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Michael W. McConnell

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A MORAL REALIST DEFENSE OF CONSTITUTIONAL DEMOCRACY

MICHAEL W. MCCONNELL*

Constitutional democracy is that form of government in which representative institutions, acting through constitutionally-prescribed procedures, have the authority to make legally-binding decisions about some (though not all) matters. The system is "democratic" because representative institutions are ultimately majoritarian. It is "constitutional" because it is constituted by some source of enacted fundamental law that defines and limits the authority of the governing institutions, reserving some matters to the private sphere. Congress may regulate commerce,¹ but it may not establish a national church.² Within the scope of authority defined by the Constitution, the decisions of representative institutions must be enforced by executive officers and judges, whether or not they agree with the substance of the decisions. The Constitution’s own term for “constitutional democracy” is the “Republican Form of Government.”³

The doctrine of “moral realism,” associated with the much older conception of natural right, holds that there is an objective standard of right against which we can judge the decisions made by representative institutions. A decision reached by the legislature, within the scope of its constitutionally-delegated authority and through constitutionally-prescribed procedures, can nonetheless be said to be wrong. Democratic legitimacy is no guarantee of right results.

The question raised by Professor Sotirios Barber’s essay⁴ is whether a belief in natural right is compatible with constitutional democracy. He contends, in effect, that it is not. He argues that moral realism compels the conclusion that judges and other officials are entitled (under the ninth amendment or other “open-ended” provisions of the Constitution) to overturn the decisions of representative institutions on the basis of their

* Assistant Professor of Law, University of Chicago Law School. Many thanks are due Gerhard Casper, Larry Kramer, Douglas Laycock, Richard Posner, and Cass Sunstein for helpful comments on an earlier draft.

1. U.S. CONST. art. I, § 8, cl. 3.
2. Id. at amend. I.
3. Id. at art. IV, § 4.
own understanding of natural right, even if that understanding has no basis in the text, structure, or history of the Constitution, the sense of the community, the precedents of the courts, or other sources of positive law. Indeed, he takes the position that to confine the authority of judges to any set of "sources" whatsoever is "an error." Any particular conception of natural right, including the Constitution's, will inevitably fall short of natural right itself: all are "defeasible" and "fall short of the . . . aim of simple justice." Therefore, Professor Barber concludes, those who believe in natural right must oppose any attempt to use the Constitution as the sole basis for limits on governmental power. A moral realist must believe in judicially-enforceable "unenumerated rights"—rights that have their source beyond the Constitution, in natural right itself.

I do not dispute Professor Barber's belief in natural right. I am, under his definition, a moral realist: one who believes in "rights as in some sense real or natural, not just conventional; rights as connected in some way with what our most reflective and dedicated thinking proposes about the truth concerning simple justice or human nature." But I do not agree that a belief in natural right compels a belief in judicially-enforceable unenumerated rights. Professor Barber's fundamental fallacy is to confuse the willingness to recognize the authority of representative bodies with the belief that "in principle the community can do no wrong." Proponents of constitutional democracy do not accede to the decisions of representative institutions because they are always right. We do so because the republican form of government seems more likely than the alternatives (including rule by judges) to reach right results over time in a wide range of cases. We are willing to bear the risk that the community will sometimes be wrong because the risks posed by the alternatives are worse.

Professor Barber directs his argument almost solely to the importance of natural rights, while giving little attention to the institutional

6. Barber, supra note 4, at 69-70.
7. Id. at 83 n.48.
8. Id. at 80.
9. Id.
10. Id. at 81
11. Id. at 70.
12. Id. at 75.
question of how they can be identified and implemented. This is a peculiar and dangerous oversight. It is peculiar because the central questions addressed by our Constitution have to do with the allocation of power. It is dangerous because the power to identify and implement natural rights, independent of constitutional principles or majoritarian sanction, is an awesome power. Constitutional democracy is based in no small part on the insistence that no one can be trusted with unrestrained power. Professor Barber's position is that government officials who assert power in the name of natural right are answerable to no principle of positive law, and that judges who assert such power are answerable neither to any principle of positive law, nor to any other branch of government, nor to the electorate.

There may be arguments for reading the ninth amendment expansively, but moral realism does not compel this interpretation. Rather, in the last section of this essay I will present reasons why moral realists, in particular, might prefer constitutional democracy to Professor Barber's alternative.

I

Most modern judges and commentators perceive some degree of "open-endedness" in the Constitution, for various reasons and with various justifications, some stronger than others. Very few, and certainly not Professor Barber's favorite target, Robert Bork, would limit constitutional interpretation to the narrow applications specifically contemplated by the framers.\textsuperscript{13} The discernment of governing principles in the Constitution and their application to new and sometimes unforeseen circumstances requires judgment and discretion. The most we can hope for is that judges will be steeped in the philosophy of the Constitution, and will interpret it in a way that is true to the vision of the framers and ratifiers.

Professor Barber distinguishes himself by advocating open-endedness \textit{in itself}, an open-endedness freed not only from the specific contemplations of the framers but from the very philosophy of the Constitution. He insists on "the elusive nature of justice and the defeasible character of \textit{all} conceptions of justice."\textsuperscript{14} This necessarily includes the conception of justice reflected in the Constitution. Any constraint on the judge's ultimate freedom to do justice is necessarily inconsistent with moral realism, or so he believes. His position may thus be described as \textit{anti-constitu-}

\textsuperscript{13} For a sympathetic account of Bork's position, with supporting citations, see McConnell, \textit{The First Amendment Jurisprudence of Judge Robert H. Bork}, 9 \textit{Cardozo L. Rev.} 63 (1987).

