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## At the Intersection of Due Process and Equal Protection: Expanding the Range of Protected Interests

Vincent J. Samar  
*Loyola University of Chicago*, [vsamar@luc.edu](mailto:vsamar@luc.edu)

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# Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity

by VINCENT J. SAMAR\*

## Introduction

This article will show that debates over the two most common approaches to constitutional interpretation, Originalism and living constitution, are both theoretically and practically open to challenges from those who believe either approach is undemocratic or provides insufficient protection for minority rights. Given these challenges, a new approach is needed: one that provides constitutional viability in the present age without opening the Constitution to any fad of interpretation. The Supreme Court needs to have available a method of interpretation that is respectful of the past without being tied to it, so as to meet current challenges to our evolving understanding of human rights.

Constitutional interpretation proceeds on the assumption that the Constitution remains binding law. That assumption, I will argue, requires privileging human rights if most Americans are to continue to find legitimacy in the Constitution's status as higher law. Current theories of constitutional interpretation have either largely failed to account for the document's continued, cross-generational legitimacy or have widened interpretation as to effectively nullify any work the document might perform. Originalism, for example, interprets the Constitution in an attempt to affirm what the Framers would have most likely expected to be the consequences of their writings. Few Supreme Court decisions utilize this approach, and it is almost entirely nonresponsive to changes in social and economic conditions during the last century. The living Constitution approach follows a common law-like approach, which means the Court may merely appeal to custom or precedent to create constitutional change, effectively adjusting the

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\* Vincent J. Samar is a Lecturer in Philosophy and an Associate Faculty Member at Loyola University Chicago Graduate School, and an Adjunct Professor of Law at Loyola University Chicago School of Law. The author would like to express his thanks to Professor Mark Strasser of Capital University Law School for his comments on an earlier version of this article.

language to resolve current issues, even if the adjustment results in distortion of the language. Arguably, by using this method of interpretation, the Court fails to ascribe any significance to the document's actual language or original purposes. In the view to be expressed here, tradition continues to play a role, but not-so-rigidly as to disavow new ways of reconstructing past determinations so as to legitimately respond to important social and cultural needs. Human rights serve as the glue for binding the different interpretations together under a higher-ordered set of values, whether by adoption of amendments or Court interpretations. Since a philosophical grounding for human rights can be found in our common understanding of human freedom and well-being, it stands to reason that this foundation, along with its criteria for resolving conflicts of rights, is a viable way to avoid the most obvious difficulties with the current theories.

It should be noted that my approach is both systematic and narrowly-focused. First, it is systematic because it searches for the common thread between the preferred interpretation of the Constitution and why most Americans continue to find this interpretation to be legitimate. Second, my approach is narrowly-focused because it is designed to set forth a method of constitutional interpretation that is neither limited to only past intentions nor so open-ended as to support virtually any fashionable, value-laden trend. Protecting indispensable human rights will sustain the centrality of the document to the American experiment.

Section 1 will review the varied, specific modalities the Supreme Court has adopted over the past two-and-one-quarter centuries of interpreting the Constitution to meet changing conditions. Section 2 explores the shortcomings of the two most prevalent background normative theories of interpretation—Originalism and living Constitution—that have animated Supreme Court opinions, but do not provide a clear moral direction for future interpretations. Section 3 discusses how the theory of the social contract, when developed into a tradition capable of framing duties incumbent on future generations, might explain the Constitution's legitimacy today. Section 4 notes how the Court, at times through its decisions, aided the Constitution's continued legitimacy by gingerly navigating between opposing concerns for continuity and for change, which inevitably arise when tradition must govern the present. Together, Sections 3 and 4 establish the need for an approach to constitutional interpretation that is dynamic enough to meet changing conditions, yet sober enough to recognize past contributions. Section 5 identifies human rights as deriving from two sources: (1) some rights originate from the Framers' beliefs at the time of the creation of the Constitution and its subsequent amendments, and (2) other rights are those recognized today as human rights by many nations, including the United States. Section 6 follows by addressing concerns about

indeterminacy entering constitutional interpretation when new values are added on to those rights already recognized. Section 7 provides the antidote to indeterminacy by requiring all human rights to be founded upon voluntary, purposive human action; this will avoid transactional inconsistencies when applied; and should support the long-term well-being of all persons. Finally, Section 8 completes the work of this Article by showing how the proposed change to constitutional interpretation affirms human dignity, which the Supreme Court has previously acknowledged as an important constitutional value. A brief conclusion then follows.

### I. Modalities Recognized by the Supreme Court for Interpreting the United States Constitution

In 1991, Phillip Bobbitt identified six modalities that the Supreme Court recognized for interpreting the United States Constitution.<sup>1</sup> By a “modality,” Bobbitt meant a “way in which we characterize a form of expression as true.”<sup>2</sup> The Supreme Court uses modalities to justify its interpretations of the Constitution.

Modalities are important because they set out the true conditions for an interpretative proposition. For example, Bobbitt notes that “[a] *historical* modality may be attributed to constitutional arguments that claim that the [F]ramers and ratifiers of the Fourteenth Amendment intended, or did not intend, or that it cannot be ascertained whether it was their intention, to protect pregnant women from state’s coercion . . . to bear children.”<sup>3</sup> In *Roe v. Wade*, for example, Justice Blackmun, writing for the Majority, expressed concern that the various uses of the word *person* in the United States Bill of Rights did not indicate a postnatal being from which he concluded that “[a]ll this, together with our observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they

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1. PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (the modalities are historical, textual, structural, prudential, doctrinal, and ethical).

2. *Id.* at 11. For example, Bobbitt notes a *logical* modality, is “attributed to the proposition, *p*, by saying that it is logically necessary or contingent or logically impossible, that ‘*p*.’” *Id.* In other words, there are certain conditions for determining where a statement is true: either it is true tautologically by virtue of what it says (like “there are or are not 5 people in the room”) or it is true contingently from facts we discover (“Mary wore a turtleneck to work today”), or it is not possible to be true as in the case of a contradiction (“it is and is not raining here now”). Bobbitt notes how “knowledge engages the force of logic” when “an *epistemic* mode” is employed “[t]o say that it is known or unknown or known that it is not true that ‘*p*[.]’” *Id.* This contrasts with saying that *p*, “is obligatory, permissible or forbidden,” which is to signal “a *moral* or *deontic* mode” or to say that *p* “is now or will be” . . . “[a] *temporal* modality.”

3. *Id.* at 13 (emphasis added).

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are today, persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>4</sup>

Bobbitt identifies the historical modality used, for example, by Justice Roger B. Taney in the *Dred Scott* case, as an “originalist position.”<sup>5</sup> An Originalist position considers what the Framers intended to convey and potentially what they anticipated would be the result of their conveyance when they wrote the Constitution and its subsequent amendments. It thus draws on the *historical* mode in that its focus is on intent that must be proved by use of historical sources. An example of this, cited by Bobbitt, is found in Justice Taney’s now infamous Majority Opinion in the *Dred Scott* case.<sup>6</sup> Taney wrote, in determining whether Article III’s diversity jurisdiction extends to former slaves:

It becomes necessary, therefore, to determine who were the citizens of the several [s]tates when the Constitution was adopted. And in order to do this, we must recur to the [g]overnments and institutions of the thirteen colonies . . . . We must inquire who, at that time, were recogni[z]ed as the people or citizens of a [s]tate, whose rights and liberties had been outraged by the English government; and who declared their independence and assumed the powers of [g]overnment to defend their rights by force of arms . . . . We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted.<sup>7</sup>

Obviously, the use of the historical modality, prior to the adoption of the post-Civil War Reconstruction amendments, would likely operate, as it did in Taney’s Opinion, to reaffirm the lack of citizenship rights of African-Americans. I will return to discussing these human rights concerns in Section 7.

The second modality is a *textual* modality.<sup>8</sup> Bobbitt writes, “[a] *textual* modality may be attributed to arguments that the text of the Constitution would, to the average person, appear to declare, or deny, or be too vague to say whether, [for example,] a suit between a black American citizen resident in a state and a white American citizen resident in another state, is a

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4. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

5. BOBBITT, *supra* note 1, at 13.

6. *Id.* at 13 *citing* 60 U.S. (19 How.) 393, 407 (1856).

7. *Scott v. Sanford*, 60 U.S. 393, 407, 409 (1856).

8. BOBBITT, *supra* note 1, at 14.

‘controversy between citizens of different states.’”<sup>9</sup> Noting the difference between a contemporary meaning of these words and the meaning Justice Taney ascribed, “[o]ne should not be tempted to conclude, however, that textual approaches are inevitably more progressive than originalist approaches[;]” indeed, a textual approach “can be a straitjacket, confining the judge to language that would have been different if its drafters had foreseen later events.”<sup>10</sup> Consider Justice William H. Taft’s concern in a wiretapping case, allegedly involving a violation of the Fourth Amendment “right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures[.]”<sup>11</sup> Justice Taft wrote:

The [a]mendment itself shows that the search is to be of material things—the person, the house, his papers or his effects . . . . The [a]mendment does not forbid what was done here. . . . There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses . . . . The language of the [a]mendment [cannot] be extended and expanded . . . .<sup>12</sup>

Would the Framers have truly intended to exclude listening in on a private conversation if they could have foreseen how technological advances would make this an effective tool for law enforcement? When considering a textualist approach, this should be a guiding question.

Bobbitt’s third modality, *structural* modality, arises in a context that turns out [with only slight changes to include electronic emails] to be very contemporary: “can a court issue a subpoena (or should it enjoin some other subpoena) for the disclosure of the President’s working notes and diaries?”<sup>13</sup> He notes, “[t]o say that the institutional relationships promulgated by the Constitution require, or are incompatible with, or tolerate a particular answer to this question is to use a *structural* mode of argument.”<sup>14</sup> As an example, Bobbitt cites “*McCulloch v. Maryland*, . . . [which] relies almost wholly on structural approaches . . . [i]n determining whether a Maryland tax on the Federal Bank of the United States could be enforced[.]”<sup>15</sup> Bobbitt notes that “Chief Justice Marshall studiously refuses to specify the particular text that

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9. BOBBITT, *supra* note 1, at 14 (emphasis added).

10. *Id.*

11. U.S. CONST. amend. IV.

12. *Olmstead v. U.S.*, 277 U.S. 438, 464-65 (1928).

13. BOBBITT, *supra* note 1, at 14.

14. *Id.* at 14-15.

15. *Id.* at 15 (citing *McCulloch v. Md.*, 17 U.S. 316, 317-26 (1819)).

supports his argument, and explicitly rejects reliance on historical arguments, preferring instead to state the rationale on inferences for the *structure* of federalism.”<sup>16</sup> Because structural arguments are less intuitive than arguments based on text or history, Bobbitt notes that:

Usually, arguments in this modality are straightforward: first, an uncontroversial statement about a constitutional structure is introduced . . . . [“The States have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government.”[a.]]; second, a relationship is inferred from this structure . . . . [“This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular State, nor to a tax imposed on the proprietary interest which the citizens of that State may hold in this institution. . . .”[b.]]; third, a factual assertion about the world is made . . . . [“Nearly each succeeding Congress, if not every one, has acted and legislated on the presumption of the legal existence of such a power in the government . . . . The executive government has acted upon it; and the courts of law have acted upon it.[c.] Finally, a conclusion is drawn that provides the rule in the case. [“[Congress] has established a bank; and before the act establishing it can be pronounced unconstitutional and void, it must be shown, that a bank has no fair connection with the execution of any power or duty of the national government, and that its creation is consequently a manifest usurpation.”]”<sup>17</sup>

Bobbitt’s fourth modality is from a *prudential* point of view. Here, Bobbitt notes that “the dramatic national crises of the depression and world war soon provided ample reason to introduce the practical effects of constitutional doctrine into the rationales underpinning doctrine:”<sup>18</sup>

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16. *Id.* at 15 (emphasis added).

17. *Id.* at 16. The bracketed quotes are this Article author’s choosing of language from *McCulloch v. Maryland*, 317 U.S. 316 (1819), to illustrate Bobbitt’s four points of a structural argument. They appear in this footnote as lettered indentions below:

a. *McCulloch*, 317 U.S. at 317

b. *Id.*

c. *Id.* at 323.

d. *Id.* at 326.

18. BOBBITT, *supra* note 1, at 16.

For example, one such case arose when, in the depths of the midwestern farm depression, the Minnesota legislature passed a statute providing that anyone who was unable to pay a mortgage could be granted a moratorium from foreclosure. On its face such a statute not only appeared to realize the fears of the framers that state legislatures would compromise the credit market by enacting debtor relief statutes, but also plainly to violate the Contracts Clause that was the textual outcome of such concerns. Moreover, the structure of national economic union strongly counseled against permitting states to protect their constituents by exploding a national recovery program that depended on restoring confidence to banking operations. Nevertheless[,] the Supreme Court upheld the statute, observing that: An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community.<sup>19</sup>

Bobbitt's fifth modality derives from caselaw when lawyers make appeals "in a *doctrinal* mode."<sup>20</sup> The questions he points to here is: "[C]an a state constitutionally aid parochial schools" by providing school students a cash allowance for their transportation, or would such aid "offend the Establishment Clause of the First Amendment . . . .[?]"<sup>21</sup> Bobbitt notes that the caselaw has "developed a three-prong test: (1) does the state program have a secular purpose; (2) is its principle effect neither to advance nor inhibit religion; and (3) does its administration excessively entangle the state in religious affairs?"<sup>22</sup> Bobbitt writes, "[a]pplying this test to the question above, the judge might write: '*Everson* must be distinguished from the instant case because the program in *Everson* provided transportation common to all students, whereas here only some students—the parochial ones—are given cash allowances.'"<sup>23</sup> Alternatively, a judge might decide that "*Everson*, which also involved public transportation to parochial school students, governs this case. Here as there, the state's program provides aid to students and their parents, and not—as in cases that have applied *Everson* and struck down state assistance in this area—direct assistance to church-related schools."<sup>24</sup> The doctrinal modality does not state which of these two interpretations is correct but, rather, allows the Court the opportunity to

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19. BOBBITT, *supra* note 1, at 16-17.

20. *Id.* at 17-18 (emphasis added).

21. *Id.* at 18.

22. *Id.* at 19 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

23. *Id.* at 19.

24. *Id.*



adopt either position, so long as the adopted position can be fitted into the caselaw that has come before.

Bobbitt's last modality is an *ethical* modality.<sup>25</sup> As Bobbitt writes, "[t]his form of argument denotes an appeal to those elements of the American cultural ethos that are reflected in the Constitution. The fundamental American constitutional ethos is the idea of limited government, which presumptively holds that all residual authority remains in the private sphere."<sup>26</sup> Bobbitt offers a hypothetical to show the basic pattern of such arguments. South Carolina offered three convicted sex offenders a choice between a thirty-year prison sentence or drug-induced castration. The hypothetical continues:

Suppose a convicted man accepted the bargain and was released on probation terms that incorporated this pledge (as by drug-induced impotence). Then suppose that he ceased taking the prescribed drug. If his probation were revoked, a constitutional challenge to the terms of his probation might take this form:

1. The reservation to the individual of the decision to have children is deeply rooted in the American notion of autonomy; there is no express constitutional power to implement a program of eugenics.
2. Moreover, such programs are not a conventionally appropriate means to any express power.
3. Those means denied the federal government are also denied the states.
4. The South Carolina sentence amounted to ordering a man to comply with eugenics scheme that deemed him ineligible to procreate.<sup>27</sup>

The example Bobbitt uses is particularly interesting because it focuses on the personal autonomy of the individual, and how ensuring certain civil liberties protections guards this autonomy. It is fair to say that what Bobbitt is expressing here, and what has been expressed in a variety of Court cases—from *Pierce v. Society of Sisters*,<sup>28</sup> to *Griswold v. Connecticut*,<sup>29</sup> to *Roe v.*

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25. BOBBITT, *supra* note 1, at 19.

26. *Id.*

27. *Id.* at 21.

28. 268 U.S. 510 (1925).

29. 381 U.S. 479 (1965).

*Wade*,<sup>30</sup> to *Lawrence v. Texas*,<sup>31</sup> and to *Obergefell v. Hodges*,<sup>32</sup> just to name a few—will become central to my argument, *infra* Section 6, that human rights should become a determinative factor for constitutional interpretation, ranking higher than all other modalities in an assessment of constitutional value.

