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LIBERTY AND THE CONSTITUTION

Michael S. Moore*
University of Illinois; Georgetown University Law Center; Center for Neuroscience and Society, University of Pennsylvania; Yale Law School

ABSTRACT
The article uses the recent U.S. Supreme Court decision in the same-sex marriage case *Obergefell v. Hodges* as the springboard for a general enquiry into the nature and existence of a constitutional right to liberty under the American Constitution. The discussion is divided into two main parts. The first examines the meaning and the justifiability of there being a moral right to liberty as a matter of political philosophy. Two such rights are distinguished and defended: first, a right not to be coerced by the state when the state is motivated by improper reasons (prominent among which are paternalistic reasons); and second, a right not to be coerced by the state when there are insufficient justifying reasons for the state to do so, irrespective of how such state coercion may be motivated. Neither right is regarded as "absolute," and so it is morally permissible for the state to override such rights in certain circumstances. The second part of the article examines the distinct and additional considerations that must be taken into account when these two moral rights to liberty are fashioned into corresponding legal rights under American constitutional law. Both such rights survive the transformation, but each becomes altered somewhat in its content. This legal transformation includes recognition of the nonabsolute nature of moral rights,

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such recognition taking the form of some doctrine of "compelling state interests." The discussion in these two main parts of the article is prefaced with a defense of the article's use of political philosophy to inform constitutional law, a defense motivated by Chief Justice Robert's denunciation of such an approach to constitutional law in his opinion in *Obergefell*.

Fifty years into the U.S. Supreme Court's current quest to protect fundamental liberties from state encroachment, we witnessed a major milepost laid down last term in the same-sex marriage cases.[1] Yet, disappointingly, significant as the result in that decision may prove to be, the opinions issued with it make little progress in defending or even defining the content of the constitutional right to liberty that is the main basis of the Court's decision. The Court as a whole has no theory of what liberty is, why it is valuable, and what its limits against state encroachment might be. Neither the liberal majority nor the socially conservative dissenters in the Court's recent same-sex marriage decision advance our understanding of these matters much if at all. The liberals apparently have no theory of liberty on which they can agree, other than the vague bromides that liberty protects "personal choices," ones that are "intimate," "central to individual dignity and autonomy," and choices that "define personal identity and beliefs,"[2] while the conservatives think either that there is no such right in the Constitution or at least that it is not within their competence or job description to formulate a theory themselves as to such a right's nature. The upshot is that the Court has yet again produced another ad hoc substantive due-process decision, one that stands like an isolated island of protected liberty, part no doubt of an archipelago, but one whose general shape remains uncharted. With a value as central to our constitutional scheme as is liberty, American constitutional lawyers can and should do better than this.

I. THE ROLE OF POLITICAL PHILOSOPHY IN ARTICULATING THE MEANING OF "LIBERTY" IN THE CONSTITUTION

When I first conceived of writing this article, I had it organized in my mind into two parts. One would be pure political philosophy: Are there natural

1. Obergefell v. Hodges, 576 U.S.___(2015).

2. *Id.* at 10. (Because as of the time of this publication the opinions in Obergefell have not been published in the official U.S. Reports, all page references are to the semi-official slip opinions.) In fairness to Justice Kennedy and the rest of the liberal majority, perhaps in *Obergefell* they thought the theoretical heavy lifting had already been done by prior Supreme Court precedents that established the right to marry as a fundamental liberty. Yet one searches in vain for such theorizing about liberty in other opinions where no such precedential boost for theory exists. *See, e.g.*, Kennedy's opinion in Lawrence v. Texas, 539 U.S. 558 (2003).

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rights, is the right to liberty one of them, and to what does such a right morally entitle one? The second part would be legal analysis: How much of the natural right to liberty (described by political philosophy) can be fashioned into a workable constitutional right to liberty? It is still my intent to pursue these two questions, which I do in Sections II and III below, respectively. But the U.S. Supreme Court's opinions in *Obergefell v. Hodges*[3] last term now require me to justify this way of proceeding.

More specifically, Chief Justice Roberts in his dissent has thrown down the gauntlet before political philosophers.[4] Their political philosophies, Roberts tells us, have no place in constitutional law. Such political philosophies specifically have no voice in giving meaning to the *liberty* protected under substantive due process.

Roberts conceptualizes his put-aside of political and moral philosophy in terms of the familiar is/ought distinction. Judges are confined in their role as judges "to the exercise of *legal* judgment."[5] Legal judgment, as Roberts conceives it, requires judges to exercise the "power to say what the law is, not what it should be."[6] Because political philosophy concerns itself with what the law should be, Roberts is "skeptical that the *legal* abilities of judges also reflect insights into moral and philosophical issues."[7] Insight into Mill's harm principle, for example, "may or may not be attractive moral philosophy" but it is to be put aside because it "sounds more in philosophy than in *law*."[8]