\textsuperscript{14} Barber, \textit{supra} note 4, at 81 (emphasis added).
tional: anti-constitutional because it sets up an authority (the judge's own view of natural right) as superior, as a matter of law, to the Constitution.\textsuperscript{15}

Of course Professor Barber rejects the standard interpretivist position, represented by Judge Bork among others. The interpretivist view is that judges must look to the text, structure, history, and purposes of the Constitution to determine the principles to apply to the circumstances of today. The basis for this view is that all legitimate authority, including that of judges, stems initially from the consent of the governed. Many observers believe this view is too narrow, though often their criticism is directed against a mere caricature rather than against interpretivism at its best.\textsuperscript{16} It is important to note that Professor Barber does not reject interpretivism on the ground that we cannot reliably discern the original meaning, or that it is difficult to know how to apply original meaning to modern circumstances. His objection is much more fundamental: he rejects the very notion that the constitutive principles of government should be decided by the people. The "assertion of community power to define the most basic standards of right and wrong," he says, "would conflict with the presuppositions of our ordinary moral experience."\textsuperscript{17}

To anchor positive law in the will of the people—whether enacted law, tradition, or community moral consensus—is to commit the sin of "conventionalism."

15. If the description "anti-constitutional" seems harsh, consider Professor Barber's frank statement in an earlier work that "one cannot avoid concluding that adherence to the Constitution may prove to be irrational and unjust," S. Barber, \textit{On What the Constitution Means} 49 (1984). If this referred solely to the ultimate right of revolution, as enshrined in the Declaration of Independence, though not the Constitution (see U.S. Const. art. V), this might be unexceptional, though hardly the position of a constitutionalist of any sort. But he goes on to say that "I see no way to avoid the conclusion that circumstances can exist in which honoring the supremacy clause would be irrational and unjust by norms implicit in the Constitution itself." \textit{Id.} at 53. If I understand this statement correctly, Professor Barber believes that government officials, most pertinently judges, even while acting under color of the Constitution, can treat some other source of law as superior to the Constitution as a matter of positive law. This is pure anticonstitutionalism.

16. Justice Brennan, for one, seems to recognize this. In his famous rebuttal to the doctrine of "the intentions of the Framers," Justice Brennan confined his attack to what he called "its most doctrinaire incarnation." Address by Justice William J. Brennan, Jr., Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), \textit{reprinted in The Great Debate: Interpreting Our Written Constitution} 11, 14 (Federalist Society Occasional Paper No. 2, 1986). Indeed, in the same address, Justice Brennan stated that "the very purpose of a Constitution ... [is] to declare certain values transcendent, beyond the reach of temporary political majorities" and that "[o]ne cannot read the text without admitting that it embodies substantive value choices." \textit{Id.} at 16. In so doing, he embraced the central tenet of interpretivism, properly understood: that the Constitution embodies certain unchanging principles that judges have an obligation to enforce, whatever their personal opinions on those principles may be.

17. Barber, \textit{supra} note 4, at 75; see also \textit{id.} at 69 (criticizing Bork's belief that "the Constitution limits the majority's agent-government solely because majorities at the founding and at later moments of constitutional amendment willed it so").
Professor Barber's argument thus bears little resemblance to the current debate over interpretivism; he denounces both sides. Ronald Dworkin he dismisses as a "deep conventionalist." Laurence Tribe is a (mere?) "conventionalist." He has hopes for Michael Perry, but, alas, Perry's theory is "vitiating by [his] ultimate embrace of a conventionalist metaphysics." So is Rogers Smith's. John Hart Ely is "correct" in some respects, but "errs" when he attempts to provide some theory to guide judges in the legitimate exercise of authority under the open-ended provisions of the Constitution. Nor do judges escape the indictment. Professor Barber criticizes Justice Black for his "professed positivism." He does not mention Justice Brennan, but it is easy to guess what he would have to say about a Justice who believes that "[t]he act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought." 

Professor Barber's attack thus goes far beyond the constitutional theory of Robert Bork. He rejects any attempt to cabin judicial discretion through a "strong commitment to precedent." He rejects Justice Brennan's position that some provisions of the Constitution look to an evolving community consensus, or to "rights embedded deeply in a community's moral tradition." He even rejects the expansive variation of this view that would "yield to judges the power to anticipate changes in community morality," even though, to a skeptic, this looks very much like the power to do anything at all. These positions, he says, "share a conventionalist view of constitutional rights because they agree that rights have no source or weight beyond social convention, established or emerging." They are, therefore, no more than a "liberalized form of Bork's basic view."

Indeed, since moral realism implies loyalty to natural right as such, Professor Barber must set his face against any and all limits on judicial discretion, beyond the judge's own conscience. He cannot imagine a constitution, even in theory, that should be permitted to constrain judicial

18. Id. at 72 n.19.
19. Id.
20. Id. at 76 n.27.
21. Id. at 70 n.13.
22. Id. at 80.
23. Id. at 83.
25. Barber, supra note 4, at 83 n.48.
26. Id. at 69.
27. Id. at 70.
28. Id. (emphasis in original).
29. Id. at 69.
decision making. It is not just our Constitution that is deficient, but the very idea of a constitution.

