*

⁷⁹ MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* 94 (2007).

⁸⁰ Michael Perry considers the *argument from democracy* just as persuasive as the argument to empower courts, and thus offers that "judicial penultimacy" would be normatively superior to "judicial supremacy." Under this system, already in place in Canada and the UK, a legislature has final say on the Constitutionality of a law, after a court has ruled. See *id.* at 96–117.

fundamental or basic social tensions are settled.⁸¹ Shouldn't basic social conflicts be resolved democratically? Voices on both sides of constitutional disputes tend to employ rhetoric emphasizing the apparently high stakes—e.g., fears of “totalitarianism” if one side or the other is to prevail.⁸² However, the argument may also be made that courts are *uniquely positioned* to function as Socratic teachers or guides, particularly when the stakes are so high and it appears that law itself cannot resolve the tension. For example, Robert Burt makes the argument that in the context of “diametric disputes”—those that go to the core of what glues a community together—democratic resolution is in fact impossible, and only courts can provide hope for settlement through enforcing dialogue.⁸³

I submit that Burt's thesis is complementary to mine, and that enforcing dialogue between deeply entrenched political groups is a moral imperative. In Burt's view, judges may only subconsciously realize how their office is critical to arousing a sense of shared vulnerability among all citizens. Is this lack of self-awareness crucial to the judicial role? I think not. I imagine that more reflexive awareness on the part of judges would make judicial interpretation of unwritten law more legitimate, in reality and in the minds of the people. However, Burt's thesis provides an interesting counterpoint to judges as qualified to interpret natural law: no human can claim perfect understanding of universal moral imperatives—we are all vulnerable to misinterpreting natural law. The take-away lesson for judges, perhaps, is that constitutional decision-making, especially in the context of protecting unwritten rights, should take place within a space of humility and shared vulnerability, as opposed to arrogant authoritativeness.

Thus far, I have laid out how natural law theory is more ontologically legitimate and inherently primary to positive law; that the Constitutional Framers apparently intended natural law theory to be considered alongside the written text in the process of adjudication, especially as to individual rights; and that judges are in an appropriate position to usefully interpret and apply natural law principles. In the last Part of this paper I address how, moving forward, human judges or justices might best attempt to legitimately (i.e., within a *legal* paradigm, and with appropriate humility) interpret the moral imperatives of natural law. I offer that virtue ethics provides a framework which may offer some assistance with this program.

VI. VIRTUE ETHICS AS A METHOD OF NATURAL LAW INTERPRETATION

Virtue ethics, a tradition of moral philosophy with roots dating directly back to Aristotle, is typically thought of as emphasizing *right being over right action*.⁸⁴ However, I am primarily interested in an aspect of the tradition which I believe can provide a framework that allows judicial employment of the various modes of human inquiry (which, once again, includes logic and reason without barring the use of such faculties as felt truth; intuition; instinct; creativity; insight; empathy; and others⁸⁵) in search of our society's moral true north. I am referring to the *doctrine of the mean*, which encapsulates the idea that virtues “generally entail moderation or seeking the middle path.”⁸⁶ The doctrine of the mean links Western Aristotelian thought⁸⁷ with

⁸¹ Interview with Robert F. Nagel, Rothgerber Professor of Constitutional Law, Univ. of Colo. Law Sch., Boulder, Colo. (Mar. 18, 2010).

⁸² *Id.*

⁸³ Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 Yale L. J. 455 (1984).

⁸⁴ BOSS, *supra* note 74, at 383.

⁸⁵ *See supra* note 26 and accompanying text.

⁸⁶ BOSS, *supra* note 74, at 393.

⁸⁷ ARISTOTLE, *THE NICOMACHEAN ETHICS* 31 (David Ross trans., rev. 2009) (“Virtue, then, is a state of character concerned with choice, lying in a mean . . . between two vices., that which depends on excess and that which depends on defect . . .”).

the Eastern philosophies of Confucius⁸⁸ and Buddhism's "Middle Way."⁸⁹ It is thus a tradition which spans great reaches of time and divergent cultures—it is a sustainable principle on which humans have learned to rely and trust.