However, a concern arises from Bobbitt's presentation. The truth of propositions of law are fundamentally different from propositions of logic. Whereas propositions of logic can be found to be apodictically true based on meanings alone, propositions of law, like propositions of experience, require a background framework for why they should be adopted. This is particularly evident with the doctrinal modality, but also present in the historical, textual, prudential, and ethical modalities. Indeed, propositions of law, even more than propositions of experience, require, in addition to how our experiences may have changed, a normative background framework of politics for why they ought to be accepted. That is, legal propositions do not simply affirm some fact or set of facts as true, but instead, rely on existing normative obligations incumbent on those who interpret the law for what is to be done or not done.<sup>33</sup> This is why law cannot be assumed to be a command from some sovereign backed by a threat, but must instead, even from a positivist point of view, engage a normative reason for what is to be upheld.<sup>34</sup>

## II. Originalism Versus the Idea of a Living Constitution: A Question of Political Morality

The previous section focused on seven modalities the Court has adopted in its interpretations of the United States Constitution. What is of interest regarding these alternative modalities is how they are themselves justified by a framework of constitutional interpretation. Recall that because they involve norms, they do not stand as true propositions on their own like

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30. *Roe*, 410 U.S. at 113.

31. 539 U.S. 558 (2003).

32. 135 S. Ct. 2584 (2015).

33. This idea that law piggybacks on an already existing normative obligation can be traced back to Plato, who in the *Crito*, has Socrates, his protagonist, defend his decision not to escape from the prison by appealing to background moral ideals of fair play, gratitude, and consent to justify his obedience to an unjust law of Athens. See PLATO, *CRITO* 45b, 48c, 49d, 50b, 50c-e, 52b-d (Project Gutenberg 1999).

34. H.L.A. HART, *THE CONCEPT OF LAW*, 82-91 (Oxford at the Clarendon Press, 2nd ed. 1961) (disagrees with Austin's positivism that law operated as a command backed by a threat because that would not distinguish being obliged, as when a gunman says your money or your life, from having an obligation).

modalities of logic.<sup>35</sup> Logical modalities would fit any possible world one could conceive. Legal modalities, including the ones the Court has adopted for constitutional interpretation, are like the modalities of science, contingent on fitting into the actual world in which the law operates. In that world, one needs to ask, what is the goal to be achieved by the choice of modality? Inevitably, the goal will be connected to the values thought to be important to constitutional order. Thus, the modes reside within a framework of political morality in which our duty to obey the law subsumes what we take the law to legitimately require.<sup>36</sup> The modes of interpretation do not function independently of the political morality adopted by society, but rather as consequences of that political morality. Only interpretations that can be justified within a reasonable scheme of political morality can serve as a source of law.

Professor William Eskridge identifies the different canons and norms commentators have used for discerning constitutional meaning.<sup>37</sup> These canons overlap with the modalities previously described by Bobbitt for understanding what the Constitution prescribes. But even more than those modalities, Eskridge's canons beg the question: why *these* canons? In other words, they are not just another name for the modes the Court has adopted to interpret the law, but should be seen as transitions from the various theories of political morality to what the law requires. They include:

- *Ordinary [original] meaning* of constitutional language as it would have been understood by average Americans at the time of adoption;
- *Structure of the Constitution* as a presumptively coherent plan for the Union, tied together by fundamental principles and policies that, in turn, provide a context for applying the Constitution;
- *Legislative history* of the Constitution and its amendments especially state ratification debates, but also (by some accounts) the drafting deliberations at the Constitutional Convention in 1787 and in Congress (for the amendments);

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35. See BOBBITT, *supra* note 1.

36. Elsewhere I have described this framework as a global map in which the duty to obey the law is discovered “not in an analytical understanding of what the law is but by way of a normative understanding of how actions of political institutions are justified.”

37. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 363 (2016).

- *Executive departmental interpretation*, especially relevant where there has been legislative deliberation and acceptance or acquiescence; and,
- *Background meta-norms* reflected in the common law tradition and law of nations.<sup>38</sup>

Individually, each canon provides grounds for why it should be followed. Undoubtedly, litigants who stand to benefit from the application of a specific canon in a particular case or set of cases will argue for its adoption. However, it is unclear from the list how the various canons ought to be prioritized or when they should be applied. If the Court is free to choose among the different canons or norms, and if the Court chooses to affirm one side or the other in a particular litigation, what will prevent the choice from being arbitrary or biased?<sup>39</sup> The choice of canon or norm must be based on more than its service in affirming a particular interpretation. It must also be based on rational grounds supporting a reasonable understanding of society's political morality. Reasonable in this context means that the society's own view of its political morality may not be enough to justify its choice of canon, unless the canon is also capable of being reproduced by the best system of political morality available. Thus, the Court should inquire into society's political morality as part of its duty to follow higher law if majoritarian biases do not carry the day.<sup>40</sup> Recall, one of the reasons the Framers agreed to adopt a Bill of Rights was to offset the argument that the Constitution may be used by a majority to enforce its own will to the detriment of minority and states' rights.<sup>41</sup> As a consequence, commentators like David Strauss, the late Justice Antonin Scalia, and Ronald Dworkin, among others, have focused their arguments less on the choice of canon, and more on the political philosophy that provides the basis for the choice.

David Strauss, who supports the idea that the Constitution is a living document, has noted:

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38. ESKRIDGE, *supra* note 37, at 361-63 (footnotes omitted).

39. In *Furman v. Georgia*, 408 U.S. 239 (1972), the Supreme Court held that the death penalty, as applied, was arbitrary and possibly discriminatory against minority groups in violation of the Eighth Amendment of the U.S. Constitution, which prohibits against "cruel and unusual punishment."

40. See THE FEDERALIST 51 (Madison) at 321 (discussing how a system of checks and balances in republican government can serve not only to check the growth of factions, but to ensure "the minority, will be in little danger from interested combinations of the majority.").

41. THE BILL OF RIGHTS, *American Government*, U.S. HISTORY (June 22, 2019), <http://www.ushistory.org/gov/2d.asp> ("In 1789, Virginian James Madison submitted twelve amendments to Congress. His intention was to answer the criticisms of the Anti-Federalists. The states ratified all but two of them . . . as the Bill of Rights . . .").

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The written Constitution is a short document that has been amended only a handful of times. By comparison, the United States has over two centuries of experience grappling with the fundamental issues—constitutional issues—that arise in a large, complex, diverse, changing society. The lessons we have learned in grappling with those issues only sometimes make their way into the text of the Constitution by way of amendments, and even then the amendments often occur only after the law has already changed. But those lessons are routinely embodied in the cases that the Supreme Court decides and also, importantly, in the traditions and understandings that have developed outside the courts.<sup>42</sup>

Strauss' emphasis on the role of judgment when the words in the original document or its amendments cannot be reduced to a simple reading is significant because, unlike the reading of a statute, constitutional arguments should by the Preamble of the Constitution serve to “establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity...”<sup>43</sup> In this respect, understanding constitutional law requires much more than an understanding of the words of the various Articles in the original document and its subsequent amendments; it requires an understanding of the precedents the Court has “shaped by notions of fairness and good policy” as those precedents are arguably what makes the Constitution viable today.<sup>44</sup> Strauss describes this legal approach as the way the “common law” has operated for centuries, “long before there was a written U.S. Constitution.”<sup>45</sup> But the approach stands for following the *political morality* at the heart of the tradition, which requires courts to consider the justice and fairness of each application, even though the approach itself does not offer concrete criteria for determining justice or fairness. In this sense, the interpretative tradition that has animated American constitutional law fails the positivist test of pedigree since every constitutional decision of the Court will not necessarily rest its grounding on the specific intentions or purposes of the Framers. Oftentimes, the Court will find it necessary to inquire into the political morality of the subject itself.

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42. DAVID STRAUSS, *THE LIVING CONSTITUTION* 34-35 (2010).

43. *See id.* at 35.

44. *Id.* at 36.

45. STRAUSS, *supra* note 42, at 36.

Strauss uses an example from contract law to illustrate common law innovations<sup>46</sup> in the line of privity of contract cases beginning with *Winterbottom v. Wright*,<sup>47</sup> and continuing through to *MacPherson v. Buick Motor Company*.<sup>48</sup> In *Winterbottom v. Wright*, Winterbottom was employed by a company providing Postmaster General drivers to deliver mail.<sup>49</sup> Wright was under contract with the Postmaster General to provide and keep the coaches used by the Postmaster General in good working order.<sup>50</sup> After Winterbottom suffered injuries from a latent defect in the coach he was driving, he attempted to sue Wright for nonfeasance of his contract with the Postmaster General.<sup>51</sup> The Court of the Exchequer held that, in the absence of a contract between Winterbottom and Wright, Winterbottom's lawsuit could not go forward.<sup>52</sup> The principle of law that emerged from this case was that one could not maintain a suit for nonfeasance absent privity of contract.<sup>53</sup> Ten years later, in the New York case *Thomas v. Winchester*,<sup>54</sup> Mrs. Thomas was erroneously prescribed a medicinal, extract of dandelion.<sup>55</sup> Due to a mislabeling by the manufacturer, Winchester, the pharmacist, mistakenly issued Mrs. Thomas extract of belladonna, a known poison.<sup>56</sup> When the manufacturer appealed to nonsuit the case, the New York State Court of Appeals held that suit could proceed because putting a mislabeled bottle of medicine on the market was "inherently dangerous," notwithstanding the lack of contract between the parties, as it was unlikely the mislabeling would be discovered before causing injury.<sup>57</sup> In effect, the no-privity principle was now subject to an exception for inherently dangerous items. Finally, in *MacPherson v. Buick Motor Company*, defendant, MacPherson, purchased a Buick motor car from a retail dealer.<sup>58</sup> Defendant suffered injuries when the wheel on his automobile collapsed, and sued the manufacturer for negligence.<sup>59</sup> In holding that the defendant's suit

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46. *Id.* at 80-85.

47. 152 Eng. Rep. 402 (1842).

48. 217 N.Y. 382 (1916).

49. *Winterbottom*, 152 Eng. Rep. at 403.

50. *Id.* at 402-03.

51. *Winterbottom*, 152 Eng. Rep. at 403.

52. *Id.* at 404-05.

53. *Id.* at 405.

54. 6 N.Y. 397 (1852).

55. *Id.* at 398.

56. *Id.*

57. 6 N.Y. 397 at 409.

58. *MacPherson*, 217 N.Y. 384.

59. *Id.* at 385.

could proceed, Judge Benjamin Cardozo, writing the Opinion for the court, noted that the manufacturer had reason to know a negligently produced automobile would cause harm, as well as that the product would ultimately be sold to a dealer and consumer, neither of whom would be expected to inspect it.<sup>60</sup> In effect, what had been the exception to the no-privity rule in *Thomas*, was now the rule in *MacPherson*, and the previous no-privity rule was now the exception.<sup>61</sup>

On the surface, this line of cases appears reasonable, and the results are fair and just. Manufacturers should not be able to avoid liability to the ultimate consumer by placing products on the market that are likely to have undiscovered defects, which could be defective and cause serious injuries.<sup>62</sup> Yet one could still ask whether the Courts' sense of justice in these cases is related to anything firmer than the arbitrary whims of judges, even if holdings encapsulate what most people believe to be fair. Indeed, realist Justices, such as Oliver Wendell Holmes, believe that the law of a case is simply what the judges are willing to do to resolve controversies.<sup>63</sup> But even if that is true for common law tort and contract cases, and even if the court decisions in those cases appear quite satisfying to the general public, the lack of any bright-line rule for how these issues are to be determined or the weight to be assigned to particular concerns, provides courts with little direction, especially where the issues themselves are often unclear and the constitutional structure for the separation of powers seems absolute. Thus, before committing to a full-fledged acceptance of the living Constitution approach, it is necessary to further investigate the spectrum of political morality behind the Constitution to better understand the ideal interpretation.

This need for further investigation is most apparent in the U.S. Supreme Court's now iconic decision, *Brown v. Board of Education*.<sup>64</sup> Professor Strauss noted:

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60. *Id.* at 389.

61. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 25 (1949).

62. STRAUSS, *supra* note 42, at 84 (Strauss states that "Cardozo was, therefore, in a position to argue that his ultimate conclusion—that the privity regime should be discarded in favor of a simple requirement of foreseeability—not only was good policy but was implicitly supported by several decades' worth of decisions.").

63. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881) (As Justice Oliver Wendell Holmes has stated: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

64. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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We know from private papers that several justices who were part of the unanimous Court in *Brown* were initially unsure of what to do because, while they individually opposed segregation, they were at least initially troubled about whether the Court could lawfully declare segregation to be unconstitutional. Herbert Wechsler, a law professor who helped the civil rights lawyers prepare their case in *Brown*, later wrote that *Brown* could not be justified in principle legal terms.<sup>65</sup>

Nevertheless, Strauss goes on to point out that:

Today, *Brown* is not just accepted; it is an icon. The lawfulness of *Brown* is a fixed point for the mainstream legal culture. Anyone who doubts that *Brown* is lawful is a fringe player, at best. It is, for example, inconceivable that anyone could get appointed, or confirmed, to a federal judgeship if it became known that he or she thought that *Brown* was unlawful.<sup>66</sup>

Strauss further comments that “any theory about the U.S. Constitution must explain, and justify, *Brown*.”<sup>67</sup> But the Fourteenth Amendment does not speak on racial equality. Instead, Originalists make odd use of history to narrow this bit of language to reflect a different view, which they could have directly expressed at the time. If the Framers intended to afford equal protection specifically for matters of racial equality, they possessed the writing abilities to express what they meant. Their failure to do so not only gave rise to the Court’s later decision in *Plessy v. Ferguson*,<sup>68</sup> (now dead as a precedent post-*Brown*) but, nevertheless, indicated what they may have expected to be the consequences of what they wrote. Recall that the Framers of the original Constitution of 1787 provided that slavery should be a continued practice, at least until 1808,<sup>69</sup> suggesting that they understood that future generations may reconsider the consequences of Originalist decisions.

The notion that the Framers would leave some questions open only to be resolved by the developing political morality of society is also found in the Eighth Amendment’s prohibition against “cruel and unusual

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65. STRAUSS, *supra* note 42, at 77-78.

66. *Id.*

67. *Id.* at 78-79.

68. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

69. U.S. CONST. art. V.



punishments.”<sup>70</sup> Does the definition of cruel and unusual punishments depend only on what the Framers of the Eighth Amendment considered to be cruel and unusual in 1791, or is it open to the interpretation of Americans in the 21st century? There is evidence that what the Framers thought to be cruel and unusual punishments at the time was less derived from a true Originalist understanding of their own legal history, and more a political point of view regarding the anticipated perception of how they foresaw future generations defining cruel and unusual punishments.<sup>71</sup>

The particular question for the current generation arises in the context of the imposition of the death penalty. But, if the Eighth Amendment’s meaning is open to what today’s Americans consider to be “cruel and unusual,” Originalists will ask: in what sense does the Constitution in general, and the Bill of Rights in particular, protect other areas of minority rights from the influences of different combinations of factions forming the majority? These kinds of concerns may explain why Originalists will often advocate for a narrower interpretation of the Constitution’s meaning, based on the understanding of the Framers at the time of enactment.

Originalists, in contrast to those who adopt the “living,” common law approach to constitutional interpretation, share the core idea “that when we give meanings to the words of the Constitution, we should use the meanings that the people who adopted those constitutional provisions would have assigned.”<sup>72</sup> To the Originalist, changes to traditions and understandings are less important than preserving what the authors of the words meant when they wrote, for example, the Eighth Amendment. In effect, they determine what would follow, unless the Constitution was amended through the process described in Article V, which would change the actual language of the document.<sup>73</sup> Consequently, with regard to the aforementioned death penalty example, Originalists argue that if the authors of the Bill of Rights did not consider the death penalty to be cruel and unusual in 1791, then it should not be considered cruel and unusual today. For Justice Scalia, a self-proclaimed Originalist, the living Constitution approach does “not seek to facilitate social change but to prevent it” by constitutionalizing contemporary trends in our understanding of the language, thus bringing the issue outside the

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70. U.S. CONST. amend. VIII.

71. Cf. Anthony F. Granucci, *No Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 865 (1969) (arguing that the American Framers of the Eighth Amendment misinterpreted Blackstone and early English law by proscribing “not excessive but torturous punishments”).

72. STRAUSS, *supra* note 42, at 10.

73. STRAUSS, *THE LIVING CONSTITUTION*, *supra* note 42, at 36-37.

democratic process.<sup>74</sup> Is Scalia correct that if the Court follows an Originalist position, it must necessarily leave in place the right of the states and the federal government to decide whether to continue the death penalty for certain crimes? Scalia himself acknowledges, “I do not suggest, mind you, that Originalists always agree upon their answer. There is plenty of room for disagreement as to what the original meaning was, and even more as to how that original meaning applies to the current situation before the court.”<sup>75</sup>

Professor Ronald Dworkin identifies one place for disagreement as the words the Framers chose when drafting the Eighth Amendment. Dworkin distinguishes “semantic originalism” from “expectation originalism.”<sup>76</sup> The former “insists that rights-granting clauses be read to say what those who made them intended to say.”<sup>77</sup> The latter “holds that these clauses should be understood to have the consequences that those who wrote them expected them to have.”<sup>78</sup> The two understandings are not the same, as words can have a broader intension from the extensional objects one might expect them to apply to, not to mention the fact that the intension might change over time.<sup>79</sup> Dworkin goes on to explain:

Consider, to see the difference, the *Brown* question: does the Fourteenth Amendment guarantee of “equal protection of the laws” forbid racial segregation in public schools? We know that the majority of the members of Congress who voted for that amendment did not expect or intend it to have that consequence: they themselves sustained racial segregation in the schools of the District of Columbia. So an expectation-originalist would interpret the Fourteenth Amendment to permit segregation and would declare the Court’s decision wrong. But there is no plausible interpretation of what these statesmen meant to *say*, in laying down the language “equal protection of the laws,” that entitles us to conclude that they *declared* segregation

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74. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 42 (1997).

75. SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 74, at 45.

76. Ronald Dworkin, *Comment* on ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 119 (1997).

77. *Id.*

78. *Id.*

79. “Intension” refers to a word or phrase’s meaning, rather than the psychological state of the author. Extension, by contrast, refers only to the objects subsumed by the word or phrase. See *Intension and Extension: Logic and Semantics*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/intension> (last visited June 22, 2019).

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constitutional. On the contrary, as the Supreme Court held, the best understanding of their semantic intentions supposes that they meant to, and did, lay down a general principle of political morality which (it had become clear by 1954) condemns racial segregation. So, on that ground, a semantic-originalist would concur in the Court's decision.<sup>80</sup>

Similarly, a semantic-originalist would adopt a different position from an expectation-originalist regarding the Eighth Amendment. Consider what Dworkin says are two different accounts of what "the Framers intended to say in the Eighth Amendment:"<sup>81</sup>

The first reading supposes that the Framers intended to say, by using the words "cruel and unusual," that punishments generally thought cruel at the time they spoke were to be prohibited—that is, that they would have expressed themselves more clearly if they had used the phrase "punishments widely regarded as cruel and unusual at the date of this enactment" in place of the misleading language they actually used. The second reading supposes that they intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual. Of course, if the correct translation is the first version, then capital punishment does not violate the Eighth Amendment. But if the second, principled, translation is a more accurate account of what they intended to say, the question remains open.<sup>82</sup>

Why does the question remain open if the second version is correct? Because, even from an Originalist position, the Framers' use of abstract versus more concrete language suggests that they intended for consideration of what punishment qualifies as "cruel and unusual" in light of changing understandings of justice and fairness, human psychology, and social climate. So, contrary to Originalist presumptions, Originalist thinking will not always, or even mostly, lead to what the Framers expected. Nor is it by any means clear that Originalism will be better equipped to protect the rights of minorities than the more common law-like, living Constitution approach. As Dworkin points out,

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80. Dworkin, *supra* note 76, at 119 (citing *Brown*, 347 U.S. at 483).

81. *Id.* at 120.

82. *Id.*

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[m]any conservative judges therefore reject semantic originalism as undemocratic; elected judges, they say, should not have that responsibility. Scalia gives nearly the opposite reason: he says the moral reading gives the people not too little but too much power, because it politicizes the appointment of Supreme Court justices and makes it more likely that justices will be appointed who reflect the changing moods of the majority. He fears the constitutional rights of individuals will suffer.<sup>83</sup>

Justice Scalia suggests that the moral reading of the Constitution allows for potential tyranny of the majority to offset individual rights of the minority. Undoubtedly, Justice Scalia is concerned about property rights, which have been diminished since the advent of the New Deal.<sup>84</sup> However, Dworkin views the situation differently. He writes:

History disagrees [with Scalia's position]. Justices whose methods seem closest to the moral reading of the Constitution have been champions, not enemies, of individual rights, and, as the political defeat of Robert Bork's nomination taught us, the people seem content not only with the moral reading but with its individualist implications.<sup>85</sup>

Neither position provides a clear, knock-out win for "which individual rights are genuine and important and about whether the moral reading is a threat or an encouragement" because, "in the end the magnet of political morality is the strongest force in jurisprudence," and that magnet may operate in different directions.<sup>86</sup>

Where does this leave the discussion of the two most common forms of debate about the correct approach to constitutional interpretation? Arguably, each approach has something unique to offer, yet each is both theoretically and practically open to various challenges from those who believe it either undemocratic or insufficiently capable of protecting minority rights. Originalism, in the narrow sense of expectation-Originalism, may protect those who fear that current coalitions of majorities may undermine previously acknowledged rights they hold dear. However, expectation-

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83. Dworkin, *supra* note 76, at 126.

84. See, e.g., SCALIA, *supra* note 74, at 41-42.

85. Dworkin, *supra* note 76, at 126-27.

86. See *id.* at 127.

Originalism runs the risk of being unable to account for the Framers' use of abstract language in some constitutional provisions, and concrete language in others. It also ignores the very real possibility that the Framers believed this difference was necessary in order to protect basic rights and values enshrined in abstract language from being circumscribed by a particular historical point of view.

Here, the idea of a living Constitution can be used to ensure the evolution of rights and values that adjust according to changing political, cultural, and moral understandings. The question is: whose rights and which values are ensured by the Constitution? There is also the argument that suggests resolving changing viewpoints by way of the supermajority Article V amendment process, which avoids the possibility of a tyranny of the majority. Problematically, the Article V amendment process can be thwarted by momentary legislative majorities, whose preferences are not always likely to consider the basic rights of individuals recognized by the best of society's current political, cultural, and moral understandings. Moreover, it tends to be a long-drawn-out process for issues that might have an immediate impact on individual lives.<sup>87</sup> However, use of Article V seems necessary to repeal either an original Article or an Amendment, since those are at the heart of the Constitution.<sup>88</sup>

Therefore, a new kind of interpretation is needed: one chosen to secure the legitimate interests of those minorities who may not receive majority favor, which, more often than not, are presented in individual cases where basic rights are supremely vulnerable to societal indifference. As it stands, neither approach provides a complete and morally satisfactory formulation of what should accompany judgments about constitutional matters, let alone why such judgments should matter, given that those who wrote the Constitution and Bill of Rights are long since dead. Thus, if the Constitution and Bill of Rights shall continue to function as higher law that influences modern day America, it is urgent to consider, as a possible foundation for the interpretivist question, the origin of constitutional authority.

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87. Most pertinent to this Article are issues involving women's reproductive rights, marriage equality, racial discrimination, and sex discrimination.

88. See Vincent J. Samar, *Can A Constitutional Amendment Be Unconstitutional?* OKLA. CITY U. L. REV. 667, 687-94 (2008). *Contra* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 82-100 (2017). (It is unclear, however, if an amendment could legitimately repeal any fundamental rights that are a part of the Bill of Rights or the Fourteenth Amendment, since these constitute not only an essential part of what the Constitution stands for, but also, as human rights, are themselves part of higher law.).

### III. Social Contract as the Forerunner of a Tradition

Why should Americans care about the intent of those who wrote the Constitution more than two-and-a-quarter centuries ago, or those who wrote the Fourteenth Amendment a century-and-a-half ago? It is quite common to think of the Constitution and the Amendments following it as setting forth the social contract among “We the People” for how the Government of the United States and the various state governments operate. The problem with this view is that social contract theory fails to explain, beyond the first generation, why subsequent generations should be obliged to follow the directives of those who are now long since dead.<sup>89</sup> Indeed, none other than Thomas Jefferson, the author of the Declaration of Independence, questioned “whether one generation of men has a right to bind another.”<sup>90</sup> Jefferson goes on to argue that if generations are defined to exist only for a set time, no debt assumed by one generation could be passed on to a future generation which had not agreed to the obligation.<sup>91</sup> His argument extinguishes the claim that society could impose this obligation based on an original Lockean natural right; Jefferson identifies the practical constraint that each generation, as a whole, is granted by nature only a specific finite time for its existence.<sup>92</sup> Consequently, nature and the rights of nature seem to prevent any such obligation from being passed on to subsequent generations.

On the contrary, one might argue that since whole generations do not simply die out at a specific time, society may be represented by an overlapping consensus of those members who accede to the previous obligations. Even if this were the case, would the obligation only go so far, and no farther, than those who had accepted the previous obligation? This is not a matter of adopting an amendment, but of reaffirming what is already in place.<sup>93</sup> Continuation of constitutional authority is part of the background framework of the tradition under which the Constitution operates, as well as why major changes in structure ought to require an amendment. More importantly, since that tradition has continued, at least in its broader structural aspects, from generation to generation, with Supreme Court

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89. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 374-75 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (In the *Second Treatise*, Locke presents his social contract theory. He begins by noting that “Men being ... by Nature, all free, equal and independent, no one can be put out of his Estate, and subject to the Political Power of another, without his own *Consent*.”).

90. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 488 (Random House, N.Y., 1944).

91. *Id.*

92. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 91, at 488.

93. See U.S. CONST. art. V.

decisions adjusting only its details,<sup>94</sup> while the various amendments adjust its larger scope and promise (especially the Reconstruction Amendments),<sup>95</sup> that tradition should now also be seen as constituting a significant part of the American identity.<sup>96</sup>

Still, Jefferson's point extends beyond whether past financial debts might be honored in the future. He was more concerned with the structure and obligations imposed by the Constitution, as well as the meanings and intent of those who authored it. Indeed, the basic structures of the government, along with the reasons for its creation—to provide a system of checks and balances, to ensure federal separation of powers, and to guarantee a substantial degree of state sovereignty—can be found in the arguments leading up to the Constitution's ratification.<sup>97</sup> However, the values under which those systems operate have undergone profound changes, especially with the adoption of the Reconstruction Amendments at the end of the Civil War, which brought onto the national stage, in varying degrees at different times, a much greater emphasis on individual freedom and equality that would obligate the states as much as the federal government.<sup>98</sup> In part, this

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94 See *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

95 1 BRUCE ACKERMAN, *WE THE PEOPLE* 58 (1991) (The American Constitutional Historian, Bruce Ackerman, has described the American Constitution as comprising Three Republics: "the Founding, Reconstruction, and the New Deal," the Reconstruction period being defined by passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.).

96 The argument is that the Constitution becomes a part of the American ethos, so long as it continues to be seen as legitimate because it is grounded in a set of values Americans respect as important. That way of looking at legitimacy is significantly different from the way Max Weber considered legitimacy. The justification for the original constitution and the subsequent amendments, especially the Reconstruction Amendments, might be grounded on the social contract created between the then living members of society or their representatives as set out in Articles V (amendments) and VII (ratification) of the U.S. Constitution. That much fits Max Weber's notion of a legal "rational ground" originally affording legitimacy to the Constitution and its subsequent amendments. See 1 MAX WEBER, *ECONOMY AND SOCIETY* 215, 217-220 (Guenther Roth and Claus Wittich eds., 1978). But, as this Article hopes to show, that legal rational grounds explanation of Constitution's legitimacy breaks down when the members to the original social contract or the social contract that gave birth to the Reconstruction Amendments are no longer alive. In these instances, for the Constitution to continue to remain legitimate, a different notion of legitimacy will be required. The notion presented here allows for the creation of a tradition capable of adapting to a changing world by the inclusion of additional human rights norms that are themselves respected, even though they may affect the importance of norms already present. This is not Weber's "traditional grounds" approach, which demands personal loyalty to persons within an "immemorial tradition." *But cf. id.* at 215, 226-27. As a consequence, the approach here will require an appeal to a still higher set of moral norms so that it does not just become a peg-board for posting any values that gain popular attention.

97 See generally 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1937) (providing information that helped frame the Constitution for submission to the states).

98 See U.S. CONST. amends. XIII, XIV, XV. A brief review of how the Fourteenth Amendment's Equal Protection Clause would come to be seen as a basis for ending segregation,

is related to the changing role of the United States Supreme Court, which has evolved from its original emphasis clarifying the boundaries of federalism to what, following the Great Depression and the New Deal, has become an institution set upon protecting individual rights more broadly, the latter in keeping with the Fourteenth Amendment right to ensure equality under the law.<sup>99</sup> The Court's willingness to back away from just emphasizing the preservation of state rights and the individual civil rights of white men produced a shift in interpretation toward paying greater attention to the rights of women, illegitimate children, and gays and lesbians, as well as showing respect for a larger federal role of securing the general welfare, even when this meant placing less emphasis on protecting previously important property rights.<sup>100</sup>

Precisely how these new arrangements became a part of the American legal and political landscape is interesting given the ever-widening consensus required by the country's expansion and population growth, as well as the United States becoming an ever-growing political and economic player in the 21st century. Currently, the country's two major oceans no longer provide the security or isolation from the world's problems that may have existed at an earlier time. Today, what happens economically on the Tokyo Stock Exchange affects what happens in the economic markets of London, New York, and Chicago.<sup>101</sup> Nor is the United States unaffected by

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and later be adopted to guaranteeing equal protection for women, as well as gays and lesbians, will be set out in Section 6. *See infra* Part 6.

99. *See U.S. v. Caroline Products*, 304 U.S. 144, 152 n. 4 (1938) (noting "here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth").

100. John Locke, whose writings strongly influenced Thomas Jefferson, held the natural rights view that upon birth "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in [common to everyone], he had mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*." LOCKE, *supra* note 89, § 27. This view, when interpreted by libertarians, undercuts government regulation of private property that might be aimed at protecting the health and safety of workers. This is because, under Locke's view, government is limited to protecting those pre-political rights afforded in the state of nature. *See Lockner v. N.Y.*, 198 U.S. 45 (1905) (holding a New York statute that limited bakers to a 40-hour work week violated the Due Process Clause of the Fourteenth Amendment). But ought this to be the whole of government's responsibilities when the Constitution itself states that government is established "to promote the general Welfare." U.S. CONST. pmb. *See W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding the constitutionality of state minimum wage legislation).

101. *See Stock Exchanges Around the World*, INVESTOPEDIA, <https://www.investopedia.com/financial-edge/1212/stock-exchanges-around-the-world.aspx> (last visited May 29,



terrorism, whether global or domestic,<sup>102</sup> or climate change, also caused by human pollution entering the atmosphere, especially from newly developing industrial nations, like China.<sup>103</sup> Additionally, with the arrival of the global internet, the relative physical isolation caused by its two oceans no longer secures the United States from outside threats (putting aside its shared borders with Canada and Mexico) because hackers residing anywhere in the world can potentially cause great harm to the United States infrastructure (such as its electrical grid<sup>104</sup>), but also, and perhaps more importantly, to its democratic system of politics.<sup>105</sup>

Social contract theory, when considered within a tradition that reconstructs the past to accommodate living in an ever-changing economic and political world, can set out purposes and obligations that respond to Jefferson's concern because it finds a common denominator to operate between generations. Tradition serves as the common denominator by allowing for a higher-ordered connection to emerge between what came previously and what is common and necessary today. Whereas, at one time it may have been thought that the values that separate higher law from ordinary law set forth a clear boundary between the Constitution and statutory law, that boundary is not impervious to outside pressures from real-world conditions. The requirement that any change to basic structures preserve liberty and equality is the protection higher law affords, both by way of the formal amendment process and by requiring courts to be cognizant of values that could be supported by a populace with various political ideologies.<sup>106</sup>

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2019); *see also* *Economy: Impact of the World Economy*, THEUSAONLINE.COM, <https://www.theusaonline.com/economy/world-economy.htm> (last visited May 29, 2019).

102. *See Part IV: What is the threat to the United States Today?* In *Terrorism in America After 9/11*, NEW AMERICA, <https://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/> (last visited May 29, 2019); *see also* Natasha Bach, *Domestic Terrorism is on the Rise. But How Prepared is the U.S. to Counter It?* FORTUNE (Apr. 4, 2019), <http://fortune.com/2019/04/04/dhs-domestic-terrorism/>.

103. *See* Scott Moore & Michelle Melton, *China's Pivot on Climate Change and National Security*, LAWFARE (Apr. 2, 2019, 2:43 PM), <https://www.lawfareblog.com/chinas-pivot-climate-change-and-national-security>.

104. Danny Bradbury, *Electrical Grid Hacking Makes US Top Threat List*, INFOSECURITY MAGAZINE: INFOSEC BLOG (Feb. 15, 2019), <https://www.infosecurity-magazine.com/infosec/electricity-grid-hacking-makes-us-1-1/>.

105. Frances Robles, *Russian Hackers Were 'In a Position' to Alter Florida Voter Rolls, Rubio Confirms*, N.Y. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/us/florida-russia-hacking-election.html>.

106. This process can be illustrated by compromises agreed to by both major political parties since the Twelfth Amendment requires "a majority of the whole number of the Electors appointed" to elect the President; otherwise the choice will be made by the House of Representatives. U.S. CONST. amend. XII.