Even if we were to amend the Constitution to incorporate by reference all state constitutional rights, common law rights, rights enumerated in treaties and other international conventions, implied structure-based rights, rights rooted in tradition and conventional morality, rights derived from sacred texts and revealed by divine dispensation, and all other positive and conventional rights in the broadest sense of these terms . . . [i]t would still make sense to say that there are rights beyond those enumerated and incorporated by reference. . . . Because of the elusive nature of justice and the defeasible character of all conceptions of justice, the system's conception of justice, however dense, would fall short of the system's expressed aim of simple justice.30

The judge's own opinion of what is right: that is the only standard Professor Barber can support. Anything else would "fall short of the system's expressed aim of simple justice."31

II

Professor Barber does not defend his position on the basis of the Constitution's language or history. The best he can offer is that "[t]he language and history of the ninth amendment certainly admit, though they may not compel," his interpretation.32 He thus leaves open the possibility that the ninth amendment means precisely what it says, and no more. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."33 In other words: the Bill of Rights, indeed the entire Constitution, is not the only source of individual rights. Common law, state statutes, federal statutes, state constitutions, administrative regulations, municipal ordinances, contracts, familial relationships and other sources all are legiti-

30. Id. at 80-81.
31. Id. at 81.
32. Id. at 76. For a historical argument along similar lines, see Sherry, The Founders' Unwritten Constitution, 54 U. CHI. L. REV. 1127 (1987). Her position, slightly different from Professor Barber's, is that the founders understood and intended the Constitution to be only one of several sources of fundamental law. It is a tribute to the integrity of Professor Sherry's scholarship that she quotes substantial evidence against her own position, while providing ingenious readings to account for it. While this is not the occasion for a full treatment of the historical materials, it is sufficiently relevant to Professor Barber's thesis to quote some of this evidence—statements made at the Constitutional Convention drawing a sharp distinction between constitutional law, which is enforceable by courts, and natural law and justice, which have only normative force. See id. at 1159 (James Wilson stated that "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect."); id. at 1160 n.142 (George Mason stated that the judges "could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course."). See also infra note 51 (quoting statement by James Madison to similar effect).
33. U.S. CONST. amend. IX.
mate bases for positive law rights under our system. The framers thought it useful to express in no uncertain terms that the adoption of a Bill of Rights would not, by negative implication, abolish these rights. Nothing in the language or history of the ninth amendment suggests that the ratiocination of the judge is one of the sources of rights recognizable by positive law. Nor has such a reading ever been the basis of the holding of a majority opinion in the Supreme Court.

Professor Barber's apparent indifference to language, history, and longstanding interpretation makes sense given his philosophy of judicial authority. By Professor Barber's lights, these sources cannot be determinative, for they are mere positive law. The most we could prove from them is that the American people never intended to delegate authority to judges to countermand the decisions of representative institutions on the basis of their own understanding of moral reality. This would not tell us whether, if the public had proper "normative" instincts and could give the matter "full and fair consideration," they would have written a new and improved ninth amendment.

In any event, Professor Barber's contribution to the debate is theoretical rather than textual or historical. He believes he can refute the opposition on the basis of first principles. It is on that level that I therefore will respond. I will leave formulation of a positive theory of the ninth amendment to another occasion.

Professor Barber's attempted refutation of traditional constitutional jurisprudence (which he chooses to call "New Right constitutionalism") is based on a simple misunderstanding. Here is his argument:

If the public should accept Bork's constitutionalism it has to be prepared to claim that, in principle, it can do no wrong, except (for some reason) behave inconsistently with principles of its own making. Such is the upshot of Bork's view that the majority's own will provides the sole legitimate standards for limiting majority will. . . .

. . . .

Bork's constitutionalism is therefore wrong—either simply wrong or wrong with us, wrong in this community. Should spokespersons for this community seriously assert that in principle the community can do no wrong, this community would adjudge them either willful, stupid, shameless, or blasphemous.36

"Bork's constitutionalism," however, does not depend on the transparently silly assertion that the community can do no wrong. It depends on the quite different proposition that within the scope of authority dele-

34. Barber, supra note 4, at 74.
35. Id. at 67.
36. Id. at 74-75 (emphasis in original).
gated to representative institutions by the state and federal constitutions, no other institution has a better claim to rule. Unfortunately, our choice is not between natural right and majoritarian rule. It is between one set of human institutions and another, none of which is infallible. A belief in natural right does not tell us what decision-making institution we should prefer.

Under Professor Barber's formulation, judges would be entitled to enforce principles that the community never thought about, or was divided about, or silently rejected. The judge could even enforce principles the community expressly attempted to foreclose through constitutional language. It would be "willful, stupid, shameless, or blasphemous" to assume that every provision of the Constitution is right. But is it so stupid to say that every provision of the Constitution is binding on judges, as well as legislatures, until it is amended?

A judge might conclude that equal representation of jurisdictions of unequal population violates the principle of one person, one vote. What is to keep such a judge from holding invalid the equal representation of the fifty states in the Senate? Why should a judge be bound by the constitutive features of article I, section 3? If a judge should be deterred by article V's provision that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate," even by constitutional amendment? These provisions are mere positive law. "In principle," mustn't we acknowledge that the community may have erred?