According to the doctrine of the mean, moral qualities are defined as the equilibrium point between deficiency or excess with respect to a particular aspect of character.⁹⁰ Thus, the virtue of courage may be defined as the middle path between the vices of cowardice and foolhardiness.⁹¹ There is no strict formula for deriving the mean, and it is both context-dependent and agent-dependent.⁹² A disabled man's act of facing an attacker might be courageous, while the same act performed by an able-bodied fighter would not be. As one might guess, even an overly meticulous search for the perfection of the mean may be a vice—perfection itself is a middle path between scrupulosity and apathy.⁹³

Thus, the doctrine of the virtuous mean is an ethic of relatives. According to Christopher Martin, this is the first thread that connects virtue ethics with natural law theory. Martin explains that "good" is nothing but a relative concept, something either being good in relation to other things in its class, or something being good for humans.⁹⁴ Martin then describes how natural law theory is focused on the second—what is good for humans—while virtue ethics is concerned with what makes a good human.⁹⁵ The relativizations are connected by the idea that a good human life (natural law) can only be pursued by good humans (virtue ethics).⁹⁶ Because of this connection it makes sense to me that judges become practiced in recognizing the virtuous mean or middle path.

Perhaps more importantly, I believe the doctrine of the mean provides a useful metaphor for the compass that points to our society's moral true north. When Dworkin commands jurists to determine the best possible interpretation of the Constitution, what framework is the judge to use? Even if the judge is to look to natural law principles, a methodology accessible to humans is still required. Similarly, judges have long resorted to "balancing" interests, but according to what method should this be done? The doctrine of the mean is a principle *and* a framework by which judges can use the full range of modes of human inquiry in interpreting the Constitution in a manner consistent with what I am claiming is the true north of natural law. The "best" interpretation is the middle path—the mean—even if Dworkin does not know it.

In response to a possible criticism that natural law principles may not seem to cast light on every case (even every case regarding our fundamental law), I argue that the mean, as a principle, is not *best* used as a guide to answers in any single instance. As virtue ethics is concerned with right being at the level of the individual, my conception of the framework of the mean is concerned with right being at a social level. The framework of the mean can serve to re-orient interpretations of our fundamental law as we inevitably vacillate between deficiency or excess in protecting fundamental rights. The framework of the mean is particularly apt as a method for constant re-evaluation according to new contexts, given that the teleological aspect of

⁸⁸ CONFUCIAN ANALECTS 47 (James Legge trans., 2004) ("Perfect is the virtue which is according to the Constant Mean!").

⁸⁹ BOSS, *supra* note 74, at 393–94.

⁹⁰ *Id.* at 394.

⁹¹ *Id.* at 395.

⁹² *Id.* at 394–95.

⁹³ *Id.* at 395.

⁹⁴ Christopher Martin, *The Relativity of Goodness: A Prolegomenon to a Rapprochement between Virtue Ethics and Natural Law Theory*, in CONTEMPORARY PERSPECTIVES ON NATURAL LAW 188 (Ana Marta Gonzalez, ed. 2008).

⁹⁵ *Id.* at 197–98.

⁹⁶ *Id.* at 198.

natural law theory includes the concept that application of core principles will change as humans progress toward the end of greater moral sophistication.⁹⁷

While the framework of the mean is best used in a general sense, occasionally a particular instance of judicial decision-making can be found that, on close analysis, appears to respect the principle of the mean—for an example I direct the reader to the Supreme Court’s 1992 *Planned Parenthood v. Casey*⁹⁸ majority opinion. This controversial opinion illustrates the overall arc of jurisprudence regarding the Constitutionally-protected right to abortion in the United States. While acknowledging the legal force of *stare decisis* on the one hand (legalized abortion as enunciated in *Roe v. Wade*⁹⁹), and the legal interest of the State to protect against “violence against innocent human life,”¹⁰⁰ the Court ultimately seems to rely less on balancing legal interests, and to rely more on a non-legal principle, in crafting its ruling. In stating that the “*destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society*,”¹⁰¹ the Court appears to acknowledge the principle of what I will term *self-accountability*, and hands down a ruling that seems tailored to effectuate the cultivation of this virtue in female citizens of this country. The principle of self-accountability could be conceived as the virtuous mean between the vice of overreliance on paternalistic authority (e.g., reliance on legislated or judicially-mandated morality) and the vice of eschewing accountability entirely (e.g., reliance on the sense that no moral imperative exists). The principle can be applied generally, at either the individual or social level, and reflects virtue because cultivating self-accountability seems implicitly to be a component of right being.¹⁰²