Jefferson's concern is the traditional contract law point we met in *Winterbottom v. Wright*, namely, that absent privity of contract, no obligations exist under a contract.<sup>107</sup> However, one must not overlook the work done by Jefferson's very explicit example: in a normal contract, either party can assign their rights under the contract to other persons including future generations.<sup>108</sup> They cannot assign their obligations and liabilities to third parties without the third parties' consent, since such a transfer would constitute a novation requiring new consideration.<sup>109</sup> Consequently, under Jefferson's example, the rights the Framers agreed to are assigned to future generations, but any obligations or duties are not. However, in reality, whole generations do not enter into and exit existence at a single moment in time. There will always be people to convince each subsequent generation of the benefit to be gained by continuing the social contract, at least regarding its most important obligations. Moreover, there will be obligations that arise outside the contract as we saw in the *Thomas* and *MacPhearson* cases. Together, both intergenerational effort and the emergence of new obligations, give rise to a cross-generational recognition of a political tradition that strongly affirms maintaining much of the prior social contract, but only if adjustments can be and are, in fact, made to meet changing conditions.

Cross-generational traditions are culturally well-known, as they are commonly exhibited through customs and beliefs that connect different generations together.<sup>110</sup> This applies to family, religion, and culture, but can also be associated with other kinds of norms that afford stability, meaning, and security.<sup>111</sup> The idea that people regularly associate together by way of a tradition is a familiar concept, and serves as a basis to develop one's own identity as a member of a family or community.<sup>112</sup> Perhaps more significantly, each new generation finds its own identity, inevitably creating conflicts due to changed circumstances or new challenges, which require rethinking old ways of accommodation, and developing new strategies for

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107. See 152 Eng. Rep. 402 (Ex. 1842).

108. Richard Stim, *What is an Assignment of a Contract? What Happens When Rights and Duties Under a Contract are Assigned to a Third Party?* NOLO, <https://www.nolo.com/legal-encyclopedia/assignment-of-contract-basics-32643.html> (last visited May 26, 2019).

109. See *Novation*, FARLEX, THE FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/novate> (last visited May 26, 2019).

110. See Chelsey Byers Gerstenecker, *Family Life: Traditions, Customs Help Strengthen Families, Communities*, NEWS-GAZETTE (Nov. 27, 2018), <http://www.news-gazette.com/living/2018-11-27/family-life-traditions-customs-help-strengthen-families-communities.html>.

111. *The Effect of Family Culture on Family Foundations*, COUNCIL OF FOUNDATIONS, <https://www.cof.org/content/effects-family-culture-family-foundations> (last visited May 21, 2019).

112. See *id.*

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managing various situations.<sup>113</sup> If the tradition is to maintain continuity between generations, the tradition must adapt to new challenges, and not hold fast to past expectations. This does not mean giving up all past values and structures, but instead accommodating those values and structures to the new challenges presented. Most values and structures allow for this, if perceived as part of the larger normative system in which they operate. Of course, if this is to occur, the values of the tradition must not be too historically confined, nor the structures so rigid as to prevent innovation.

A better approach to constitutional interpretation is thus needed; one that must connect current and future generations by appealing to some further set of norms that also constitute higher law. Tradition will be part of this effort, but only insofar as it provides a place where one's identity with the past remains relevant. This requires that the tradition be able to answer two very pressing questions: First, must American identity necessarily be associated with having a connection to the past? Second, given tradition's role in the development of an identity, exactly how far should the past remain relevant today? Does the tradition extend, for example, to past expectations for what "should" be done, even if those answers are no longer thought helpful to resolving current needs? Are there beliefs that are so deeply rooted in the tradition that one's identity with the tradition cannot be maintained without those beliefs? Of course, if no change is possible, and the reasons for accepting past beliefs are few, if at all, there is a high likelihood that the tradition will simply die off.

These questions are at the heart of both the Jeffersonian problem previously described, and the broader concern of this Article to determine the obligations that the Constitution and its amendments impose on society today. The latter is relevant because Congress' authority, to make laws that society is legally obligated to obey, is limited by the authority assigned to it under the Constitution. A tradition is capable of affording such respect for higher law, provided the higher law is made adaptable to the present. Beyond those who merely adopt the tradition, how can a tradition legitimately claim to impose an obligation on others who may not support it? This is where legitimacy comes in: it is absolutely essential that enough members of society still perceive themselves as being bound to a certain tradition they continue to find valuable, such that they are willing to assert their collective authority to impose that tradition on others to ensure conformity.

Such a strong-armed approach of forcing tradition onto others will only make sense in a situation where the approach serves some higher good, such

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113. See *The Effect of Family Culture on Family Foundations*, *supra* note 111.

as getting at truth or achieving justice and fairness. But such higher goods must then fall outside the specific constitutional tradition in something still more general and universal that is capable of justifying the tradition at hand. This second-level higher tradition provides what might be claimed as moral reasons for any determination offered at the first-level, including, in some cases, reasons for not following the original tradition, or at least not following it too closely if justice or fairness are not obviously assured. Essentially, the obligation to be part of a tradition then may itself require a higher-ordered explanation residing outside the tradition if it is to avoid serious moral criticism. If so, the second-level higher-ordered explanation may set the boundaries of the tradition it also justifies. Arguably, this is the place where universal morality and universal human rights ought to be considered, as will be described below. For now, when considering the duties a constitution imposes on a society, it is worth noting a remark by Professor Lon Fuller, that:

No written constitution can be self-executing. To be effective it requires not merely the respectful deference we show for ordinary legal enactments, but that willing convergence of effort we give to moral principles in which we have an active belief. One may properly work to amend a constitution, but so long as it remains unamended, one must work with it, not against it or around it. All this amounts to saying that to be effective a written constitution must be accepted, at least provisionally, not just as law, but as good law.<sup>114</sup>

If constitutions are accepted in a way that is similar to that of traditions, then this analysis does much to explain why present-day Americans continue to find the Constitution authoritative. On reflection, what is followed by the overwhelming number of society's members, absent overt coercion, is thought, at least provisionally, to be good, and more so if it allows for further molding to meet unexpected challenges. This is not to say that having a pro-attitude need be the only basis for identifying with a tradition, but it motivates members of a society to follow a tradition.

The pro-attitude idea also does much to explain the broad bipartisan support of the rise of the regulatory state in the first-half of the 20th

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114. Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 72 HARV. L. REV. 630, 642 (1958) (arguing against Professor Hart's thesis for a separation of law and morals in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958)).

century.<sup>115</sup> The idea behind the original Constitution was to make “lawmaking cumbersome, representative, and consensual” because this was thought necessary to protect liberty in the nineteenth century; “the regulatory agency was a workaround to make lawmaking efficient, specialized, and purposeful,”<sup>116</sup> because this was necessary to accommodate welfare in the 20th century. Both views were ways for the Constitution to alleviate fears of an overzealous, strong, central government, while simultaneously meeting its Preamble requirement to “promote the general Welfare.”<sup>117</sup>

Since the pro-attitude idea is manifested in following a tradition that affords it sanctity, logically, it will want to consider past understandings but not limit itself to any specific past interpretation. As the philosopher Joseph Raz has noted, constitutions are viewed as legitimate, or “self-validating,” provided “*they remain within the boundaries set by moral principles.*”<sup>118</sup> This occurs when the interpretations represent what is worthy of moral attention because it seems to focus on the most important interests of society’s members.

David Strauss brings this point home to Originalists with his historical discussion of James Madison decidedly supporting the Second Bank of the United States.<sup>119</sup> When Alexander Hamilton first proposed the Bank of the United States, Madison vehemently opposed, arguing that the Constitution did not authorize such an expansion of federal power.<sup>120</sup> Madison said, at the time, that any alteration in the Constitution would be a usurpation if not accomplished through Article V:

After an extensive debate on its constitutionality, Congress enacted legislation establishing the bank. When the term of the First Bank of the United States expired, Congress re-chartered it. Madison, then president, vetoed the bill re-chartering the bank—but explicitly on non-constitutional grounds. By now it was 1815, twenty-five years after Hamilton first proposed the bank, and Madison explained that he considered the issue of constitutionality to be “precluded...by various recognitions under varied

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115. Christopher DeMuth, *The Regulatory State*, NATIONAL AFFAIRS (2012), <https://www.nationalaffairs.com/publications/detail/the-regulatory-state>.

116. *Id.*

117. U.S. CONST. pmbl.

118. JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 348 (2009).

119. STRAUSS, *supra* note 42, at 123-25.

120. *Id.* at 123.

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circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of Government, accompanied by indications, in different modes, of a concurrence in the general will of the nation . . . . A year later, Madison showed his endorsement of the living Constitution was not empty when he signed the bill creating the Second Bank of the United States.”<sup>121</sup>

What Strauss perceives as Madison’s evolution toward a living Constitution perspective could easily fit the view offered here, of a Constitution capable of innovation, but grounded in a set of binding human rights principles. Indeed, the modern regulatory state, which finds no antecedent language in the Constitution, but is the source of much federal power, is illustrative of a transmission of legislative authority by Congress to agencies, to set up and protect the economic and financial needs of the nation.<sup>122</sup> The Court’s decisions that upheld this transmission, as well as those that extended basic rights to new classes of individuals, provide another example.<sup>123</sup> Despite these congressional and judicial changes in direction, and the public’s subsequent acceptance of those changes, a kind of schizophrenia in American psyche remains that animates ongoing political debate surrounding these questions. For example, most Americans believe federal employees “who work for federal regulatory agencies do the best they can to impose the rules and regulations fairly and impartially,” yet still an overwhelmingly high number of Americans hold the view “that top leaders of regulatory agencies use their power to pursue personal agendas.” Sixty-seven percent believe regulators and “big businesses” work together in ways that are harmful and unfair to consumers.<sup>124</sup> Since most of these concerns fall within congressional oversight, this difference in public attitude should have no constitutional significance. Once again, innovations continue to resolve and sometimes create current challenges while keeping faith with past limitations. When combined with the Court’s recognition of current serious needs, such innovations as the creation of the regulatory state, or the Court’s recognition of a right to privacy that protects a woman’s right to terminate a pregnancy, or an expansion of the fundamental right to marry to include same-sex couples, are still found to be constitutionally salient. This

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121. STRAUSS, *supra* note 42, at 123-24.

122. *See* STRAUSS, *supra* note 42, at 121.

123. *See id.* at 125-26.

124. Scott Rasmussen, *Americans Continue to Reject Regulatory State*, REAL CLEAR POLITICS (Jan. 24, 2019), [https://www.realclearpolitics.com/articles/2019/01/24/americans\\_continue\\_to\\_reject\\_the\\_regulatory\\_state\\_139264.html](https://www.realclearpolitics.com/articles/2019/01/24/americans_continue_to_reject_the_regulatory_state_139264.html).

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provides the framework for how the Court's present perception of the underlying human rights purposes of the Constitution may be seen as having evolved from its original Preamble goals to answer the question: How is American identity necessarily connected with the past?

The answer to the second question of how far the past should remain relevant is more complex. It presupposes not merely the existence of a pro-attitude for following the Constitution and its subsequent amendments and Court interpretations between generations, but the need for specific limitations as to what rights warrant constitutional protection, and how various structures might accordingly be adjusted. This is an important and separate question from whether identity needs to have a connection to the past, since it challenges exactly how far the past operates to frame our identity, while incorporating the reason why we care about constitutional interpretation from the first question. Most Americans view the Constitution as legitimate higher law, provided it evolves to meet current challenges to our institutions and our abilities to govern ourselves as autonomous individuals. The second question is also problematic because people will often find that they differ, based on their own world views, on which values they believe should gain constitutional recognition and how they should be prioritized when in conflict with other values. Phrases like "due process," "equal protection," or "cruel and unusual punishment" certainly call for moral attention at what was earlier described to be a higher-level of concern regarding matters of justice and fairness, but exactly what attention needs to be afforded to meet the higher-level concern must be carefully scrutinized. How the Framers viewed extending these terms to meet various challenges may not presumptively mirror what present-day Americans see as necessary, or even that all present-day Americans agree on what concerns these terms should address. Although the concept may be the same, its conception need not be.<sup>125</sup>

#### IV. Continuity and Change

The aforementioned urgent desire for continuity in community life underlies the continuing authority of constitutional traditions. Such traditions will often look to the past to affirm present action. To the extent that such traditions have goals, or at least attempt to resolve uncertainties, they are likely to govern in their wake. Regardless, majoritarian agreements will often operate only in the short-term, especially when new and perhaps

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125. JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971) (footnote omitted) (For example, in discussing justice in the context of institutions, John Rawls distinguishes "the concept of justice as distinct from the various conceptions of justice and as being specified by the role which . . . these different conceptions have in common.").

unexpected concerns arise along with important issues not readily resolvable by constitutionally-provided rights or structures. This itself requires a discussion about the effectiveness of existing rights and structures in responding to needed and often unexpected changes in daily life, which may have been precipitated by technological improvements or significant cultural changes.<sup>126</sup> In such circumstances, if the background rights and structures allow for the needed change to occur, there is no constitutional crisis.<sup>127</sup> But where the background structures do not readily allow for adjustment in the way the community operates, the constitutional tradition must provide for an alternative procedure or suffer a loss of legitimacy.<sup>128</sup>

Following the procedure in the Article V provision of the United States Constitution may be all that is necessary to resolve the challenge.<sup>129</sup> Provisions such as Article V, however, can be clumsy and take a long time to achieve results, or even fail to achieve any results because of disagreements over what rights and structures should govern based on potential interpretations.<sup>130</sup> Moreover, there may be a strong desire to see how the proposed change would benefit the constitutional system before any formal adoption under Article V. If so, a Supreme Court interpretation that precipitates what the proposed amendment would accomplish may provide an opportunity to gain the information sought. More importantly, if the change achieves vast support among the populace following the interpretation, use of the Article V procedure may not be needed, as the change will have become part of the background tradition. In effect, the Article V provision may only be required for implementing changes necessary to resolve controversies where there is a current wide division of public opinion. For example, the controversies over slavery that gave rise to

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126. Alison Frankel, *A Supreme Court Case Has Internet Companies Running Scared*, REUTERS (DEC. 13, 2018, 1:38 PM), <https://www.reuters.com/article/us-otc-halleck-firstamendment/a-supreme-court-case-has-internet-companies-running-scared-idUSKBN1OC2XR> (A case currently pending before the U.S. Supreme Court raises the question: Can a private company “face First Amendment liability as a state actor because they provide a forum for public speech?” More directly, *Obergefell*, 135 S. Ct. at 2584, reified an important change in the background culture by affording constitutional recognition to same sex marriage.).

127. *Separation of Powers - An Overview*, NAT’L CONFERENCE OF STATE LEGISLATORS (May 1, 2019), <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>.

128. FOREST MCDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 4 (1985) (Constitutional historian Forrest McDonald points out that, at the time of the founding “though virtually every American believed that *property* and *liberty* were both *natural* and *civil rights*, it transpired during the Constitutional Convention that delegates had very different understandings of all five of the words set here in italics.”).

129. U.S. CONST. art. V.

130. STRAUSS, *supra* note 42, at 19-20.



the Civil War were settled only with the adoption of the Thirteenth Amendment.<sup>131</sup> The point of emphasizing ‘wide division of opinion’ is to avoid failing to make important changes, because initially a majority of the population may be uncertain whether a change is needed or exactly what the change should be. Thus, the study of constitutional law is a study of not just the original document and its amendments, but more importantly, what the Constitution requires according to the interpretations of the Supreme Court.

The above discussion of my two questions should further the understanding of the debate between so-called ‘Originalists,’ and those who believe in a living Constitution that adapts to new circumstances by way of a common law approach. The former group wants to assert some protection against short-term majorities who may unduly trample what is perceived as pre-political rights of minorities; the latter group often wants to be able to advance protections for those who were previously unprotected.<sup>132</sup> These schools of thought lack a way to guarantee protections of basic rights while, at the same time, allowing for the expansion of existing rights into new, previously uncharted, areas. Still, this is not an insurmountable problem because the nature of law itself often provides opportunities to resolve such problems.

One of the most important legal tools is language. The language of legal argument provides a framework for discerning the purposes behind any law before the law is applied. This is shown in Justice Scalia’s example of the use of textualism in federal statutory interpretation. Justice Scalia makes the point that “a text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”<sup>133</sup> Justice Scalia uses this method as a basis for his criticism of the Court’s holding in *Church of the Holy Trinity v. United States*,<sup>134</sup> where a federal statute prohibiting the “importation or migration of any alien . . . into the United States . . . under contract or agreement . . . to perform labor or service of any kind in the United States” was held not to apply to bringing a pastor from England because the Court thought the statute was meant to limit only “manual labor.”<sup>135</sup> The statute provided an exception for “actors, artists, lecturers, and singers,” but the Court did not rely upon any of these, making, according to Scalia, Congress’ adoption of these

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131. See *13th Amendment*, HISTORY.COM (May 16, 2019), <https://www.history.com/topics/black-history/thirteenth-amendment>.

132. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 35 U. CHI. L. REV. 1161, 1163 (1988).