Professor Barber never tells us why judges should be the officials charged with improving upon the Constitution. Nothing in his theory is distinctive to judges. Indeed, he argues that a "multiplicity of interpreters" is "essential" to the moral realist vision. Presumably, all officials (all citizens?) are required, under the moral realist teaching, to strive for greater justice to the extent of their ability, without regard to limits on authority deriving from mere positive law. If the Army Chief of Staff concludes that the community has fallen short of the ideal of simple justice, he must send in the tanks and right the wrong. We may disagree with the General on the merits, but in principle, Professor Barber leaves us with no basis to object to the legitimacy of his action.

When judges go beyond the Constitution, they act with no more legitimacy than this hypothetical General. Part of natural right—the part Professor Barber leaves out—is that no one may act beyond the le-

38. Id. at art. V.
39. Barber, supra note 4, at 86.
gitmate scope of his authority. Under our system, all governmental au-
thority derives initially from the consent of the governed, through the
Constitution. When the people consented to the Constitution, they did
so on the supposition that the principles it embodies would be the
supreme law of the land. There are, admittedly, wide expanses of judicial
discretion under the Constitution. But a judge who deliberately imposes
on the community a principle that he knows the community has never
accepted commits the judicial equivalent of a coup d'etat.

III

Professor Barber selects his rhetorical targets shrewdly. He does
not attack John Marshall; he attacks Robert Bork. He does not criticize
traditional constitutional jurisprudence; he criticizes “modernism” and
“New Right constitutionalism.” He cloaks his radical anti-constitutionalism in the comforting robes of tradition. He describes his view of
the ninth amendment, which was unheard-of for the first 150 years and
has yet to be squarely the basis of any Supreme Court majority opinion,
as “the traditional constitutionalism of the ninth amendment.” He in-
vokes the memory of Lincoln, though taking almost precisely the oppo-
site position on constitutionalism from that Lincoln defended. Professor Barber’s real target is not modernism, but the constitutional-
ism of Marbury v. Madison and the Federalist Papers.

In its simplest terms, constitutionalism is the doctrine that in decid-
ing cases and controversies, courts are bound by the substantive prin-
ciples of the Constitution, just as other officials are bound by the
Constitution in the performance of their responsibilities. The Constitu-
tion is, in Chief Justice Marshall’s words, “paramount law.” If other
sources of law inferior to the Constitution are in conflict with the Consti-
tution, the Constitution is given precedence. As Marshall put the point in Marbury:

That the people have an original right to establish, for their future
government, such principles as, in their opinion, shall most conduce to
their own happiness is the basis on which the whole American fabric
has been erected. . . . The principles, therefore, so established, are
deemed fundamental . . . [and] are designed to be permanent.

Judges are obligated to enforce the Constitution, not because any individ-

40. Id. at 67.
41. Id. at 72.
42. Id. at 68-69.
43. 5 U.S. (1 Cranch) 137 (1803).
44. Id. at 177.
45. Id. at 176.
ual provision comports with natural right, but because it is the "duty of the judicial department" to do so. If the people have the right to establish a constitutional frame of government, it follows that the judges must adhere to that frame of government as positive law. "[T]he framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." 

Under Professor Barber's conception, the Constitution is not a "rule for the government of courts." It is simply a delegation of authority to courts (and in some contexts, other government officials) to act according to their own conception of moral reality. Since the people necessarily fell short of the ideal of simple justice when they ratified the Constitution (Marshall tells us it was based on their mere "opinion" on what "shall conduce most to their own happiness"), it would be contrary to the tenets of moral realism for the judges to be bound by their handiwork. Natural right, not the Constitution, is the rule for the government of courts. The contrast could not be plainer between Professor Barber's understanding of the judicial role and that of Chief Justice Marshall.

The view taken by the Federalist Papers is, if anything, an even sharper contrast. The defense of constitutional judicial review in Federalist No. 78 is pure positivism: "the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." Why must judges give precedence to the Constitution over legislative enactments? Because the people, who have a superior legal position to their agents in the legislature, imposed the constitutional rules. Constitutional law is nothing more than an application of the law of agency. This is, of course, precisely the argument that Professor Barber is at pains to deride (having placed it, conveniently, in Judge Bork's mouth rather than Hamilton's). According to Professor Barber, Bork "seems to believe the Constitution limits the majority's agent-government solely because majorities at the founding and at later moments of constitutional amendment willed it so."

What role does the constitutionalism of Marshall and Hamilton leave for natural right? Have we come full circle, to Professor Barber's contention that constitutional democracy is fundamentally inconsistent with a belief in natural right? By no means. A moral realist can embrace

46. Id. at 177.
47. Id. at 179-80 (emphasis in original).
49. Barber, supra note 4, at 69.
the theory of natural right, and still believe in constitutional democracy, provided he recognizes the distinction between positive law and natural right. Positive law is the law of the legal system; it is law the judges are bound to enforce. Natural right is a standard of judgment against which we can determine whether positive law is good or bad, just or unjust. The founders of the United States were believers in natural right; this much is unmistakable from their Declaration: "We hold these truths to be self-evident . . . ."50 The Constitution was framed in accordance with the people's understanding of natural right; we know this from the pre-amble's statement of intentions. But the Constitution is not merely a proclamation of natural right. It is positive law. It is persuasive to the extent it accords with natural right, and that is much of its appeal, but it is authoritative because it was ratified by the people.51 Like any human endeavor, the Constitution did things it ought not to have done and left undone things it ought to have done. Among other examples that could be named, it provided protections for the institution of human slavery in the South,52 and it failed to provide protection for basic human rights against state governments.53