This invocation of the long-familiar is/ought distinction in jurisprudence by Chief Justice Roberts sounds better than it is. For authoritative legal texts often require of judges that they use knowledge that is not in the first instance uniquely legal knowledge in order to apply those texts faithfully. Consider the specific requirement of our Constitution that a natural born citizen of the United States must be thirty-five years of age in order to be eligible to serve as president.[9] Suppose someone were to challenge would-be presidential candidate Senator Marco Rubio's credentials in this regard. A judge would determine the senator's date of birth, determine the date of inauguration as president, and subtract the former date from the latter in order to determine eligibility under the Constitution. Could one imagine an objection

3. *Obergefell*, *supra* note 1.
4. Actually our current Chief Justice seems to think that much academic theorizing, not just that of political philosophers, is irrelevant to his job. *See* John Roberts, "Interview," Annual Conference of the Fourth Circuit Court of Appeal (June 2011):

> pick up a copy of any law review . . . the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria, which I am sure was of great interest to the academic that wrote it, but is not of much help to the bar.

5. *Obergefell*, *supra* note 1, at 29.
6. *Id.* at 2.
7. *Id.*
8. *Id.* at 22.
9. U.S. CONST. art. II, sec. 1, cl. 5.

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to the judge's use of arithmetic on the grounds that "arithmetic is not law, it is arithmetic?"[10] The objection is silly, because the law requires the judge to use arithmetic in order to apply the law. For purposes of judicial obligation, arithmetic is part of the law that binds judges in their role as judges.

Is the matter any different when authoritative legal texts reference morality rather than arithmetic? Quite familiar statutes award custody of minor children in divorce situations to the parent whose custody will maximize "the *best* interest of the child";[11] citizenship is granted by federal law only to those who possess "*good* moral character";[12] resident aliens may be deported if they have been "convicted of a crime of *moral* turpitude."[13] Is it plausible to urge that judges should eschew moral reasoning when they decide what is good, best, or moral? When our Constitution assures each of us that we will be given the process that is *due* us, the protection of the laws that is *equal*, punishments that are not *cruel*, searches that are not *unreasonable*, and so on, how are judges to do their job if they do not make moral judgments about procedural justice, distributive justice, punishment disproportionate to moral desert, and privacy in order to give content to these constitutional rights of each of us? Even if judges were to invent some way to arrive at these legal judgments without making moral judgments, why would they think that the legal texts that bind them ask them to do that? That would be like thinking they should invent a non–base 10 arithmetic in order to calculate whether a presidential candidate is thirty-five years of age.

Moreover, to seal off moral and political philosophy from influencing legal judgment, Roberts and other formalists must have some conception of what the law *is* that is free of the contaminating "oughts" of political philosophy. It is thus a fair question to ask all who use the familiar is/ought distinction in jurisprudence in this way, to explain what in their view constitutes the law "as it is." In particular, in this context Roberts owes us an account of the ingredients of a distinctively legal judgment of *constitutional* law that is sufficiently narrow that it excludes all principles of moral and political philosophy (of which Mill's harm principle is but an example). I consider *seriatim* below five possibilities for "the law" as judicial conservatives such as Roberts would narrowly construe it.[14]

10. This is not quite as fanciful an example as one might think. Oxford University's Les Green uses arithmetic as an example of something that is not law although often used by judges; Leslie Green, *Law and the Role of a Judge*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 325–326 (K. Ferzan & S. Morse eds., 2016). Green, of course, does not disagree that arithmetic binds judges in their role as judges; he quibbles only that it is not properly called part of the *law*.

11. For a particularly contentious and at one time well-known example of the application of the best-interest standard (by the Iowa Supreme Court evaluating the stable life in an Iowa farming community as compared to the "bohemian" life on a Sausalito houseboat), *see* Painter v. Bannister, 140 N.W.2d 156 (Iowa, 1966).

12. Originating in the first Naturalization Act of 1790, now in the Immigration and Nationality Act sec. 316(e), 8 C.F.R. sec. 316.10.

13. 8 U.S.C. sec. 1251(a)(2)(A)(i).

14. In earlier work I distinguish "law" in a narrow sense from "law" in a richer, more idiomatic sense. *See* Michael Moore, *Do We Have an Unwritten Constitution?*, 63 SO. CAL. L. REV. 107 (1989).

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A. "The Law" on Constitutional Rights is Constituted Only by Explicit Description of the Very Right in Question in the Text of the Constitution

This is the view that if there is a constitutional right to use birth control, to engage in nonheterosexual sexual intimacy, to have an abortion, to marry a person of a different race, to march on the streets of Skokie, Illinois, carrying a neo-Nazi placard, and so on, then the Constitution must itself specifically so say. Simply to state such a view, of course is pretty much to refute it. The rights provisions of the Constitution were written in no such codelike fashion. The Eighth Amendment, for example, was written generally to prohibit "cruel and unusual punishment"—it was not written so as to explicitly prohibit the rack and the screw, the public stocks, the ducking stools, the clean-up of latrines, or any other specific forms of punishments that are considered unusual and cruel even though not specifically so described.[15] The general phrases of the Constitution would have no application if this were what was required for there to be a Constitutional right. Such generally specified rights require interpretation of general language by the courts in order to have any meaningful existence.