133. SCALIA, *supra* note 74, at 23.

134. See *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892).

135. *Id.* at 463.

exceptions “utterly inexplicable” if they were not going to limit the statute’s application.<sup>136</sup> Instead, the Court attempted to look at why the statute was enacted. Since a pastor might have been brought under the exception for “lecturers,” this may have been an unnecessary move by the Court. But even if so, it does not follow that Justice Scalia’s inference should prohibit courts from ever going beyond the four corners of the statutory language or to consider why the statute was adopted. When deciding a case where statutory intent is at stake, it may be necessary to understand what problem the Legislature was attempting to resolve.<sup>137</sup> Dworkin uses Justice Scalia’s example of a person who says, “I admire bays,” and asks: does the person “admire certain horses or certain bodies of water”?<sup>138</sup> Without some investigation into the intent, the correct understanding cannot be ascertained from the face value of the words. Similarly, in legislation, invoking the phrase “using a firearm” to enhance the penalty in a criminal statute that prohibits trading in illegal drugs could mean “only in situations in which a gun is used as a threat” (a likely concern of a legislature), or “in other contexts...any purpose including barter.”<sup>139</sup> Indeed, Justice Scalia admits this need in his Dissenting Opinion in *Smith v. United States*,<sup>140</sup> where the Court, in a 6-2 decision, found that the defendant’s offer of an unloaded gun in exchange for a quantity of cocaine subjected him to the increased penalty.<sup>141</sup>

The law also requires the use of deductive and inductive reasoning.<sup>142</sup> A pluralistic society requires “the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are.”<sup>143</sup> On questions of principle versus policy,<sup>144</sup> the understanding of law should be normatively governed by

136. *Id.*

137. *See, e.g.,* *Burwell v. Hobby Lobby*, 373 U.S. 682 (2014) (Ginsburg, J., dissenting) (delving into the legislative history of the federal Religious Freedom and Restoration Act to show that Congress’ “purpose was ‘only to overturn the Supreme Court’s decision in [*Emp. Div., Dep’t Hum. Res. Of Org .v.] Smith*,’ 394 U.S. 872 (1990), not to “unsettle other areas of the law,” *citing* 139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy), along with other House and Senate documents; *see also* Vincent J. Samar, *Interpreting Hobby Lobby to Not Harm LGBT Civil Rights*, 60 S. D. LAW REV. 457, 462-64 (2015)).

138. Dworkin, *supra* note 76, at 117.

139. Dworkin, *supra* note 76, at 117.

140. *Id.* at 23-24 (citing *Smith v. U.S.*, 508 U.S. 223 (1993)).

141. *Id.*

142. *See* HOLMES, *supra* note 63, at 1, 244 (This author’s use of inductive as well as deductive logic is in response to Holmes’ claim that law is not logic, but experience.).

143. RONALD DWORKIN, *LAW’S EMPIRE* 166 (1986).

144. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977) (Dworkin had previously defined “a policy [as] that kind of standard that sets out a goal to be reached, generally an

integrity. It should hold that “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”<sup>145</sup> The requirement that the interpretation should follow from an acknowledgement of broader higher law principles seems most present in Fourteenth Amendment equal protection jurisprudence. There, distinctions involving mostly policies (those that are economically, socially, or politically based) and have little effect on an individual’s status, are afforded the lowest standard of scrutiny, rational basis review.<sup>146</sup> This stands in stark contrast to cases involving a more invidious form of discrimination, such as classifications based on stereotypes about sex or gender, which requires intermediate scrutiny to determine if the state had an important enough interest to justify its discriminatory action.<sup>147</sup> Cases involving race-based classifications require strict scrutiny because the class has suffered a history of discrimination inconsistent with the ideals of equal protection, and unrelated to the class’ ability to perform. The class is generally powerless to obtain assistance through normal political procedures.<sup>148</sup>

Thus, legal interpretation cannot be disconnected from moral interpretation. Although a policy may aim to create a common good (as a utilitarian might wish), it still must be justified on moral grounds if its effect is to unfairly discriminate amongst those affected by it. By “moral,” I mean those values most essential to society’s existence. It does not necessarily refer to only popular values, although some degree of social awareness regarding their importance is necessary. However, this poses another problem: if morals are relevant to an interpretation, which morals are to govern any interpretation? Values associated with particularistic moralities, such as religious moralities, are too idiosyncratic to provide the continuity

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improvement in some economic, political, or social feature of the community. He also had defined “a ‘principle’ [as] a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.” *Id.*)

145. DWORKIN, *LAW’S EMPIRE* *supra* note 143 at 225.

146. *See, e.g., Nabbia v. N.Y.*, 291 U.S. 502 (1934) (The Supreme Court applied rational basis review to uphold New York’s Milk Control Board’s regulation of milk prices to protect dairy farmers, dealers, and retailers.).

147. *See, e.g., U.S. v. Va.*, 518 U.S. 515 (1996) (The Court required an “exceedingly persuasive” justification for Virginia’s Military Academy denial of allowing women into the Academy designed to produce “citizen-soldiers.”).

148. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429 (1984) (applied strict scrutiny to prohibit the state from taking a child away from its mother because of an interracial marriage); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (allowing under strict scrutiny the University of Michigan Law School to take race into account to achieve the state’s compelling interest in maintaining a diverse student body since its individualized admissions process was narrowly drawn).

required to hold a pluralistic society together. Values identified by the Framers provide a better starting point: liberty as with due process, equality as with equal protection, and various other values, explicitly written into or implicitly founded upon the Bill of Rights, such as freedom of expression and religious liberty,<sup>149</sup> a right to privacy,<sup>150</sup> and protections against arbitrary arrest or seizure of the person or his effects,<sup>151</sup> should play a role, along with a right to a fair and speedy trial and to be confronted by witnesses against one,<sup>152</sup> the right to own property,<sup>153</sup> and the right to vote.<sup>154</sup> These values seem to be universal, and are particularly important for individual well-being in a pluralistic society. The protection against arbitrary arrest is the requirement that probable cause be present to believe a crime is being committed.

If all that was being asserted was the *presence* of a right as object for interpretation, there would be less interpretative concern. Granted, there would be a concern if the rights were not explicitly mentioned in the Constitution and had to be inferred, but this could still be solved through appeal, for example, to the Tenth Amendment.<sup>155</sup> In law, however, implicit rights are affirmed upon close examination of a factual situation where the right, as with the line of privacy cases beginning with *Griswold v. Connecticut*, represents *an important value in need of constitutional protection*. Since this process will likely continue in the future, as new situations present new reasons for the recognition of rights, emphasis on how unenumerated rights should be identified and what meanings they should have become ever more important, just as emphasis on how new structures might be adopted to meet changing circumstances also become relevant.

## V. Sources of Human Rights

It was suggested earlier that human rights beyond those found in the Bill of Rights and Fourteenth Amendment, such as those found in international human rights documents the United States has signed onto, may

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149. U.S. CONST. amend. I.

150. See the line of cases from *Griswold v. Conn.*, 381 U.S. at 479, to *Roe v. Wade*, 410 U.S. at 113.

151. U.S. CONST. amend. IV.

152. U.S. CONST. amend. VI.

153. U.S. CONST. amend. V.

154. See U.S. CONST. amend. XV (slavery), XIX (sex), XXIV (age).

155. U.S. CONST. amend. X.

also be good candidates for constitutional attention.<sup>156</sup> These rights are not self-evident in the Constitution, but are the result of processes designed to provide a set of norms across various cultures and societies. Indeed, the antecedents of that process can be traced back “to League of Nations institutions that dealt with minority rights and mandated territories;” later, to the inclusion of some vague language written into the Charter of the United Nations by “smaller countries and nongovernmental organizations . . . for the inclusion of an international bill of rights in the Charter.”<sup>157</sup> With some difficulties along the way, “[i]n time, the membership of the United Nations came to accept the proposition that the Charter had internationalized the concept of human rights.”<sup>158</sup> This opened the door to nation-states like the United States being “deemed to have assumed some international obligations relating to human rights.”<sup>159</sup> Even more important was “the obligation imposed by Article 56 on United Nations member states, which required them to cooperate with the organization in the promotion of human rights [as it] provided the United Nations with the requisite legal authority to embark on what became a massive lawmaking effort to define and codify these rights.”<sup>160</sup> Those rights are now identified in various international documents including the Universal Declaration of Human Rights (1948) (“UDHR”),<sup>161</sup> the International Covenant on Civil and Political Rights (“ICCPR”) (1966),<sup>162</sup> and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)(1966).<sup>163</sup> These rights are not without limitation, as illustrated by the use of reservations by some state signatories

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156. See, e.g., Int’l Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; Int’l Covenant on Economic, Social and Cultural Rights, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360. See also Universal Declaration of Human Rights, 1948, G.A. Res. 217, U.N. GAOR (hereinafter “UDHR”); see also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 289 (1965), arguing that many of the provisions of the UDHR have come into acceptance as international customary law.

157. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT’L L. 784-86 (2006) (footnotes omitted).

158. Buergenthal, *supra* note 157, at 787.

159. *Id.*

160. *Id.* citing U.N. Charter art. 56, which states: “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” Article 55 states: “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” *Id.*

161. Universal Declaration of Human Rights, 1948, G.A. Res. 217, U.N. GAOR.

162. Int’l Covenant on Civil and Political Rights, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

163. Int’l Covenant on Economic, Social and Cultural Rights, 1967, 93 U.N.T.S. 3.

to these treaties.<sup>164</sup> Regardless, the fact that the covenants recite most of the rights identified in the Declaration as legally binding gave rise to *opinio juris* and widespread practice to most of the rights listed in the Declaration also becoming part of customary international law.<sup>165</sup> The question thus to be considered here is: should these rights now be considered part of United States constitutional law? Article VI of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.<sup>166</sup>

This was applied in *Reid v. Covert*,<sup>167</sup> in which the Supreme Court considered whether a military tribunal might try, under a treaty, a civilian dependent for the murder of her military husband in a foreign land. Noting that this would violate the Sixth Amendment right to trial by jury, the Court found the trial not justified.<sup>168</sup> In the language of the Court,

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.<sup>169</sup>

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164. Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/2, 8 I.L.M. 679 (Article 2(1)(d) of the Vienna states that a “‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, or approving when acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.”).

165. See Brian D. Lepard, *Why Customary International Law Matters in Protecting Human Rights*, VÖLKERRECHTSBOG (Feb. 25, 2019), <https://voelkerrechtsblog.org/why-customary-international-law-matters-in-protecting-human-rights/>.

166. U.S. CONST. art. VI.

167. *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion of Black, J.); see also *Boos v. Barry*, 485 U.S. 312, 324 (1988) (reiterating the *Reid* standard).

168. *Reid v. Covert*, 354 U.S. at 39-40.

169. *Reid*, 354 U.S. at 17.

The Court noted that the reason why treaties were not required under Article VI to be made pursuant to the Constitution “was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect.”<sup>170</sup> More recently, in *Sosa v. Alvarez-Machain*, the Court held that federal courts are not obligated to take account of UDHR or ICCPR when neither the resolutions of ratification nor the treaties themselves contain language that they are self-executing.<sup>171</sup> Therefore, the Court is hesitant to acknowledge enforceable rights in federal or state courts that arise under international agreements, unless those rights comport with important American values set forth in the Constitution or Bill of Rights.

Regardless, it is interesting to query, perhaps more so in *Sosa* than *Reid*, whether the Court could have legitimately required federal courts to take account of provisions of the UDHR and ICCPR as being more aligned with the Bill of Rights, as representative of the most important human rights values of the Constitution. Absent this solution with the above limitations in place, the question of whether such rights exist, at least as an obligation of the United States, can no longer be disputed.<sup>172</sup> The use of international human rights principles in American constitutional law has been discussed elsewhere, so this Article will focus solely on how such human rights might operate within American constitutional interpretation.<sup>173</sup>

But herein also lies a problem. If international human rights principles, regardless of their origin and overarching generality in comparison to Articles I and II, are subordinate to those structural limitations, what authority can they assert over interpretations of these various powers of

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170. *Id.* at 16-17.

171. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-35 (2004) (footnote omitted) (holding “the Declaration does not of its own force impose obligations as a matter of international law.”) *See* The UN Charter and the Universal Declaration of Human Rights, 1948, G.A. Res. 217 (quoting Eleanor Roosevelt calling the Declaration “a statement of principles ... setting up a common standard of achievement for all peoples and all nations” and “not a treaty or international agreement ... impos[ing] legal obligations”). And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”).

172. In *Sosa*, the Court acknowledged the possible relevance of the law of nations when it stated: “we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Id.* at 725.

173. *See* Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, COLUM. HUM. RTS. L. REV. 1 (2005) (arguing “that international and comparative law sources are relevant to interpreting the U.S. Constitution because the Constitution itself warrants respect only insofar as it is a means for achieving minimal protections for human dignity”).

government?<sup>174</sup> If no authority can be asserted, since such principles correlate with moral claims, does this mean that morality itself (or at least the range of moral obligations beyond what had originally given rise to the Constitution) has no place in constitutional interpretation? Would not such a principle in effect undercut a great deal of legitimacy often internationally assigned to American constitutional principles, thus reducing its impact on the global human rights stage?<sup>175</sup> On the other hand, if there is a basis for constitutional interpretation to make use of international human rights principles, what is that basis and how far does it extend? The following sections will unpack these questions.

Interestingly, the Court has already acknowledged that international human rights has a role to play even with regard to domestic issues. In *Lawrence v. Texas*,<sup>176</sup> for example, the Court overruled its previous holding in *Bowers v. Hardwick*,<sup>177</sup> and took note of the *Dudgeon* decision in the European Court of Human Rights. Five years before *Bowers* was decided, *Dudgeon* held laws proscribing homosexual conduct in private among consenting adults “invalid under the European Convention on Human Rights.”<sup>178</sup> In effect, the Court suggested that foreign interpretations of conventions of human rights that would be similar to those the Supreme Court might adopt under the Constitution and Bill of Rights, cannot be ignored, even if they are not directly precedential.<sup>179</sup> This opens the door to an ordering principle for when international human rights principles might operate in American constitutional interpretation. *If the application of international human rights would provide a similar interpretation to what might be provided by a fundamental principle recognized in the United States, even though it should add something more, its relevance is at the apex, compared to a foreign interpretation at the nadir that seems distant*

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174. See U.S. CONST. art. I, § 8 (setting forth the powers specifically assigned to Congress) and U.S. CONST. art. I, § 2 (setting forth the powers specifically assigned to the President).

175. See Karla Jones, *Our Constitutional Principles: America's Greatest Export*, ALEC (Oct. 18, 2016), <https://www.alec.org/article/our-constitutional-principles-americas-greatest-export/>.

176. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

177. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

178. 539 U.S. at 573 (citing *Dudgeon v. U.K.*, 45 Eur. Ct. H. R. (1981)).

179. In *Lawrence* the Court noted in overruling its earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (which had allowed states to continue to criminalize homosexual conduct) that “[o]f even more importance [than *The Wolfenden Report: Report of the Committee of Homosexual Offenses and Prosecution* (1963), which led the British Parliament to repeal many of the offenses involving homosexual conduct in its later *Sexual Offenses Act 1967*, §1, was a decision by the European Court of Human Rights, decided five years before *Bowers*], holding “that the laws proscribing the conduct were invalid under the European Convention of Human Rights.” 539 U.S. at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 1981 & ¶ 52).



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*from the way constitutional values are generally understood.*<sup>180</sup> This perspective on human rights may lessen the belief that the outside interpretation fails to satisfy constitutional limitations, and may provide more support for it being a consistent development of the changing American constitutional landscape. Indeed, if this analysis had been followed in the *Sosa* case, the Court might have had a different opinion for whether international human rights agreements signed onto by the United States would apply in federal courts, since the issue there seemed to be more about who decides rather than what is decided. The Constitution has not maintained its legitimacy over the years simply by producing a certain kind of representative government; rather, its legitimacy is likely based in its ability to operate from values that would maintain its cross-generational vitality and legitimacy.

One does not need to be a living constitutionalist to draw out the importance of human rights in ongoing American constitutional thought. Even if one were an Originalist, there is reason to believe that the Framers expected that the institutional structures they created, at times, be in service of reconsideration of existing values, and allow for new values, so long as they were supported by a majority of Americans. Had this not been their intent, they could have written Article VI's "Pursuance" clause to apply to only treaties made after adoption of the Constitution, all others made previously being left enforce having been adopted under the Articles of Confederation.