What is the constitutionalist's response to the disjunction between the commands of the Constitution and those of natural right? The most profound answer to this urgent question was provided by Abraham Lincoln. The following is his response to the positive law argument that, since the founders had not abolished slavery, this meant that the Declaration's statement of natural law ("all men are created equal") must not have included blacks:

[The authors of the Declaration] did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which could be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never per-

50. The Declaration of Independence para. 2 (U.S. 1776).
51. Professor Sherry has described the development of the framers' understanding that the Constitution is enforceable as positive law because it was adopted by the people. Sherry, supra note 32, at 1146-55. She calls attention to a speech by Madison contrasting a "constitution established by the people themselves," with a "league or treaty," like the Articles of Confederation, "founded on the Legislatures only." "[A] law violating a treaty ratified by a pre-existing law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void." Id. at 1153-54.
52. U.S. CONST. art. I, § 9, cl. 1 (protection of slave trade until 1808); id. at art. IV, § 2, cl. 3 (fugitive slave clause).
fectly attained, constantly approximated . . . 54

Here is the test case. Natural law declares that all men are created equal; the Constitution permits slavery. Did Lincoln contend that judges should disregard positive law and declare slavery illegal on the basis of natural law? Certainly not. He urged, instead, that the Declaration's statement of natural law should serve as a "maxim for free society," a guide to future decision-making by the people through their representative institutions, and eventually to correction of the Constitution through constitutional amendment. Natural law declares the "right"; enforcement through positive law will follow "as fast as circumstances should permit." To say that there are principles of natural right is not to say that judges have the immediate power to enforce them.

A defender of constitutional democracy can therefore accept the "aspirational" character of natural law, and even of the Constitution, without acceding to the theory of open-ended judicial review. 55 The Constitution is chock-full of aspirations. We usually call them, more mundanely, constitutional principles. Moreover, many of the aspirations of our political system in the field of civil rights, among others, have been realized through the actions of representative institutions. In such instances—the Civil Rights Act of 1964 and the Voting Rights Act of 1965 come to mind—the resulting positive law has far greater public legitimacy than if the same results had been obtained on the cheap, through judicial fiat. Finally, the constitutional amendment process exists as a continuing reminder that changes in our conceptions of natural right can be incorporated into fundamental law without either revolution or breach of democratic principle. The difficulty and relative rarity of constitutional amendments may cause us to forget that all the most prominent constitutional provisions protecting natural rights are products of constitutional amendment: the Bill of Rights and the Civil War amendments. Traditional constitutionalism is not hostile to judicial enforcement of aspirational principles—if they can fairly be discovered in the text, structure, and purposes of the Constitution. 56 Open-ended judicial enforcement of aspirational principles—without the need to incorporate them into fundamental law through constitutional amendment—would have little aspirational quality. Under this view, the Constitution was intended to preserve liberties we already had, not to make changes. See, e.g., Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, 94-95. While this view undoubtedly is valid for some, perhaps many, provisions of the Constitution (and the importance of preserving liberties against novel forms of tyranny should not be underestimated), it fails to recognize the extent to which other provisions of

54. R. Basler, Abraham Lincoln: His Speeches and Writings 361 (1946) (emphasis in original).


56. Admittedly, a narrow version of originalism, under which the meaning of a constitutional provision is determined by reference to the specific practices accepted at the time of ratification, would have little aspirational quality. Under this view, the Constitution was intended to preserve liberties we already had, not to make changes. See, e.g., Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, 94-95. While this view undoubtedly is valid for some, perhaps many, provisions of the Constitution (and the importance of preserving liberties against novel forms of tyranny should not be underestimated), it fails to recognize the extent to which other provisions of
review does not give greater protection to natural rights—it simply substitutes the judge's understanding of natural rights for the Constitution's.

Professor Barber's position more closely resembles Chief Justice Taney's than it does Lincoln's. In *Dred Scott v. Sandford*, the Supreme Court confronted an act of Congress that abolished slavery in the territories. Article IV of the Constitution vests in Congress the power to adopt "all needful Rules and Regulations" for the governance of the territories, and nothing in the language or history suggests that decisions about slavery are an exception. Under traditional canons of constitutional interpretation, the Court should have given effect to the Missouri Compromise and declared Dred Scott a free man. Chief Justice Taney, however, apparently concluding that the prohibition of slavery is in violation of natural right, invoked a constitutional principle that was as unprecedented at that time as it is notorious today: substantive due process. *Dred Scott* was the first Supreme Court decision to take the view that a statute can be unconstitutional because it violates unenumerated rights: "An act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory . . . could hardly be dignified with the name of due process of law." Chief Justice Taney was not clever enough to anticipate the open-ended construction of the ninth amendment now urged. It would have served his purposes well. Slaveholding, he could have said, is a right "retained by the people" and thus protected against hostile legislation.

One presumes that Professor Barber disagrees with the result in *Dred Scott*. But can he withhold his approval of the underlying jurisprudence? The Missouri Compromise is mere positive law; the right to own other human beings is protected by the judge's view of natural law; the Constitution contains provisions that invite judges to enforce simple justice in lieu of majoritarian preferences. Sure, Taney got it wrong, but isn't that the risk we have to take?

