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PHILOSOPHICAL PERSPECTIVES ON THE CONSTITUTION

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In addressing the question, "Is the Constitution working?," the philosopher might be expected to begin by asking, "What do the terms 'working' and 'Constitution' mean?" These are important questions to ask, but since a term's meaning can depend on one's perspective or viewpoint, the answer to the question whether the Constitution is working can depend in part on one's perspective. This paper will raise the issue whether, in a world of diverse, often conflicting perspectives, there is any single correct perspective from which to know whether the Constitution is working. These comments are intended to provoke thought and discussion on the issue—to raise, not settle, the question.[1]

First, several observations can be made about the moral presuppositions of the text of the Constitution. The text presupposes that persons have moral rights that exist independently of government—the so-called natural/human rights that persons are born with or have as persons.[2] Government can deny persons the opportunity to exercise these moral rights, but it cannot take them away.[3] As expressed in the Bill of Rights, these moral rights *limit* the powers of government. In addition to moral rights, the Constitution contains a number of provisions that express moral concepts having to do with freedom, justice, and equality. Several examples of these moral concepts are: free speech, free press, and free exercise of religion in the first amendment;[4] the ban against cruel and unusual punishment in the eighth amendment;[5] the equal protection of the laws in the fourteenth amendment;[6] and due process in deprivation of life, liberty, and property in the fifth[7] and

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1 This paper presents several perspectives on interpretation of the Constitution, but because of limitations on space, these perspectives are merely *sketched* and are hence somewhat oversimplified.

2. For discussions and analyses of natural and human rights, see D. LYONS, RIGHTS (1979); A. MELDEN, HUMAN RIGHTS (1970).

3. The distinction is between *having* a right *qua* person or human being and *exercising* a right. If this distinction is valid, then slaves have the full set of human rights including liberty, even though they can barely exercise their rights. Government has the *power* (and in some cases perhaps even the *legal* right) to enforce slavery, even if it has no *moral* right to do so.

4. U.S. CONST. amend. I.

5. *Id.* at amend. VIII.

6. *Id.* at amend. XIV.

7. *Id.* at amend. V.

fourteenth amendments.[8] The text of the Constitution, however, does not *define* these grand, abstract moral concepts; in addition, there are many competing conceptions of free speech, free press, free exercise of religion, cruel and unusual punishment, equal protection, and due process. Thus, some believe, for example, that the death penalty is cruel and unusual punishment, while others do not.[9] Some believe that affirmative action is required by equal protection, while others perceive that such action is a violation of equal protection.[10] Plainly, moral concepts are subject to competing conceptions that require interpretation; hence, the text itself, which is silent regarding how to define or interpret the moral concepts in or presupposed by the Constitution, must be supplemented, at least in regard to moral concepts.[11] But how should the text of the Constitution be supplemented?

One answer is that the text means what the Framers intended it to mean, so that the text should be supplemented by the intentions of the Framers. Another answer is that the text should be supplemented by the intentions of the Ratifiers, who best express the will of the people. A more precise answer is espoused by Chief Justice Rehnquist and is shared by the Attorney General, Edwin Meese: the text should be supplemented by the intentions of the Framers or the legislature (in cases like the fourteenth amendment equal protection and due process clauses).[12] Such a perspective, however, faces several challenges. First, the Framers did not all have the same intentions; there was plenty of disagreement among them.[13] The Bill of Rights, for example, was a compromise among competing intentions and views.[14] Second, it is not clear why past intentions from two hundred years ago should be used to

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8. *Id.* at amend. XIV.

9. *See* Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

10. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

11. This is not to say that the text of the Constitution must always be supplemented, but only that the moral concepts, such as equal protection and due process, must be interpreted. *See* R. DWORKIN, A MATTER OF PRINCIPLE 316 (1985) (Dworkin argues against a "literal reading" of the term "discrimination").

12. These kinds of views are often called "original intent" theories. *See* R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Meese, *The Battle for the Constitution: The Attorney General Replies to His Critics*, 35 POL'Y REV. 32 (1986); Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455 (1986); Meese, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1 (1986); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); R. Bork, The Constitution, Original Intent, and Economic Rights (1985) (unpublised manuscript).

13. *See* J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1966).