It follows from what has been said that the language of the Constitution, as the supreme law of the land, must therefore be interpreted, and it is the responsibility of the Court to carry out that interpretation. Article III states: "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time

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.180 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J. concurring), where Justice Jackson affirms an analogous expression for Presidential power. Jackson writes:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . .
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

ordain and establish.”<sup>181</sup> In *Marbury v. Madison*, Chief Justice Marshall posed the question:

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.<sup>182</sup>

So, by the Constitution’s sole grant of the judicial power to the federal courts, it necessarily leaves to them the primary responsibility of how to interpret the Constitution, which would include those human rights “[t]reaties made, or which shall be made, under the Authority of the United States . . . .”<sup>183</sup>

## VI. Interpretation and Indeterminacy

This Article has hopefully demonstrated the continued authority of the Constitution because the values associated with it, both past and present, reflect society’s continuing concern to protect basic human rights in new contexts. Joseph Raz argues that the interpretation of these values cannot simply be reduced to reasoning from any single moral value.<sup>184</sup> In this regard, he noted four considerations that affect the moral merit of the Constitution’s institutional role:

First, there is no real theory of constitutional interpretation, in the sense of a set of principles that when applied to an interpretative question yield the correct interpretation of the constitutional provision concerned . . . . Second, there is a cogent way of distinguishing between innovative and conserving interpretations, and often between more or less innovative (less or more conserving) interpretations. Third, interpretation is central to legal reasoning because in legal reasoning fidelity to an original competes with, and has to be combined with, reasons for innovation . . . . Fourth, it makes no sense to ask in general what is the right mix of

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181. U.S. CONST. art. III.

182. 5 U.S. 1 at 179.

183. U.S. CONST. art. VI.

184. RAZ, *supra* note 118, at 355.

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conservation and innovation in constitutional interpretation.<sup>185</sup>

These different concerns, especially the third consideration regarding the role of the courts, reaches the foreground in the debates between Originalists and those who follow a living Constitution approach. Although the problem might be resolved by a suitable justificatory theory of human rights (to be discussed in the next section), that itself assumes that the problem of moral interpretation is not indeterminate, a position Raz would question. It also presupposes that different considerations might support alternative, incommensurable views. If the moral principles relied upon are themselves indeterminate, are the courts truly best equipped to resolve the interpretative problem? Part of the issue here seems to be the unstated need to find an answer that can withstand the challenge of moral relativism.<sup>186</sup>

This problem finds expression in the area of international human rights debates, as Alan Buchanan, for example, has noted:

It is often said that the Universal Declaration of Human Rights and the various human rights treaties that followed it wisely avoided attempting a justification for the norms they asserted. To paraphrase the philosopher Jacques Maritain, it was possible to agree on a list of human rights only on the condition that almost nothing was said about how they are grounded.<sup>187</sup>

Buchanan does, however, offer the hopeful possibility that:

In the end, whether a justification becomes available will depend not only upon the further development of the moral foundations of the idea of human rights—a task which until recently most contemporary moral and political philosophers, like most international legal theorists, have avoided—but also upon improvements in the global public deliberative processes that occur within the complex array of institutions within which human rights norms are articulated, contested, and revised over time.<sup>188</sup>

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185. RAZ, *supra* note 118, at 361.

186. WILLIAM GRAHAM SUMNER, *FOLKWAYS* 28 (1906) (Sociologist William Graham Sumner wrote in 1906, that “[t]he ‘right’ way is the way which the ancestors used and which has been handed down. The tradition is its own warrant.”).

187. ALLEN BUCHANAN, *The Legitimacy of International Law* in *THE PHILOSOPHY OF INTERNATIONAL LAW* 96 (Samantha Besson & John Tasioulas eds., 2010).

188. *Id.* (footnote omitted).

In the context of constitutional law, because values are always present, it helps to identify the three distinct levels of interpretation where human rights values are likely to be implicated.

The first and most basic level are constitutional norms. This level includes basic principles of human rights that are synonymous with the fundamental rights already recognized by the Supreme Court,<sup>189</sup> but must be able to assimilate other human rights, yet to be recognized, as part of what the Constitution affirms. Recall that a married couple's right to use contraceptives,<sup>190</sup> and a single person's right to the same,<sup>191</sup> along with a woman's right to bear or beget a child,<sup>192</sup> and a same-sex couple's right to marry,<sup>193</sup> were all unknown until the Court recognized a constitutional right to privacy under the Due Process Clause of the Fourteenth Amendment, and even then, only over time, was the right to privacy extended to afford protection in all three areas.<sup>194</sup> Part of the explanation for the time lag is that the Court does not offer advisory opinions, but instead waits for an actual case or controversy to arise before it affords a resolution.<sup>195</sup> In *Griswold*, the time lag also provided the Justices an opportunity to decide where this right to privacy might be located in the Constitution, since it is not explicitly mentioned in the document.<sup>196</sup> Of course, at this first level of interpretation,

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189. See BOBBITT, *supra* note 1, at 20 (This level corresponds to what Bobbitt has identified as the Supreme Court's sometimes use of an ethical modality.).

190. *Griswold v. Conn.*, 381 U.S. 479 (1965) (holding for the first time the existence of a marital right to privacy to use contraceptives and physicians to advise on their use). For a broader discussion on how the constitutional right to privacy relates to the Fourth Amendment and tort protections of privacy, as well as how privacy might be grounded in autonomy, see generally VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* 51-117 (1991).

191. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

192. *Roe v. Wade*, 410 U.S. at 153 (where the Court settles on the Fourteenth Amendment as the basis for the right to privacy); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

193. See *Obergefell*, 135 S. Ct. at 2584. Interestingly, in *Obergefell*, Justice Kennedy's Majority Opinion holding the right of same-sex marriage to be part of the fundamental right of marriage, indicates that his due process analysis under the Fourteenth Amendment was informed by the Equal Protection Clause, although he does not say exactly how. *Id.* at 2602-03. For a discussion of how these two clauses might be aligned, see Vincent J. Samar, *At the Intersection of Due Process and Equal Protection: Expanding the Range of Protected Interests*, 68 CATH. U. L. REV. 87 (2019).

194. See *Muskrat v. U.S.*, 219 U.S. 346 (1911) (The Court has interpreted U.S. CONST. art. III, § 2, cl. 1 to require a real case or controversy, before a decision can be rendered.).

195. See *Controversy*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/controversy> (last visited July 15, 2019).

196. The Justices forming the majority in *Griswold* disagreed as to whether the right was in the penumbra of the First, Third, Fourth, Fifth, and Ninth Amendments, 381 U.S. at 484 (Douglas,

decisions may appear somewhat open-ended, though they are not necessarily unprincipled. As will be shown below, a framework guides interpretations at this level and is not confined to either Originalism or open to the possible indeterminacy that might be characteristic of a common law-like, living Constitution approach.

The second level for interpretation concerns structural matters. The Constitution provides very specific institutional structures for the architecture of the federal government, and identifies specific powers each branch of that structure—legislative, executive, and judicial—is entitled to exercise.<sup>197</sup> All other matters are left to be resolved by either Congress or the state legislatures.<sup>198</sup> Since this level represents the thoughts of the Framers to specifically guarantee the protection of liberty, and later, after passage of the Reconstruction Amendments, both liberty and equality, it bears a presumption of legitimacy under constitutional norms.<sup>199</sup> That is to say, if the original institutional structures set out by the Framers were thought necessary to secure liberty and later to secure both liberty and equality, then insofar as these norms remain salient, the structures that support them should remain intact. Consequently, at this level, major changes of structure would most likely occur only if there was a significant change in the norms supported, and even then, they would likely continue by shifting their support to a new set of replacement norms, unless impracticable. Consequently, a total demise of these structures would require a constitutional amendment following the procedures in Article V.

Here, it is certainly reasonable to suppose that, at the boundaries where structures fail to adequately guarantee constitutional norms, adjustments may be needed regarding the way the Constitution is written. For example, the Twelfth Amendment continues the earlier Article II requirement for the election of the President and Vice President by a vote of the Electoral College.<sup>200</sup> It added the requirement that the Electors designate who they were voting for President from whom they were selecting as Vice President. This was to prevent a future election from occurring, like the 1800 election between Thomas Jefferson and Aaron Burr that was forced into the United States House of Representatives because both candidates received the same

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J. plurality); or in the Ninth Amendment reservation of rights “retained by the people,” *Id.* at 499 (Goldberg, J. concurring); or “implicit in the concept of ordered liberty” of the Fourteenth Amendment, *Id.* at 500 (Harlan, J. concurring).

197. See generally U.S. CONST. arts. I, II, III.

198. See U.S. CONST. amend. X.

199. See BOBBITT, *supra* note 1, at 13, 4 (Bobbitt’s historical and textual modalities fit within this second level of interpretation provided the institutions are able to function adequately to guarantee the protection of constitutional norms.).

200. Compare U.S. CONST. amend. XII (1804) with *id.* art. II, §1, cl. 3 (1789).

number of electoral votes, notwithstanding that the electors themselves had intended Jefferson to be President and Burr to be Vice President.<sup>201</sup>

The third level for constitutional interpretation concerns innovations to meet changing social conditions. Thomas Jefferson had suggested the need to adapt the Constitution to meet changing circumstances, without referring to the amendment process.<sup>202</sup> In an important letter to Samuel Kercheval, in 1816, seven years after serving as President, Jefferson wrote:

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change, with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when he a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>203</sup>

The progress anticipated by Jefferson arrived a century later with the advent of the Great Depression and the rise of the regulatory state in which Congress delegated some of its legislative authority to specific agencies to make rules to protect individuals' economic and social well-being.<sup>204</sup> Three examples are presented for illustration. In 1913, Congress created the Federal Reserve System to make monetary policy and to supervise banking by transferring some of its constitutional authority, "[t]o coin Money [and] regulate the Value thereof," to a Board that would oversee private banking in

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201. See Amendment XII in *The Constitution of the United States: Analysis and Interpretation*, LIBRARY OF CONGRESS, <https://www.congress.gov/constitution-annotated/> (last visited June 14, 2019).

202. *Letter to Samuel Kercheval*, Monticello, July 12, 1816, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, *supra* note 90, at 674.

203. *Id.*

204. *5.1 Administrative Agencies: Their Structures and Powers* in *INTRODUCTION TO THE LAW OF PROPERTY, ESTATE PLANNING AND INSURANCE*, [https://saylordotorg.github.io/text\\_introduction-to-the-law-of-property-estate-planning-and-insurance/s08-01-administrative-agencies-the-ir-.html](https://saylordotorg.github.io/text_introduction-to-the-law-of-property-estate-planning-and-insurance/s08-01-administrative-agencies-the-ir-.html) (last visited June 14, 2019).

the United States.<sup>205</sup> In 1933, Congress adopted the Agricultural Adjustment Act “to stabilize production in agriculture by offering subsidies to farmers to limit their crops.”<sup>206</sup> Although the Act would eventually be held unconstitutional as a violation of the Tenth Amendment, the Court in that case adopted a view previously set forth by Alexander Hamilton “that Congress could tax and spend for any purpose that it believed served the general welfare, so long as Congress did not violate another constitutional provision.”<sup>207</sup> The following year, the Court upheld Congress’ creation of the Social Security Act under its broad taxing and spending authority.<sup>208</sup>

Were these violations of Article I’s statement, “[A]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives[?]”<sup>209</sup> A key question surrounding the Tenth Amendment is whether it provides “a judicially enforceable limit on Congress’s powers.”<sup>210</sup> The Court has at times vacillated, sometimes finding that “the Tenth Amendment is not a separate constraint on Congress, but rather, is simply a reminder that Congress only may legislate if it has authority under the Constitution.”<sup>211</sup> At other times, the Court has found “that the Tenth Amendment protects state sovereignty from federal intrusion.”<sup>212</sup> Surely, at the time it was adopted, changes in the economies of other countries did not so clearly and often implicate changes in the United States economy.<sup>213</sup> Given the uncertainty of the future, is it reasonable to suppose that the Framers meant to create a Constitution and Bill of Rights that would be frozen by its structures to only being able to meet then current social and economic conditions?<sup>214</sup> Surely, Jefferson, who

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205. U.S. CONST. art. I, §8, cl. 5; see Federal Reserve Act of 1913, Pub. L. 63-43, ch. 6, 38 Stat. 251 (1913), amend. 1933 Banking Act, Pub. L. 73-66, 48 Stat. 162.

206. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 274 (3d ed. 2006) (citing *U.S. v. Butler*, 297 U.S. 1 (1936)); see U.S. CONST. art. I, § 8.

207. CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, *supra* note 206, at 274 (citing *Butler*, 297 U.S. at 65-66 (1935)).

208. See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937). Note: Bobbitt’s structural and prudential modalities can be seen to play an important role here. See BOBBITT, *supra* note 1, at 14, 15, 16.

209. U.S. CONST. art. I, § 1, cl. 1.

210. CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, *supra* note 206, at 312.

211. *Id.* at 313.

212. *Id.*

213. See M. Ayhan Kose, Csilla Lakatos, Franziska Ohnsorge, & Marc Stocker, *Understanding the Global Role of the U.S. Economy*, VOX CEPR POLICY PORTAL (Feb. 27, 2017), <https://voxeu.org/article/understanding-global-role-us-economy>.

214. In *Wayman v. Southard*, 23 U.S. 1, 43 (1825), Chief Justice Marshall distinguished “important subjects,” which must be entirely regulated by Congress from “mere details,” the latter

perceived himself to be a constitutional strict constructionist, did not think so, as he himself went ahead with the Louisiana Purchase when that unexpected opportunity came his way during his presidency.<sup>215</sup>

Granted, there is always the Article V amendment route. However, that approach is very time-consuming and may elicit concerns outside of the immediate subject matter.<sup>216</sup> If the Constitution created a government that would endure, then one duty for the Supreme Court would be to check on whether a change in interpretation of some provision of the Constitution was necessary to the overall well-being of the United States as prescribed in the Preamble, and was not specifically violative of any other provision. Moreover, if anyone might worry that allowing such changes might be too dangerous to liberty, consider Professor Ackerman's point, that the third republic of the United States—the one that began with Franklin D. Roosevelt's New Deal—was approved by a significant number of Americans who elected and re-elected this Democratic president, and also provided him in his first re-election a decisive Democratic majority in Congress that would eventually lead to “the recognition by all three branches that *the People had spoken*.”<sup>217</sup>

## VII. Affirming Human Rights

Up to this point, the priority for constitutional interpretation has been to promote constitutional norms, especially those affording fundamental human rights, while also allowing for the possibility that the set of norms might be expanded or adjusted as to their relevant scope or contents to meet changing circumstances, so long as they do not become too distant from existing norms. Secondarily, constitutional interpretation was to keep in place the basic institutional structures created by the Framers, provided these

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of which Congress could delegate. In *Mistretta v. United States*, 488 U.S. 361, 372 (1989), the Supreme Court applied an “intelligible principle” test that required Congress to clearly delineate the public policy it was applying and the boundaries of the delegated authority.” In *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1984), the Court held that since Congress did not express a clear intention when it used the phrase “statutory source” in the Clean Air Act, the agency’s construction of the term “source” was a reasonable policy choice that must be given deference. See also Ganesh Sitaraman, *Our Constitution Wasn’t Built for This*, N.Y. TIMES OPINION (Sept. 16, 2017), <https://www.nytimes.com/2017/09/16/opinion/sunday/constitution-economy.html>.

215. See Adam Kloppe, *The Louisiana Purchase and the Constitutionalism of Thomas Jefferson*, MISSOURI HISTORICAL SOCIETY (Mar. 17, 2015), <https://mohistory.org/blog/the-louisiana-purchase-and-the-constitutionalism-of-thomas-jefferson/>.

216. See *The Amendment Process: Adding a New Amendment to the United States Constitution, Not An Easy Task*, HARRY S. TRUMAN PRESIDENTIAL LIBRARY AND MUSEUM, [https://www.trumanlibrary.org/whistlestop/teacher\\_lessons/3branches/15b.htm](https://www.trumanlibrary.org/whistlestop/teacher_lessons/3branches/15b.htm).

217. See ACKERMAN, *supra* note 95, at 110-11.



structures should continue to serve constitutional norms generally, and to make further adjustments by way of the Article V amendment process. Lastly, constitutional interpretation was to allow for innovation in the creation of new governmental agencies to meet changing conditions that could not have been foreseen by the Framers, but which Congress could institute if approved by the federal courts.

Thus, the important matter of indeterminacy, raised in the previous section, must now be discussed to ensure that additions and adjustments to underlying constitutional norms or innovations to the structures not just be “code” for simply bending to the will of the current legislative majority. The concern in both these instances is to protect important constitutional norms, since the structures exist in order to support and guarantee these norms.<sup>218</sup> Consequently, at the constitutional level, what matters is finding some criteria to determine which additional norms or changes to norms are legitimate, and how to determine what weight they should be afforded. The importance of this question must not be understated, since implicit in the answer will be the way the whole constitutional framework operates. Values are the key, and so determining which values and what weight to afford them is all important. This is also at the core of the debate between Originalists and those who subscribe to a living Constitution. It was also implicit in Buchanan’s concern that the nations that agreed to recognize a set of international human rights only did so because there was no justification for their foundation. That problem now needs to be solved specifically regarding how American constitutional interpretation may move forward.<sup>219</sup>

The approach to be adopted here to resolve the problem of indeterminacy relies on the work of the American moral philosopher, Alan Gewirth. In *Reason and Morality*,<sup>220</sup> Gewirth lays a foundation for a consistent set of human rights that do not beg any question and can operate together.<sup>221</sup> He does this by searching for a moral principle that might underlie such rights. He begins by taking note of the various failed attempts throughout history to provide a non-question begging, adequate justification

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218. THE FEDERALIST No. 39 (James Madison) (In *Federalist* 39, James Madison makes clear the norms that would govern the republican government established by the Convention.).