It was Benjamin Curtis, dissenting in *Dred Scott*, not Robert Bork, who penned the following prescient commentary on the theory of unenumerated rights:

> [W]hen a strict interpretation of the Constitution, according to the

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57. 60 U.S. (19 How.) 393 (1857).
58. U.S. CONST. art. IV, § 3, cl. 2.
59. 60 U.S. at 450.

the Constitution were intended to improve upon past governmental arrangements. For a criticism of specific intentionalism from the perspective of traditional interpretive theory, see McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359 (1988).
fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. 60

IV

Professor Barber is not oblivious to the objection to open-ended judicial review based on what he calls "a fear of judicial supremacy, usually coupled with a populist abhorrence of 'Platonic guardians.' " 61 His response is to deny that "courts should monopolize the function of constitutional interpretation." "If anything," he says, the moral realist position "suggests the contrary." It favors "a multiplicity of interpreters as essential to the process of seeking better versions [of justice]." 62 Even courts can "lose their self-critical capacities and degenerate into willfulness, stupidity, and . . . illegitimacy." 63 So seriously does Professor Barber take this "multiplicity of interpreters" view that he even has a good word to say for Attorney General Meese, who has recently propounded it. 64

Without in any way disparaging the Meese-Barber position, with which I agree, it is fair to ask whether this is an adequate response to the problem of judicial supremacy. Once we concede that judges have no monopoly on wisdom about natural right— that sometimes representative institutions get it right and judges get it wrong— what is the basis for Professor Barber's prescription of judicial enforcement of simple justice? What happens when the Congress concludes (rightly) that slavery is wrong and should be banned from the territories, and the judges in charge conclude (wrongly) that slavery is an unenumerated right protected by the open-ended provisions of the Constitution? Does Professor Barber mean to suggest (as Lincoln and Meese were careful not to do) that other officials have the authority to defy a Supreme Court judgment? If so, his position ceases to be anti-democratic and becomes hyper-democratic, since it would free the political branches to disregard constitutional limitations (mere positive law) that they consider unjust.

The "multiplicity of interpreters" boils down to this: one inter-

60. 60 U.S. at 621 (Curtis, J., dissenting).
62. Barber, supra note 4, at 86.
63. Id.
64. Id.
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preter—the Court—always wins. Whenever the Court’s vision of natural justice is violated by the action or inaction of other branches of government, the Court will issue a binding judgment, based on its own lights, and it does not matter how persuasive the contrary opinion of the other “interpreters” may be. The Court’s judgment is final. The other interpreters are relegated to what Lincoln called “political resistance”—the laborious process of changing the law.

To be sure, the other branches are able to interpret the Constitution in the course of performing their ordinary duties. Congress can decline to pass a bill it considers unconstitutional (or contrary to natural law), and the President can veto it. But the invocation of the Constitution in these contexts adds nothing to the authority of either Congress or the President. Congress can decline to pass a bill for any reason or no reason at all, and the President is equally free to veto.65 I certainly hope that Congress and the President exercise their powers in accordance with what the Constitution and natural right require, but this limited power of “interpretation” does not in any way diminish the power of courts. Whatever its other merits, the “multiplicity of interpreters” approach is not responsive to the danger of judicial supremacy created by the open-ended theory of judicial review.

Some might answer that judicial supremacy is not a prospect to be feared, since under Professor Barber’s theory courts will wield authority only to protect rights. But as Dred Scott illustrates, it is mistaken to view the expansion of “rights” as necessarily good or progressive. If rights are wrongly conceived, they can be as inimical to justice, and even to liberty, as any recognition of state power. Enforcement of the unenumerated right to own slaves precludes emancipation. Enforcement of the unenumerated right of freedom of contract precludes minimum wage laws. Enforcement of the unenumerated right to abort overrides the

65. No one, to my knowledge, proposes that Congress and the President (or for that matter, the states) have an authority to enforce constitutional principles that exceeds the ordinary bounds of their office. For example, when Congress passed the Voting Rights Act of 1965, embodying its independent interpretation that literacy tests are unconstitutional, the validity of the enactment depended on the positive law question of whether it was acting within its enumerated powers. Katzenbach v. Morgan, 384 U.S. 641 (1966). Similarly, Presidents sometimes assert the authority to refuse to implement a statute they believe to be unconstitutional. The legality of this refusal depends (or should depend) on a construction of the “take care” clause. See Ameron, Inc. v. United States Army Corp of Eng’rs, 787 F.2d 875, 889 (3d Cir.), adhered to, 809 F.2d 979 (3d Cir. 1986). A similar question came up in 1798 in the context of state power to block federal legislation that the states deemed unconstitutional, i.e., the Alien and Sedition Acts. See Kentucky and Virginia Resolutions of 1798, reprinted in H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 178-83 (7th ed. 1963).

It is inconceivable that these non-judicial powers of constitutional interpretation, controversial as they are under orthodox principles of constitutional law, would be recognized as legitimate under an open-ended theory.
right to life. Enforcement of the right of voluntary associations to control their own membership makes it more difficult for the community to eradicate race and sex discrimination. Enforcement of children's rights against parental control conflicts with parents' rights to control the family. The point is not that any or all of these rights are wrongful, but that the recognition of unenumerated rights is likely to conflict with plausible assertions of right on the other side.

The problem becomes still more acute if we recognize "affirmative rights" (the right to receive government assistance or support) as well as "negative rights" (the right to be free from government interference). Under an open-ended theory of judicial review, there is no logical limit to the power courts could assert to protect "affirmative rights" in ways not chosen by the people through their representative institutions. A federal district court in Kansas City has doubled the property tax to pay for better schools, and state courts in New Jersey have required local communities to build more public housing. The natural rights Professor Barber has in mind are "all exemptions from governmental power," he says. "Whether the Constitution is open to welfare rights which judges can enforce is of course most problematic." Why so? If a judge concludes that welfare benefits higher than those voted by the legislature would be just, what in the theory of open-ended judicial review should constrain him?