To me, the *Casey* decision appears to subtly subordinate legal balancing in service of articulating a moral imperative. Perhaps because law has a didactic function—i.e., because law serves to educate citizens as to moral norms—the *Casey* Court is reluctant to hand down a simple ruling on the right to abortion, and thus risk leaving women with the feeling that abortion is an act devoid of moral content. It thus labors to craft a novel and complex legal regime whereby the State’s interest increases as the fetus develops in time, and I believe this knotty doctrine exists at least in part to communicate the moral imperative of individual responsibility for bringing new lives into our world. Based on the ruling in *Casey*, it appears painfully difficult to define precise legal obligations with respect to abortion. But I submit that the *Casey* Court has avoided precision in part because it is well aware that the most important function it can serve is in communicating the moral imperative to tread carefully when conceiving a child, and to not take lightly the act of terminating a pregnancy, while simultaneously elevating the possibility that women, by retaining the right to choose an abortion, will develop more self-accountability. Lastly, to the extent the *Casey* decision seeks to offer individuals the “dignity and burden of their own responsibility,”¹⁰³ it exemplifies the humility and sense of mutual vulnerability that

⁹⁷ See generally BOSS, *supra* note 74, at 157.

⁹⁸ 505 U.S. 833 (1992).

⁹⁹ 410 U.S. 113 (1973).

¹⁰⁰ *Id.* at 852.

¹⁰¹ *Id.* (emphasis added).

¹⁰² Michael Perry makes a similar argument from virtue, at the institutional level. He quotes James Bradley Thayer as warning that “the exercise of judicial review . . . is always attended with a serious evil, namely that the correction of legislative mistakes comes from the outside, and the people thus lose . . . the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors . . . [which tends] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.” PERRY, *supra* note 79, at 97–98. Perry also quotes Alexander Bickel: “The search must be for a [judicial] function . . . whose discharge by the courts will not lower the quality of the other departments’ performance by *denuding them of the dignity and burned of their own responsibility*.” *Id.* at 98 (emphasis in original).

¹⁰³ See *id.* and accompanying discussion.

probably must accompany Constitutional adjudication if it is to succeed at the level Robert Burt has defined—the stitching together of a divided moral and political community.

The framework of the mean cannot define, with precision, the metes and bounds of natural law. It is only a method of attempting to derive a middle path between extremes, and “the middle” is about as imprecise a standard as one can employ within a legal context, especially the context of constitutional law with its tendency to compel decisions that draw harsh distinctions between fundamental or basic tensions. However, I offer that working without a framework leaves us stumbling around, surprised when we happen upon interpretations that accord with moral imperatives. And continuing to view the Constitution as mere positive law? That will leave us more or less completely in the dark.

CONCLUSION

I have argued that the historical progression away from natural law as a basis of Constitutional adjudication is unfortunate. Natural law seems fundamental to the U.S. Constitutional project, and the Framers likely assumed courts would interpret and apply natural law concepts alongside the enacted provisions of the document. However, we have seen that courts did not follow this course. Since the early 19th Century judges have eschewed any appeal to natural law, and instead have sought to ground all decisions on specific text in the Constitution. Not only is this inconsistent with the intent of the Framers, but it makes for bad adjudication. As Suzanna Sherry frames it: “[T]acit preference for textual constitutionalism over natural law concepts undermines the Court's decision by allowing critics to attack the decision using the Court's own criteria of decision making.”¹⁰⁴

Fortunately, I believe philosophy and custom can be marshaled on the side of re-introducing judicial appeal to natural law. I have argued that, philosophically, the fact that the positivist conception of law has no connection to ethics or natural law principles makes it ontologically bankrupt—unlike natural law, positive law has no ontological validity at its core. I have further argued that natural law is inherently primary to positive law—in the sense that that moral imperatives shape positive law, and in the sense that interpreting positive law requires higher guiding principles. I have also argued that the existence of a long-standing custom of judicial appeal to natural law provides an ethical basis for judicial creativity in protecting rights that flow from natural law principles.

Finally, I have argued that judges are competent to apply a range of faculties in ascertaining our society’s moral true north, although jurists would be greatly aided by an explicit framework to guide them in this program. I have offered that virtue ethics, and specifically the venerable tradition of the middle path—the doctrine of the mean—can provide this framework. The doctrine of the mean is analogous to a compass that can orient us in the inevitable event that there has been a straying from the course.

¹⁰⁴ Sherry, *supra* note 4, at 1176.