219. Elsewhere, this issue is discussed in the context of grounding a set of international human rights. See Samar, *supra* note 173, at 40-63.

220. ALAN GEWIRTH, *REASON AND MORALITY* (1978).

221. *Id.* at 21.

for a human rights principle, including intuitionism,<sup>222</sup> institutionalism,<sup>223</sup> interests,<sup>224</sup> intrinsic worth of human beings,<sup>225</sup> and John Rawls' approach of searching for such rights behind a veil of ignorance where representative persons do not know any particular facts about themselves, but only know general facts concerning human motivation, as might be found from the study of psychology or economics.<sup>226</sup> Since all of these approaches fail to provide a determinate justification for moral rights, Gewirth instead uses as his starting point what lies behind any moral rights claim that an agent might make. Note that at this point Gewirth focuses on individual claims, not institutional claims, although what he ultimately arrives at can be applied to institutions in the same way as it is applied to individuals, especially the institution of law. Gewirth remarks that:

Amid the immense variety of [practical] precepts [that set requirements for human action], they have in common that the intention of the persons who set them forth is to guide, advise, or urge the persons to whom they are directed so that these latter

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222. *Id.* at 14. Gewirth's response to arguments based on intuition points out that "[a]ccording to the Declaration of Independence, the unalienable rights of man include life, liberty, and the pursuit of happiness; yet Jefferson accepted the legitimacy of capital punishment, imprisonment, and military conscription. If no qualifications are introduced, two complementary things must be said about the relation between the ideal rights and the actual laws: not only is the relation between these not one of deduction, but they appear to conflict with one another unless modifying considerations are provided." *Id.* at 280.

223. *Id.* at 27 (pointing out that "[t]he primary morality, in this view, is that of 'my station and its duties' as derived from the requirements of groups, so that a person is an 'assemblage of roles:' husband, father, voter, taxpayer, carpenter, union member, proletarian, buyer, bowling-team captain, or more generally a member of some national, religious, ethnic, or racial group or economic class, and so forth.")

224. Gewirth notes "[i]t is sometimes argued that because all persons equally have certain needs or desires, it follows that all persons ought equally to have the means of satisfying these needs or desires. Entirely apart from the gap here between 'is' and 'ought, there is the further difficulty that . . . [inegalitarian ideals] . . . should all be given equal weight." *Id.* at 18-19.

225. Here, Gewirth notes that "[i]n the classic formulation of Thomas Aquinas's natural law theory, there are only two morally right modes of derivation: human laws must be derivable from natural law either by deduction or specification. In the first way human law's prohibition of murder is derived from natural law's prohibition of inflicting evil on other persons; in the second way human law's specification of the death penalty for evildoing is derived from natural law's prescription that evildoers be punished. The trouble with this simple way of relating natural law to human law is that it does not serve to explain the seeming conflicts between the two kinds of law" as, e.g., if the punishment is death. *Id.* (footnote omitted).

226. GEWIRTH, REASON AND MORALITY, *supra* note 220 (stating that "the veil of ignorance, in addition to its obvious non-rational (because noncognitive) features, is, like the assumption of original equality, a way of removing from [representative persons] the rational choosers' consideration certain factors, consisting in their actual empirical inequalities and dissimilarities, that together with their self-interest would strongly influence them to make inegalitarian choices").

persons will more or less reflectively fashion their behavior along the lines indicated in the precepts. Hence, it is assumed that the hearers can control their behavior through their unforced choice as to try to achieve the prescribed ends or contents, although they may also intentionally refrain from complying with the precepts. From this it follows that action, in the strict sense that is relevant to moral and other practical precepts, has two interrelated generic features: voluntariness or freedom and purposiveness or intentionality.<sup>227</sup>

Together, these two generic features of action that underlie all moral and practical precepts (including constitutional precepts) provide for Gewirth an independent ground for a moral principle from which human rights can be derived. Since the analysis for his grounding of human rights is not restricted to any particular institutional arrangement nor limited by any particular religious or cultural precondition, its use, especially when combined with American historical considerations,<sup>228</sup> should be of great help

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227. *Id.* at 26-27. Contra Raz, *Human Rights Without Foundations* in PHILOSOPHY OF INT'L LAW, 324 (Joseph Raz misconstrues Gewirth's justification for human rights when he claims first, that "[Gewirth] ignores the possibility of believing that certain conditions are essential to our life, and even of striving to secure such conditions, without either claiming or having a right to them" and second, by stating that Gewirth believes "that there is a general (overridable) right to freedom because 'freedom is a necessary condition of purposive action'—a claim which is evidently false if it means that, for instance, slaves cannot act purposively." *Id.* Raz's first criticism misconstrues Gewirth's claim that all human actions, insofar as they are purposive, presuppose some pro-attitude or value under which they are undertaken. To deny this would be to contradict oneself. Regarding Raz's second criticism, Gewirth's states that "freedom and well-being (with their bases in voluntariness and purposiveness, respectively), can be distinguished from one another as entering into the general context of action.... Freedom involves a procedural aspect of actions in that it concerns the way actions are controlled as ongoing events. Well-being, on the other hand, while also having a procedural aspect, involves the substantive aspect of actions, the specific contents of these events." ALAN GEWIRTH, SELF-FULFILLMENT 112 (1998). Certainly, no one would consider the slave who acts on behest of his master to be acting truly voluntarily.).

228. See U.S. CONST. amend. I. Anti-Federalists, who are credited with getting the Bill of Rights adopted, contradictorily "favored both government encouragement of religion and liberty of individual conscience." HERBERT STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 64 (1981). In 1779, Thomas Jefferson drafted what would eventually become The Virginia Act for Establishing Religious Freedom (1786), which clearly spoke to freedom of conscience and delineated a separation of church and state. See *Thomas Jefferson and the Virginia Statute for Religious Freedom*, VIRGINIA MUSEUM FOR HISTORY AND CULTURE, <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/thomas-jefferson> (last visited June 25, 2019). Later he would write to the Committee of the Danbury Baptist Association, on Jan. 1, 180: "I contemplate . . . building a wall of separation between Church and State." [https://en.wikipedia.org/wiki/Baptists\\_in\\_the\\_history\\_of\\_separation\\_of\\_church\\_and\\_state](https://en.wikipedia.org/wiki/Baptists_in_the_history_of_separation_of_church_and_state) (last visited June 25, 2019). U.S. CONST. art. VI, § 3 provides: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

in delineating which rights best fit the American constitutional framework. Indeed, as it turns out, because the theory also affords criteria for the resolution of conflicts of rights, it should also be of help in resolving the problem of indeterminacy.

This is how the derivation proceeds. When an agent (i.e., an actor) practically performs an action, her thinking can be expressed linguistically as “I choose to do X for purpose E,” or more simply, “I do X for purpose E.”<sup>229</sup> If the agent is rational, then from her standpoint, dialectically, “E is good” is a claim that can be associated to her *qua* agent.<sup>230</sup> This is true even where the action is arbitrarily chosen and has no moral, legal, or prudential worth.<sup>231</sup> From this it follows, the agent values her voluntariness or freedom without which she could not act,<sup>232</sup> and her purposiveness or well-being without which she could not achieve the goal for which she acts.<sup>233</sup> Well-being can be separated into three levels. Basic well-being is the precondition without which one could not act such as life, physical integrity and mental equilibrium.<sup>234</sup> Non-subtractive well-being includes the condition for maintaining one’s current level of purpose fulfillment, which is undermined when one is lied to, defrauded or a promise is broken.<sup>235</sup> Additive well-being is the condition required for increasing one’s level of purpose fulfillment;<sup>236</sup> these include adequate health care, a minimal living wage, and education.<sup>237</sup> Thus, because freedom and well-being are necessary to an agent doing X for purpose E, from the agent’s point of view, she logically claims rights to these generic goods by her very actions.<sup>238</sup> Indeed, if she were to deny “I have rights to freedom and well-being,” the agent would also have to deny “all other persons ought at least to refrain from interfering with my freedom and well-being” because rights, in the relevant sense here, are correlative with duties.<sup>239</sup> This would lead to a contradiction if she also accepts “My freedom and well-being are necessary goods,” which the agent must accept; “for by virtue of regarding [her] purposes as good the agent must also a fortiori value [her] freedom and well-being, as required for achieving any of [her]

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229. GEWIRTH, REASON AND MORALITY, *supra* note 220, at 42, 49 (1978).

230. GEWIRTH, REASON AND MORALITY, *supra* note 220, at 44, 49.

231. *Id.* at 51, 75-76.

232. *See id.* at 52.

233. *See id.* at 53-54.

234. *See id.* at 54.

235. *See id.* at 54-56, 233.

236. GEWIRTH, REASON AND MORALITY, *supra* note 220, at 56.

237. *See id.* at 240, 243-44.

238. *See id.* at 63-64.

239. *Id.* at 80.

purposes.”<sup>240</sup> However, “the objects to which the agent necessarily claims rights are only those goods that are truly necessary for [her] action or [her] successful action *in general*;” it would not include, for example, “I must have a motorcycle.”<sup>241</sup>

Up to this point, Gewirth has succeeded only in establishing that any agent *qua* agent must logically claim, from her own internal conative standpoint, rights to the generic and necessary conditions of her action. This prudential standard is different from a moral standard. “Morality . . . is primarily concerned with interpersonal actions, that is, with actions that affect persons other than their agents.”<sup>242</sup> Thus, to advance the agent’s claim to a moral level, Gewirth must further establish a moral principle in which all other prospective purposive agents “logically must acknowledge certain generic obligations. Negatively, [s]he ought to refrain from coercing and from harming [her] recipients; positively, [s]he ought to assist them to have freedom and well-being whenever they cannot otherwise have these necessary goods and [s]he can help them at no comparable cost to [her]self[.]”<sup>243</sup> That principle, which Gewirth calls the Principle of Generic Consistency (“PGC”) is a “categorical” moral principle.<sup>244</sup> It states: “[a]ct *in accord with the generic rights of your recipients as well as yourself*.”<sup>245</sup> The way he reaches this moral standard is as follows.

The agent’s prudential claim gives rise to a moral claim because “‘I have rights to freedom and well-being’ entails ‘All other persons ought to respect my freedom and well-being.’”<sup>246</sup> And since any agent can make this same claim for the sufficient justifying reason of just being an agent, it can be universalized to “[a]ll prospective purposive agents have rights to freedom and well-being.”<sup>247</sup> Thus, although the PGC was derived dialectically and cannot be separated from its dialectical linkage, Gewirth is able to assert, that the principle, now standing by itself, requires that “every agent logically must accept that [s]he ought to act in accord with the generic rights of [her] recipients as well as [her]self.”<sup>248</sup> The latter follows from the fact that “[t]he PGC is a product not of ignorance, but rather of rational awareness of what logically follows from being an agent, so that its

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240. *Id.*

241. *Id.* at 82 (italics added).

242. GEWIRTH, REASON AND MORALITY, *supra* note 220, at 129.

243. *Id.* at 135.

244. *Id.*

245. *Id.* at 135.

246. *Id.* at 146.

247. *Id.* at 147.

248. GEWIRTH, REASON AND MORALITY, *supra* note 220, at 155.

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obligatoriness is not overcome, but rather is established and reinforced by rational understanding of its basis.”<sup>249</sup>

Additionally, the PGC affirms positive as well as negative rights. “The negative rights require that limitations not be imposed by social conventions or political power on persons’ ability to aspire realistically to whatever goals their inherent capacities may render feasible . . . .”<sup>250</sup> “The positive rights require social arrangements whereby persons are helped to develop their abilities of aspiration-fulfillment so long as they cannot do so by their own efforts.”<sup>251</sup> For purposes of this article, acknowledging the logical grounding of the PGC as a non-question begging standard for morality identifies what human rights exist, along with how conflicts among these rights are rationally resolved. The distinction between identifying which rights are human rights and showing how conflicts among these rights are resolved can now be set forth.

Because the PGC derives from the conviction that any agent would logically have to acknowledge on pain of contradiction that she has rights to freedom and well-being,<sup>252</sup> and because all human beings capable of voluntary purposive action are, at least, prospective agents,<sup>253</sup> it follows that the PGC can provide a baseline for determining human rights whether or not present in the Constitution or in international documents generally.<sup>254</sup> The baseline calls attention to the fact that the rights exist by virtue of their being necessary for prospective purposive agency, regardless of whether there is a need for their actualization at the moment or even whether the need can be fulfilled.<sup>255</sup> This is particularly important in relation to social arrangements. Remember, it is not a specific claim to freedom or well-being, as the earlier motorcycle example represents, that the PGC protects, but what an agent *qua* agent would necessarily have to claim merely by being an agent. Here, is where more specific human rights may get instantiated as necessary for the continuation of human beings as prospective purposive agents. It is here also that the rights to freedom and well-being may apply to guide answers to situations where purposive agency in general would otherwise be

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249. *Id.* at 156.

250. GEWIRTH, SELF-FULFILLMENT, *supra* note 227, at 94.

251. *Id.*

252. *See* GEWIRTH, REASON AND MORALITY, *supra* note 220, at 103.

253. *See id.* at 141. Elsewhere, I discuss the situation of infants, very young children, and the fetus. *See generally* Vincent J. Samar, *Personhood Under the Fourteenth Amendment*, 101 MARQ. L. REV. 287 (2017).

254. *See* GEWIRTH, REASON AND MORALITY, *supra* note 220, at 64 (noting that the *generic rights* “are ‘human rights’ in that they are rights that all humans have as human agents”).

255. *Id.* at 317.

threatened.<sup>256</sup> The Universal Declaration of Human Rights<sup>257</sup> generally, along with the Covenant on Civil and Political Rights,<sup>258</sup> and the Covenant on Economic, Social and Cultural Rights<sup>259</sup> (discussed above<sup>260</sup>) in particular, provide good examples of where states should be expected to assure the protection of these rights. The former is aimed at providing individual freedom and protection from coercive practices by governments that do not try to protect human rights. The latter is aimed at supporting well-being to the extent the governments in question have the resources necessary to render that support. The Kantian requirement that *Ought implies Can* governs the application of the latter covenant.<sup>261</sup> The same could be said for other covenants the various members of the United Nations adopt to support human rights.<sup>262</sup> It also fits our earlier discussion of values that motivated the Framers' adoption of the Bill of Rights, especially the value of guaranteeing freedom from the possibility of an oppressive and coercive government. A similar argument could be made for the value of equality that motivated the adoption of the Fourteenth Amendment, especially in the context of assuring former slaves' privileges and

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256. An argument for the derivation of specific human rights from a more general moral standard and from there an even more specific set of gay rights can be found at Vincent J. Samar, *Gay Rights as a Particular Instantiation of Human Rights*, 64 ALBANY L. REV. 983 (2001).

257. 217 (III), Universal Declaration of Human Rights (Dec. 10, 1948).

258. Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

259. Int'l Covenant on Economic, Social and Cultural Rights, 1967, 993 U.N.T.S. 3.

260. Section 5, *supra*.

261. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 473 (Norman Kemp Smith trans., MacMillon and Co., Ltd., 2d ed. 1929) (1781).

262. See, e.g., Slavery Convention, Sept. 25, 1926, 60 U.N.T.S. 253, as amended by Protocol Amending Slavery Convention, Dec. 7, 1953, 182 U.N.T.S. 51; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention on Decent Work for Domestic Workers, June 16, 2011, ILO No. 189; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, 6 I.L.M. 78; Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 350 (CERD); G.A. Res. 3068 (XXVIII), Convention on the Suppression and Punishment of the Crime of Apartheid (Nov. 30, 1973); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 U.N.T.S. 222 (May 25, 2000); Protocol on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. A/Res/54/263 (2000); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (CEDAW); G.A. Res. 46 (XXXIX) 1984) annex, Convention Against Torture and Other Cruel and Inhuman Degrading Treatment of Punishment, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (Dec. 10, 1984), as modified, 24 I.L.M. 535 (Oct. 23, 1985); Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, (U.S. signed but not ratified); and International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2715 U.N.T.S.

immunities as citizens of the United States and states where they lived.<sup>263</sup> Here, one sees that the value of equality not only guarantees equal freedom but also, when considered in context of opportunities, affords the same legal opportunities other citizens possess.<sup>264</sup> Obviously, historical examples that would illustrate this development took many decades,<sup>265</sup> and the extension of these rights to other groups did not happen quickly, which included women,<sup>266</sup> illegitimate children,<sup>267</sup> and gays and lesbians.<sup>268</sup> Thus, this historical development is consistent with what the PGC requires as a grounding principle to protect freedom and well-being of all persons.