Apparently very little: Professor Barber goes on to say that "[w]elfare rights are therefore a possibility. The question would turn on several considerations: a substantive theory of the ends of government, whether serving those ends sometimes could entail legislative entitlements, and whether courts could exhort a reluctant community to its constitutional aspirations." Since courts are the bodies that will be weighing these considerations, the issue thus hinges on two questions: whether the judge thinks increased welfare benefits would be just, and whether the courts have the political muscle to make their judgments stick.

68. Barber, supra note 4, at 83 n.50.
69. Id.
70. Professor Barber's position on affirmative rights is somewhat less clear than the discussion in the text may indicate. Other language in this part of his essay suggests, though it provides no reason, that judicial power to create and enforce welfare rights may be limited to the power to "exhort officials to duties whose performance judges cannot enforce." Id. Of course, this would require reversal of the almost 200-year-old jurisdictional prohibition against issuing advisory opin-
To be persuasive, Professor Barber's theory requires some reason to believe that courts are the most reliable expositors of natural right. Some commentators, for example, point to the courts' relative disinterestedness, attention to principle, and scholarly method. Professor Barber makes no such argument, apparently because he does not agree with it. Judges, too, are prone to "willfulness" and "stupidity." That is why he advocates a "multiplicity of interpreters." If a genuine multiplicity of interpreters is "essential" to the theory of open-ended review, as he states, the theory falls short. Invocation of natural right is not a sufficient theory of constitutional law if it cannot deal with the institutional issues of how natural right is to be identified and implemented.

V

This brings us to the final issue: why might a moral realist prefer constitutional democracy to judicial supremacy or the other alternatives? Professor Barber suggests that conventionalists can have no answer to this question, and I think he is right. But ironically, one who shares Professor Barber's moral realist persuasion, as I do, has no difficulty in providing reasons to support constitutional democracy and to reject Professor Barber's radical anti-constitutionalism. I would propose three reasons, in ascending order of importance.

First, there is no reason to believe that judges are likely to be more reliable than representative bodies in discovering and enforcing natural right. Judges are grossly unrepresentative of the population. All are lawyers, most are middle-aged or older, all are upper-middle class or above, most are white males, most are secular and skeptical in their philosophical orientation, in common with the professional elite of this country. Rather than natural right, judges are more likely to impose upon us the prejudices of their class. The nature of their task makes it more attractive to seek the abstract solution than the intelligent compromise. The doctrine of precedent, so important to the court's system of institutional authority and integrity, makes correction of mistakes relatively dif-

ions. See Correspondence of the Justices, Letter from Chief Justice John Jay and the Associate Justices to President George Washington (Aug. 8, 1793), reprinted in 3 H. JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (1891). Professor Barber does not let this bother him, dismissing the jurisdictional prohibition, with unself-conscious irony, as "judge-made doctrine." Barber, supra note 4, at 83 n.50.

72. Barber, supra note 4, at 86.
73. Id.
74. Id. at 84-85.
ficult. The courts' fact-finding ability is woefully deficient. They are dependent for information and ideas upon people with an inherent professional axe to grind. They are carefully insulated from the real world. Their caseloads (especially the Supreme Court's) are overwhelming. They have little time for even the most important of cases, and it is the rare Supreme Court Justice who can keep up with more than a negligible sampling of the poetry, science, economics, literature, philosophy, theology, and history that should inform an expositor of moral reality. Their sole assistants are bright young things just out of law school. Perhaps most importantly, judges are irresponsible in the most fundamental sense: they are not accountable for the consequences of their decisions and ordinarily are not even aware of them. Power without responsibility is not a happy combination.

Not that representative bodies are much better. Legislatures and executive agencies are subject to special interest pressure and all too prone to respond thoughtlessly to passing fashions. Common experience shows that it is a rare politician whose understanding of natural right noticeably influences his decisions. Politicians may be more representative of the population than judges are, but not necessarily of its better qualities. Madison's description would not seem out of place today:

Complaints are everywhere heard from our most considerate and virtuous citizens... that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.75

Notwithstanding this dispiriting account of legislative vices, there is something affirmative to be said for constitutional democracy (in addition to the still-persuasive point that courts may be worse). Largely because of the problems Madison described, our constitutional system was not set up as a pure democracy. The essential structural features of our republican system are: (1) a large expanse of territory, which dilutes the power of concentrated local interests, (2) representation, which "refines and enlarges" the popular view, (3) deliberation, which makes it more likely that reasons, rather than brute political force, will prevail, (4) separation of powers, which gives officials in various branches and levels of government the incentive and ability to curb the excesses of the others, (5) checks and balances, which slow down the process of change and thus promote stability and deliberation, and (6) federalism, which permits a diversity of approaches to public issues.