14. *See* 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983–1203 (1971).

establish the meaning of the Constitution today. The times have changed greatly from two hundred years ago; we live in an advanced technological society that the Framers never dreamed of or conceptualized. Moreover, if the intentions of the Framers were counted as decisive, most of the major civil rights cases of the last fifty years would have to be rejected or overruled, because the Framers did not intend the Bill of Rights to be applied to the states through incorporation of certain provisions through the fourteenth amendment. Indeed, the fourteenth amendment did not exist when the Framer drafted the Constitution.[15] Nor were the Framers very supportive of democracy. However, if democracy means that the moral authority, not the power, of government rests on the will of the people, then there is no reason to base the Constitution on the will of a *minority* of the people two hundred years ago. In a democracy such as ours, the will of the people today should count for something in establishing the moral legitimacy of the basis of our law and government.

Another answer to the question of what should supplement the text of the Constitution is that it should be supplemented by the will of the people as expressed by the majority, because democracy means majority rule.[16] Difficult concepts and provisions, such as due process and equal protection, should be understood to mean what the majority thinks they mean. But this perspective also encounters serious objections. First, the majority seems not to know very much about the Constitution or even to have read it. It is problematic to have a uninformed majority decide what the Constitution means. It might, therefore, be suggested that a critically reflective, informed majority determine the meaning of the text of the instrument. It is not clear, however, what criteria could be used to determine when the majority is sufficiently informed and critically reflective. Nor is it clear that a majority on any important constitutional provision or concept even exists. Furthermore, some argue that the root moral idea in the Constitution is the *equal* natural rights of all people and that a majority may violate the rights of the minority; in this view, our democratic government is majority rule *limited by* the equal rights of *all*, including minorities.[17]

This view (hereinafter referred to as the natural rights view) provides another answer: the text must be supplemented by the concept of equal natural rights (namely those that exist independently of govern-

15. The fourteenth amendment was enacted in 1868. U.S.C. vol. 1, at XLIX, LVI (1982) (Proposal and Ratification).

16. This view, which rests on a conception of democracy, seems to be a popular view among citizens but does not appear to be advanced by any major thinker or commentator.

17. *See* D. RICHARDS, THE MORAL CRITICISM OF LAW 39–56 (1977).

ment, and form the moral foundation of the Constitution).[18] In this view, the major function of the Supreme Court is to protect our fundamental moral rights by invalidating legislation that violates these rights. Like the other perspectives, however, this one has its problems. First, this theory may be objected to on the grounds that it is undemocratic for nine *unelected* Justices to be the protectors of our natural rights and that the legislature, consisting of the elected representatives of the people, would better express the will of the people, and therefore, should protect our natural rights. Proponents of the natural rights view, however, would reply that our natural rights should not be subject to the vote, as they would be if protected only by the legislature. Still, it seems problematic that five or six Justices can decide major moral rights issues such as abortion.[19]

Second, it is not clear what our natural rights are and how we are to conceive of them. We know that there are competing conceptions of our fundamental moral rights;[20] further, we are cognizant that there are differing theories of natural rights that take us into the airy realms of moral philosophy, which may be embodied in the Constitution, and that explain and justify the Constitution.[21] The complexity of this point can be briefly illustrated by two current natural rights theories that *might* be proposed as *the* moral philosophy of the Constitution.

In *A Theory of Justice*,[22] John Rawls argues that if we were to put ourselves into a position of fairness and impartiality in which we did not know anything about our personal identity (which Rawls calls the Original Position), so that we had to treat everyone equally as persons, we would all choose two principles of justice which would serve as the basis for constructing a just constitution.[23] The first principle is that of equal liberty in the political realm, which would guarantee that all persons have equal political rights and liberties, such as those found in

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18. In this view, the purpose of government is to protect natural or human rights, as expressed in the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .

The Declaration of Independence para. 2 (U.S. 1776), *reprinted in* U.S.C. vol. 1, at XXXV (1982).

19. *See* Roe v. Wade, 410 U.S. 113 (1973). For a classic disagreement over the function of the Supreme Court, see West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

20. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 131–49 (1978).

21. *See* D. RICHARDS, *supra* note 17 (containing a Rawlsian application of moral philosopy to the Constitution).

22. J. RAWLS, A THEORY OF JUSTICE 118–92 (1971).

23. *Id.*

the Bill of Rights.[24] The second principle is that social and economic inequalities may exist only if they are to the advantage of the worst-off social and economic group and are attached to offices and positions open to all under conditions of equal opportunity.[25] Rawls maintains that the first principle of equal liberty takes priority over the second principle, so that we may say our political rights are prior to our economic rights.[26] In applying this kind of theory to the Constitution, one might argue that our political rights are more fundamental than our economic rights, that equality is more basic than property, and that it is the function of the Supreme Court to maintain this priority. Such a view, it might be argued, justifies both the application of the Bill of Rights to the states by incorporation through provisions of the fourteenth amendment and the activist stance of the Warren Court in its employment of the equal protection and due process clauses of the fourteenth amendment.