Having thus shown the PGC can identify specific human rights, the question that must now be considered is, what purpose might it serve in cases of conflicts of rights? It may be helpful to note how the different levels of well-being discussed above allow for two ways to resolve conflicts of rights among individuals. Where the conflict is at the same level, as when an aggressor uses his freedom to attack a basic right to well-being of his recipient, the PGC recognizes a transactional inconsistency created by the aggressor's implicit claim that his rights are more valuable than his recipient's.<sup>269</sup> In that instance, the recipient, whose rights are the same as the aggressor because both are prospective purposive agents, can

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263. In *Palmore v. Sidoti*, 466 U.S. at 429, the Court struck down a state court's order denying a mother custody of her child because she married a man of a different race. In that case, Chief Justice Burger wrote: "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race," effectively knocking out any use of race to gain a privilege under the law. *Id.* at 432.

264. See *Palmore v. Sidoti*, 466 U.S. at 432.

265. In *Plessy v. Ferguson*, 163 U.S. at 537, the Court upheld a Louisiana law that mandated "separate but equal facilities" on railroad cars for blacks and whites, a judgement that would later be implicitly overruled in *Brown v. Board of Education*, 347 U.S. at 483, when the Court held segregation in the public schools to be unconstitutional. Importantly, in that decision Chief Justice Warren's opinion began by explaining that the constitutionality of the issue of segregation could not be resolved based on the Framers' intent because the historical sources "[a]t best...are inconclusive" and did not fit the way education of whites in the South had changed from originally being in the hands of private groups. *Id.* at 489-90. The Court then took note of the recent fact that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children" especially "when it has the sanction of the law." *Id.* at 494.

266. See *Craig v. Boren*, 429 U.S. 190 (1976) (where the Supreme Court applied intermediate scrutiny for gender classifications); see also *U.S. v. Va. Military Acad.*, 518 U.S. at 515.

267. See *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding unconstitutional a state statute that required only the consent of the mother and not the father to place for adoption a child born out-of-wedlock).

268. See *Lawrence v. Texas*, 539 U.S. at 558 (upholding a due process liberty right for same-sex intimate associations); see also *Obergefell v. Hodges*, 135 S. Ct. at 2071 (holding that the fundamental right to marry includes the right to a same-sex marriage).

269. See *GEWIRTH, REASON AND MORALITY*, *supra* note 220, at 213.



legitimately protect herself, even by the use of deadly force if warranted.<sup>270</sup> In short, self-defense is morally justified.<sup>271</sup> On the positive side, because “the agent necessarily holds that [s]he has a right to the basic goods that are necessary preconditions of action, so [s]he must hold that other persons also have this basic right.”<sup>272</sup> This gives rise to a positive duty to help where, for example, one might be drowning, and the potential rescuer could save the person at no comparable costs to herself.<sup>273</sup> Both examples illustrate “the entitlements to the goods of the parties affected, as ascertained by the consideration of equal rights to the necessary conditions of agency.”<sup>274</sup> But what about cases where the conflict may not involve basic or even the same level of well-being but loss, for example, of some non-subtractive well-being in order to preserve basic well-being?<sup>275</sup> In that instance, the degree of *needfulness* of action must be taken into account.<sup>276</sup> As with the duty to rescue, where the harm is especially great to purpose fulfillment, the duty to prevent the harm takes on greater significance.<sup>277</sup> An obvious historical example would be lying to the Gestapo about where the Jewish family might be hiding to prevent their being murdered. Although the lie lowers the level of the Gestapo’s non-subtractive well-being to fulfill their purposes, because their purposes are to destroy basic rights of innocent people, one is morally permitted to lie and, if one can do so at no comparable harm to oneself, the lie is obligatory.<sup>278</sup>

But the story does not end here. The larger issue, and the issue for this Article, is how these criteria might operate to provide grounds for interpretation of the United States Constitution and laws, both of which will likely implicate human rights. In this regard, it is worth noting that the PGC applies to institutions indirectly.<sup>279</sup> This is especially important to note, since “social rules [that ‘involve complex interactions among many persons’] may require that agents [sometimes] violate the PGC’s direct applications.”<sup>280</sup>

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270. *Id.*

271. *Id.*

272. *Id.* at 217.

273. See GEWIRTH, REASON AND MORALITY, *supra* note 220, at 217-19.

274. *Id.* at 216.

275. *Id.* at 236.

276. Gewirth had earlier noted: “The loss of dispositional or long-range freedom, such as by imprisonment or enslavement, makes all or most purposive action impossible, while to lose some occurrent or particular freedom debars one from some particular action but not from all actions.” *Id.* at 52.

277. See *id.* at 236-37.

278. See *id.* at 237; see also GEWIRTH, SELF-FULFILLMENT, *supra* note 227, at 90.

279. GEWIRTH, REASON AND MORALITY, *supra* note 220, at 272.

280. *Id.* at 272-73.

Also, “associations regulated by social rules” allow for “relatively stable, standardized arrangement . . . that is socially approved on the ground (whether justified or unjustified) of its value to society.”<sup>281</sup> In the case of the democratic state, the freedom component of the PGC is met when the law depends on rational consent through the frameworks of the PGC.<sup>282</sup> Thus, consensual procedures are required to operate within the constitutional structure at four distinct levels: “(1) the minimal state with the criminal law, (2) the supportive state with its need for other laws and officials, (3) its constitutional structure providing for certain consensual decision-procedures, [and] (4) the specific laws and officials determined by use of these procedures.”<sup>283</sup>

“The main point of this constitutional determination by the PGC consists of the equal distribution of the civil liberties.”<sup>284</sup> These include “especially the actions of speaking, publishing, and assembling and associating with others.”<sup>285</sup> The method of consent, however, “cannot rightly transgress the constitution which, through the PGC provides its justification as a procedure whose results are binding.” provided the Constitution itself is morally justified by the PGC.<sup>286</sup> For that to be the case, the Constitution “must require that there be equal freedom to participate in the political process for all members of the society, so that the civil liberties must be equally preserved for all.”<sup>287</sup> Here it is important to note:

[T]he equality of political participation that [the method of consent] makes possible may be more formal than real. In particular, differences of economic power may strongly influence the degree of effectiveness with which different persons and groups participate in the political process. Hence, with a view to the equality of generic rights, it is a matter of great importance what steps are to be taken to ensure that other serious harms are not inflicted by those who are superior in economic or other power on those who are inferior in these respects, and that the opportunities available to the latter for obtaining well-being are more nearly equalized.<sup>288</sup>

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281. *Id.* at 274.

282. *Id.* at 304-06.

283. GEWIRTH, REASON AND MORALITY, *supra* note 220, at 306.

284. *Id.* at 307.

285. *Id.* at 308.

286. *Id.* at 310.

287. *Id.*

288. *Id.* at 311.

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The requirement that real consent not be undermined by differences in economic power or other power opens the door to the application of the well-being component of the PGC to institutions of the state in order to correct problems of inequality wherever they may surface.

What distinguishes the minimal state from the supportive state is the fact that it is no longer sufficient to merely protect basic and non-subtractive well-being, as had been the case when *Lochner v. New York* was decided.<sup>289</sup> Now the claim is more robust. For human rights to flourish, certain grounding conditions represented by the PGC's additive goods will be necessary for the exercise and advancement of human self-fulfillment. An example of these grounding conditions was the Court's willingness to accept the constitutionality of New Deal legislation following the Great Depression of the 1930s. The purpose of this legislation was to ensure the economic and social survival of the society.<sup>290</sup> These grounding conditions will only achieve their goal of ensuring social well-being, however, if the rules by which they are administered have three kinds of content:

First, they must provide for supplying basic goods, such as food and housing, to those who cannot obtain them by their own efforts. Second, they must try to rectify inequalities of additive well-being by improving the capabilities for productive work of persons who are deficient in this respect. Education is a prime means of such improvement, but also important is whatever strengthens family life and enables parents to give constructive, intelligent, loving nurture to their children. The wider diffusion of such means is a prime component of increasing equality of opportunity. Third, the rules must provide for various public goods that, while helping all the members of the society, serve to increase the opportunities for productive employment.<sup>291</sup>

These rules, which the PGC provides for determining the structure of the supportive state, must in the first instance govern the Legislative Branch,

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289. See ACKERMAN, *supra* note 95, at 15 (“Courts of the *Lochner* era hedged their libertarian principles with a number of exceptions, including one involving ‘protection of public morals’” so even the limited libertarian principles were not always followed.).

290. See *W. Coast Hotel v. Parrish*, 300 U.S. at 399 (upholding a minimum wage law for women and, in effect, expanding the government’s power to regulate beyond public safety, health, or morals to now encompass “[t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power and thus relatively defenseless against the denial of as living wage . . .”).

291. GEWIRTH, REASON AND MORALITY, *supra* note 220, at 314.

since it is that branch which has the constitutional authority to bring these contents into reality. Although there may be disagreement as to the best way to bring about these conditions, so long as the methods chosen are reasonable in that they do not violate other basic rights (as might be present in other constitutional provisions), they should be constitutionally allowed. This is true even if the methods should require innovations, such as the creation of new agencies to resolve complex social and economic problems. The role of the courts in these circumstances is to prevent only unreasonable restrictions on the Legislature's ability to do its job. That means that challenges concerning legislative overreach, for instance, as with Congress mandating health care or minimum wage requirements, must be closely reviewed and not held invalid, so long as the needs are real and the legislative choices are consistent with constitutional and human rights concerns. As noted earlier, the Constitution's legitimacy draws its authority from how well the structures and norms that were adopted at the time of ratification continue to fit with whatever adjustments or additions might be appropriate for today's moral understanding of the proper governance of the state.

### VIII. Human Dignity

So far, this discussion has focused on the role that human rights ought to play in constitutional interpretation. But what does this mean for human dignity, which, as explained below, has already been recognized as an important constitutional value? One might begin explaining human dignity by distinguishing "self-respect," as a realistic assessment of having satisfied one's moral obligations, from "self-esteem," which is an affirmation of one's specific abilities to fulfill one's own desires or goals. The latter might include following a personalist morality beyond what human rights requires.<sup>292</sup> Dignity then, as a moral virtue, represents the self-respect one has for oneself, and the respect one deserves from others for satisfying reasonable moral obligations as would be required by a system of universal morality, such as is offered by the PGC.<sup>293</sup> Exactly how dignity and universal morality are implicated in constitutional interpretation, however, now needs explanation.

First, it should be noted "that dignity is a humanistic characteristic."<sup>294</sup> As Gewirth points out, "it is in reason and voluntariness or free will as generic features of action that the basis of human dignity is to be found."<sup>295</sup>

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.292 GEWIRTH, SELF-FULFILLMENT, *supra* note 227, at 94-95.

293. *Id.*

294. *Id.* at 168.

295. *Id.*

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For the worth assigned to human dignity arises because humans are capable of being the authors of their own actions, as well as being moral agents capable of controlling their own behavior. Humans would not have much dignity if the state did not afford them the ability to make their own choices. Their dignity resides in their autonomy. Hence, humans properly take ownership of their own actions, when their actions are not coerced, and, consequently, subject themselves to praise or blame for the choices they make. Gewirth describes this relation between dignity and authorship of one's own actions this way:

An ineluctable element of agent-estimated worth, then, is involved in the very concept and context of human purposive action. Now there is a direct route from this ascribed worth of the agent's purposes to the worth or dignity of the agent himself. For he is both the general locus of all the particular purposes he wants to attain and also the source of his attribution of worth to them. Because he is the locus and source, he must hold that the worth he attributes to his purposes pertains a fortiori to himself. They are *his* purposes, and they are worth attaining because *he* is worth sustaining and fulfilling, so that he has what for him is a justified sense of his own worth.<sup>296</sup>

Gewirth goes on to point out that the "worth or dignity the agent logically attributes to himself by virtue of the purposiveness of his actions, he must also attribute to all other actual or purposive agents. For their actions have the same general kind of purposiveness that provides the ground for his attribution of dignity to himself."<sup>297</sup> Consequently, every agent, in acknowledging she has rights to freedom and well-being, acknowledges all other humans have these same rights. This imposes "a universalist moral restriction on the purposes she is justified in regarding as worth pursuing, and, hence, too, on her ascription of worth or dignity to herself."<sup>298</sup> It also means that law must be sensitive to this justification and not punish the legitimate assertion of human rights. Yet, nowhere in Gewirth's analysis does he suggest that the actions satisfying human rights or the presence of human dignity are the same, or even that the latter is a derivative of the former. Rather, what he suggests is that one's *moral* dignity supervenes on one's possession of human rights, along with their willingness to maintain

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296. GEWIRTH, SELF-FULFILLMENT, *supra* note 227, at 169.

297. *Id.*

298. *Id.* at 170.

rights that are consistent with the rights of others.<sup>299</sup> It is this attribution of worth that is dialectically necessary, rather than phenomenology required.<sup>300</sup> And it is this attribution of worth that ultimately applies to all human beings, such that attempts by anyone, including the state, to undermine or be indifferent to it cannot be morally justified.

Perhaps this is why human dignity has now taken hold in constitutional interpretations. Consider *Lawrence v. Texas*, a case challenging a Texas statute that imposed criminal penalties for private same-sex sexual relations of consenting adults with no coercion or overt harm to either party.<sup>301</sup> Justice Anthony Kennedy, writing for the Majority in striking down the Texas statute as unconstitutional, interpreted the Due Process Clause of the Fourteenth Amendment to provide this connection of human dignity to constitutional rights:

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>302</sup>

Kennedy would note later in the opinion that “[t]he petitioners are entitled to respect for their private lives.”<sup>303</sup> Kennedy’s Opinion in this case, as well as the Court’s subsequent same-sex marriage decision in *Obergefell v. Hodges*, suggests that efforts to preserve human rights as part of constitutional interpretation equate with preserving human dignity at the same level; for the constitutional protection of human rights is indeed the constitutional protection of each person’s human dignity.

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299 THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 891 (Robert Audi ed., 2nd ed. 1999) (“The concept of supervenience, as a relation between properties, is essentially this: Properties of type A are supervenient on properties of type B if and only if two objects cannot differ with respect to their A-properties without also differing with respect to their B-properties.”).

300 GEWIRTH, SELF-FULFILLMENT, *supra* note 227, at 169.

301 *Lawrence v. Texas*, 539 U.S. 558 (2003).

302 *Id.* at 567.

303 *Lawrence*, 539 U.S. at 578.

### Conclusion

This Article sought to demonstrate that constitutional interpretation must proceed on the assumption that the Constitution continues to serve as binding higher law cross-generationally only because it continues to be acceptable to the public. Persons who were not alive at the time the Constitution was adopted or for several generations thereafter are, therefore, critical to the Constitution's success in remaining authoritative. If constitutional values are not restricted to only what the Framers wrote or what they may have expected from what they wrote, that success will likely be supported. Success requires that the tradition the original Constitution inaugurated—along with its subsequent amendments and Court interpretations—be able to adjust to an ever-changing economic, social, and cultural world. Incorporating new values, as may be necessary to address concerns that the Framers did not consider nor could have anticipated, must be part of the equation. At the same time, if there is to be an ongoing single constitutional tradition, at least since the adoption of the Reconstruction Amendments, it is necessary that any new values or structures are consistent with what is already present, even if the new values should alter the level of importance previously assigned to those that came before. Consider what happens when a new member is brought into a family by either birth, marriage, or adoption. The new member's presence certainly alters the previous members' participation insofar as they now, if they are to remain a harmonious family, must incorporate the new member into their familial relationships. And the new member, especially when arriving by way of a marriage, will find it necessary, if the family is to flourish, to adjust to at least some of the traditions already present. The result will be that family obligations will change; some will broaden to include the new member's participation, and others may become a bit more distant as the family grows and spreads out both geographically and culturally. Yet, although it may not have the same appearance that would have been recognized by the great-grandparents or even the grandparents, the family remains.

A constitutional tradition is like a thriving family. If it is able to take on new challenges, while still maintaining a healthy respect for the past, it will thrive; otherwise, it will fail, and a new constitutional tradition will be necessary. More importantly, if it is to remain vital, it must allow for changes in the choice of values that are emphasized when circumstances require. Much of this Article has attempted to address this question by incorporating a set of human rights values, along with an equally important set of conflicts of rights, principles that hopefully would be supportable cross-generationally. The Supreme Court must now determine whether it will adopt this approach to constitutional legitimacy, and to the American public whether it will make the Constitution succeed or fail.