These features do not guarantee just results, but they are not obviously inferior to open-ended judicial decision-making. Moreover, natural rights are further protected by an astonishingly comprehensive and well-chosen set of substantive constitutional rights and protections. The most fundamental and important rights are protected either explicitly or by implication under traditional constitutional interpretive methods. With these substantive protections in addition to the constitutional structure of government, the advantage of open-ended judicial review becomes all the more attenuated. Left for the ninth amendment are those “rights” controversial enough that majorities in the various states oppose them, “rights” like the right to work for more than ten hours a day or for less than the minimum wage, to start an ice business without a license, or to abort a fetus before it is able to survive outside the womb. It is issues like these that are best resolved in a decentralized way through public deliberation, with the possibility of change and accommodation. To a moral realist, the conclusion reached by the court is too “defeasible” and contingent (it may be plain wrong) to serve as a uniform, essentially permanent, national rule.

Second, a moral realist might reject the open-ended view of the judicial function because it would empower judges to enforce their own view of natural justice even when that view conflicts with the substantive principles of natural justice reflected in the Constitution. One does not have to consider the Constitution perfect to believe it is pretty good, and probably better than whatever a twentieth-century judge might come up with. This is not the place for an extended exegesis of the political theory of the Constitution; that is a life’s work. Essential elements of it, in my view, are: decentralized and divided governmental power; protection for autonomous institutions potentially in conflict with the central government, including churches and synagogues, colleges and universities, the press, voluntary associations, families, and neighborhoods; adherence to the rule of law, including requirements of legislative generality and procedural regularity; protection for limited but important areas of individual freedom; decentralized economic power through private property and guarantee of economic opportunity through free enterprise, with restric-

76. For present purposes, we must exclude cases involving restrictions that are anachronistic and unenforced, other than by the design of the violator (Griswold v. Connecticut, 381 U.S. 479 (1965)), or by capricious accident (Bowers v. Hardwick, 106 S. Ct. 2841 (1986)). One does not need open-ended judicial review to prevent imposition of penalties in these circumstances. Conventionalism will do nicely, and even a traditional interpretation may question whether there has been due process of law when the “law” in question has fallen into desuetude. Whether these cases, or others like them, were rightly decided should not affect the disposition of cases of genuine conflict between popular and judicial conceptions of justice, such as capital punishment or abortion.
tions predicated on the state's power to regulate for the public good; equality before the law and freedom from invidious distinctions; and government through representative institutions as to all matters delegated by the people through state and federal constitutions.

Each of these principles, though embodied to some degree in our Constitution, has been challenged by intelligent people who take a different view of natural right and simple justice. Some, especially during the New Deal, have believed that a more powerful central government is necessary to the public weal; many find the autonomy of religious life contrary to their vision of a common good, whether secular or religious; the rule of law is easily sacrificed to the needs of the moment; some think that socialism is preferable to free enterprise. As a moral realist, I am troubled by the prospect that judges might be persuaded that the principles of the Constitution are "defeasible" and that some or all of them should be supplanted by principles more consistent with the judge's idea of "simple justice." I would rather consider each specific proposal for changing the law on its merits than to issue a blank check to judges.

Indeed, I fear that a moral realism dominated by the insight that all conceptions of justice are "defeasible" is, in practice, indistinguishable from moral relativism. Such a view makes it difficult for us to take a stand: to say "this I think is right." Professor Barber rejects the authority of the Constitution because it may turn out, on further reflection, to be "irrational" and "unjust." A moral relativist would reject the Constitution for the same reason. It seems more consistent with moral realism to hold that our Constitution is (or is not) the best practicable constitution we can conceive under present circumstances, perhaps proposing amendments, and to insist that judges enforce it as it is.

Third, even if judges were more capable of discerning natural right than are representative bodies, and even if their vision of natural right, where it differs from the Constitution, would be an improvement, a moral realist might oppose granting judges the power to enforce their views of natural right as positive law because this would debase and impoverish republican government. One of the reasons for adopting constitutional democracy is that properly established and limited representative institutions are the most likely to govern in the public interest. A second, independent reason is that self-government directed toward the common weal is good in itself. An important aspect of liberty—albeit not the most important—is self-determination: the collective right of a people to chart its own course. If the quest for justice is

77. S. Barber, supra note 15, at 49.
taken out of the political arena and moved into the branch of government uniquely insulated from popular participation, one of the great functions of republicanism will be lost.

I suspect that Professor Barber might agree with this, if he ceased to assume that there is no difference between constitutional democracy and moral skepticism. He concludes his essay with the following observation: "the touchstone of truth is reality or nature, not social convention and its spokespersons, be they judges, professional philosophers, or what have you. This process [of discovering truth] is nothing other than giving and exchanging reasons in an open-minded and public-spirited way about what to believe and how to live." Republican government at its best is a form of deliberation about the common good; republicanism is all the more attractive a system because it involves the citizens and their representatives, and not a selected group of "spokespersons, be they judges, philosophers, or what have you." Judicial review, by contrast, removes certain issues from the domain of politics. That is the very purpose of constitutional limitations.

Simple justice is not an issue that should be removed from the public agenda. I believe, and I think Professor Barber believes, that open-ended conceptions of justice and the common good should occupy a far more central place in our public deliberations than they now do. I believe, and I think Professor Barber should believe, that the process of discovering the best conceptions of the public good is better advanced through republican institutions than through arguments between lawyers and in front of lawyers. This means that representative bodies must be accorded the latitude to resolve issues of justice (those not resolved by the people themselves in the course of constitution drafting and amending), even if, from time to time, they deviate from what judges believe to be the dictates of justice. Open-ended judicial review—the doctrine of unenumerated rights—threatens to cut short the very process of "open-minded and public-spirited" deliberation upon which moral realism depends.

78. Barber, supra note 4, at 87.