A second, contrasting moral theory, is developed in *Anarchy, State, and Utopia*, by Rawls' colleague at Harvard, Robert Nozick.[27] Basing his theory on the Kantian principle that others should be treated as ends, never merely as means,[28] Nozick holds that there is one natural moral duty: One must not violate the basic moral rights of others. The individual is free to do whatever he wants, but only if the basic moral rights of others are not violated. These premises provide the basis for Nozick's three principles of justice: acquisition, transfer, and rectification.[29] According to the principle of acquisition, whatever an individual acquires without violating the natural rights of others belongs to that individual.[30] Thus, if through hard work and ingenuity the individual accumulates a small fortune and does so without violating anyone's natural rights, then that individual has property rights in that fortune so that it would be a violation of the individual's rights to take the fortune from him.[31] According to the principle of transfer, one may transfer his legitimately acquired property, as long as no one's natural

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24. *Id.* at 302.

25. *Id.*

26. *Id.* at 243–51.

27. R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974). It does not appear that any version of Nozick's theory has been applied to the Constitution.

28. *Id.* at 30–33. Nozick formulates his view of rights in terms of "side constraints" on the actions of others: "Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable." *Id.* at 30–31. It is interesting to note that Rawls also bases his theory on Kant, insofar as Rawls provides a Kantian interpretation of justice as fairness. J. RAWLS, *supra* note 22, at 251–57.

29. R. NOZICK, *supra* note 27, at 150–53.

30. *Id.*

31. *Id.*

rights are violated or as long as no voluntary contracts or agreements are violated.[32] Thus, the individual with the legitimately acquired small fortune is free to transfer the fortune to his child or to another wealthy person who has no need of it. Lastly, according to the principle of rectification, there must be rectification for those whose natural rights have been violated.[33]

In order to apply Nozick's theory of justice to the Constitution, we need to make a further distinction that seems consistent with Nozick's moral philosophy.[34] Moral philosophers often distinguish between two kinds of rights: negative rights and positive rights.[35] Negative rights are rights against interference; for example, free speech imposes a duty on others not to interfere with one's speech, unless there is a serious reason for doing so, such as a "clear and present danger." Positive rights are rights to receive aid or assistance, such as welfare rights. Apparently Nozick would claim that natural rights are negative rights, that there are no natural positive rights, and that positive rights result from voluntary contracts or agreements.

One could apply a Nozickian moral philosophy to the Constitution in the following way: The Founding Fathers set up a government of limited powers as expressed in the Constitution with a separation of powers and checks and balances. All, or virtually all, of our constitutional rights are negative, from freedom of speech, freedom of the press, the free exercise of religion, the right to be free from unreasonable searches and seizures, and the right to protection from cruel and unusual punishment, to the guarantees of equal protection and due process. Liberty and property are fundamental, not equality—or at least not the liberal, Rawlsian notion of equality.[36] The development of the welfare state in the twentieth century is essentially the state's recognition of positive rights for all citizens, which seems inconsistent with the Constitution's commitment to negative rights and limited government.[37]

In regard to our constitutional rights, Rawls and Nozick both defend strong civil liberties. The difference between the two, however, is most striking in regard to equal protection. This distinction can be il-

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32. *Id.* Technically, a violation of a voluntary contract or agreement is a violation of rights.

33. *Id.*

34. Nozick does not discuss the distinction between negative and positive rights, but his formulation of rights in terms of moral side constraints suggests that, in his view, natural rights are negative rights. *Id.* at 28–30.

35. For an analysis and critique of the distinction between negative and positive rights, see H. SHUE, BASIC RIGHTS (1980).

36. R. NOZICK, *supra* note 27, at 179.

37. *See generally* R. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695.

lustrated by the case of *San Antonio Independent School District v. Rodriquez*.[38] In financing public education, two school districts in San Antonio received disproportionate financing; Alamo Heights received a total funding of $594 per pupil, while Edgewood received $356 per pupil.[39] Rawls would apparently argue that this scheme of financing violates his second principle of justice because the inequalities do not work to the benefit of the most disadvantaged group, and there is a violation of equal opportunity; hence equal protection is violated because the plan is discriminatory toward the poor. Nozick would disagree and argue that if parents in the wealthier district choose to put more money into the local fund and if they acquire their money fairly, then they may transfer it to the local fund, and there is no violation of equal protection.

Aside from whose theory is the correct *moral* theory, how is one to decide whose reflects *the* moral philosophy of the Constitution? Nozick's theory is closer to that of the Founding Fathers than is Rawls', but perhaps Rawls' is, or at least was, closer to recent history. This issue is one which we have confronted earlier: Do we go with the past or with the present? Most likely those who support a free-enterprise system with minimal government intervention would prefer Nozick's theory, whereas those who think welfare is right and desirable would support Rawls' theory. However, the Constitution does not explicitly favor a particular moral philosophy, even if it embodies a commitment to individual moral rights. The Constitution, in other words, implies no theory of interpretation of any kind. This point presents us with another perspective, which is that "it's all ideological—natural rights don't really exist anyway, and moral theory is just a rationalization of one's ideology."[40] Pushed to perhaps its most extreme form, this view holds that each individual has his or her own constitution according to his or her personal ideology, and there is no way to determine who is right or wrong, so there is no Constitution.[41] What there is, in this view, is wealth and power, and the Constitution is interpreted in

38. 411 U.S. 1 (1973).

39. *Id.* at 13. Expenditures per pupil were broken down into three levels. For Edgewood, federal funds were $108, state funds were $222, and district funds were $26. *Id.* at 12. For Alamo, federal funds were $36, state funds were $225, and district funds were $333. *Id.* at 13. The case primarily concerned the disparity between district funding. *Id.* at 17.

40. This kind of criticism is often given by political scientists and sociologists, as well as Marxists and radicals. Observers of the Supreme Court often take the position that the law is whatever five or more Justices say it is.

41. For a discussion of recent writers on the demise of the possibility of interpretation, see Levinson, *On Dworkin, Kennedy, and Ely: Decoding the Legal Past*, 51 PARTISAN REV. 248 (1984). For a defense of interpretation, as well as a theory of judicial interpretation, see R. Dworkin, Law's Empire (1986).

whatever way that usually favors the interests of the wealthy and powerful.

In conclusion, our brief, incomplete survey of perspectives indicates that various perspectives yield differing, even conflicting answers to the question, "Is the Constitution working?" Thus, one perspective answers that as the Constitution has been interpreted by the Warren Court, and to some extent by the Burger Court, the Constitution has been frustrated because it has not been interpreted faithfully according to the intentions of the Framers or legislators. In this view, which is agreeable to Attorney General Meese and Chief Justice Rehnquist, the Constitution *would* work if the Supreme Court would simply follow the Constitution rather than its own personal political or moral preferences.

From another perspective, the Constitution has been working quite well, especially during the last forty or so years, because it has been at the forefront of significant social change and protection of civil liberties. In this view, however, which might be termed the "liberal" view as developed by Justices Brennan and Marshall, the Constitution will not work well if it is interpreted according to the intentions of legislators or the Framers. Whatever their differences may be, both sides agree that there is nothing wrong with the Constitution itself; their disagreement is over how the Supreme Court should *interpret* the Constitution. Additionally, both sides agree that the Constitution itself works, but admit that they have divergent conceptions of the Constitution.

The perspective that suggests that there is no one, singly identifiable Constitution, only individual conceptions, would argue that the answer to the question, "Is the Constitution working?" cannot be provided because there is no correct or best interpretation of the Constitution. This view maintains that *all* interpretations are ideological, if not outright rationalizations of ideologies, and that there is nothing in the text of the Constitution itself that can settle the issue of whether there is any correct or best interpretation of the Constitution.

Thus, the answer to the question, "Is the Constitution working?" depends on one's perspective or viewpoint, rather than on what the terms "working" and "Constitution" mean. In short, before we can ask what the terms mean, which is a question about interpretation, we must examine whether we can give a plausible defense of interpretation itself. If there is no correct or best interpretation, then there is no point in trying to interpret the meaning of terms. An adequate theory of interpretation must include the logically prior defense of interpretation itself. Once that defense is given, if indeed it can be given, then we can proceed to examine the question of which of the several interpretations is either the correct or the best interpretation. This paper attempts to show, although in too brief and too incomplete a way, that the issue of

perspective is deep and difficult in regard to interpretation of the Constitution.