Since every lawyer knows this,[16] the seeming assertion of this view of "the law" by Roberts and his conservative colleagues can only amount to the rhetorical hyperbole of partisan advocacy. It can thus be true that "the Constitution simply does not speak to the issue of same sex marriage,"[17] "the Constitution contains no 'dignity' clause,"[18] the "freedom to exercise religion is—unlike the right imagined by the majority—actually set out in the Constitution,"[19] "The Constitution itself says nothing about marriage,"[20] the liberty to marry whom one chooses is one of those "liberties the Constitution and its Amendments neglect to mention,"[21] and yet also be true as a matter of sound constitutional law that there is a right of gay persons to marry as part of a general constitutional right to liberty.

These empty rhetorical flourishes of the dissenters in *Obergefell* remind one of Warren Burger's claim in *Bowers v. Hardwick* that at issue in that case was the right to engage in "homosexual sodomy," a right nowhere

In the narrow sense, "law" is just a string of authoritatively laid-down symbols it is the job of courts to interpret. In the richer sense, "law" includes the interpretation of those symbols. I here use "law" in its richer sense because it is the sense Roberts intends in his discussion of "what the law is."

15. *See* Michael Moore, *Morality and Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47 (2008).

16. Or at least they should. Holmes famously made fun of lawyers who could not see that there was some law governing items like maliciously broken butter churns even if there were no explicit law (statutes or case decisions) specifically involving butter churns. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897), at 474–475.

17. *Obergefell*, *supra* note 1, at 6 (Alito, J., dissenting).

18. *Id.* at 16 (Thomas, J., dissenting).

19. *Id.* at 27 (Roberts, C.J., dissenting).

20. *Id.* at 6 (Roberts, C.J., dissenting).

21. *Id.* at 2 (Scalia, J., dissenting).

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mentioned in the Constitution.[22] Such rhetoric was roundly rejected by Blackmun and Stevens in the dissents that eventually became the Court's view in *Lawrence v. Texas*.[23] One can have a right to practice nonconventional modes of sexual intimacy without the Constitution saying so, just as one can have the right to march in Skokie without the First Amendment saying so. One can hold the contrary view only on pain of none of the general rights-conferring clauses of our Constitution having any concrete application.

B. The "Law" on Constitutional Rights Is Constituted Only by the "Plain Meaning" of Constitutional Phrases such as "Liberty . . . without Due Process of Law"

This view concedes that "the law" includes more than the text of the Constitution; it also includes interpretation of that text and application of it to concrete situations. Yet, the argument is, when this application is done, the rights individuals have are limited to those plainly given by the accepted, conventional meaning of words such as "liberty" and "equal protection."

Herbert Hart once opined that "law," in some "central sense" of the word, referred to a "core of settled meaning" of the words appearing in authoritative legal texts.[24] Often this counsel is taken to be a "plain meaning" approach to legal interpretation.[25] So taken, such an approach runs into well-charted difficulties needing little rehearsal here.[26] For whatever the merits of such an approach to the interpretation of statutory texts when those texts have the specificity of the rules of baseball,[27] it seems hopeless as an approach to interpreting the grand clauses of the Constitution. For few would contend that the conventional usage of the *word* "liberty" is such that a "plain meaning" can be extracted from it sufficient to decide constitutional cases.[28]

22. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).
23. *Id.* at 199 (Blackmun, J., dissenting).
24. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958); H.L.A. Hart, *Problems of the Philosophy of Law*, *in* 6 ENCYCLOPEDIA OF PHILOSOPHY 264–276 (P. Edwards ed., 1967), *reprinted in* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (1983), at 106.
25. What "plain meaning" is depends mightily on what meaning is. For some possibilities about the meaning of "meaning," and about how "plain" any of those can be, *see* Michael Moore, *The Semantics of Judging*, 54 SO. CAL. L. REV. 151 (1981).
26. *See id.*
27. The well-known simile of law to baseball was used by Chief Justice Roberts in the opening statement for his confirmation hearing before the U.S. Senate Judiciary Committee; *Text of John Roberts' Opening Statement*, USATODAY.COM (Sept. 12, 2005), http://usatoday30.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm.
28. In his classic study of liberty, Isaiah Berlin discovered more than two hundred senses to the ordinary usage of the word "liberty." ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 121 (1969).

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C. The "Law" on Constitutional Rights Is Constituted by the Intended Meaning of the Framers

Linguists rightly distinguish what people say from what they mean (or "intend to say").[29] Thus the injunctions, "say what you mean" and "mean what you say," are not empty tautologies. Likewise, linguists distinguish both what is said and what is meant, on the one hand, from what is understood by the audience of a statement, on the other.[30] From these linguistic insights comes the "originalist" interpretive methodology. Thus Thomas construes the Fourteenth Amendment's use of "liberty" by what the Lockean-steeped framers meant and their audiences understood when the framers wrote and ratified the word.[31] Scalia finds determinative what the framers were understood to have intended by way of application of the words they chose to put into the Constitution:

> When the Fourteenth Amendment was ratified in 1868, every state limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. *That resolves these cases*. When it comes to determining the meaning of vague constitutional provisions—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the people who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.[32]

Unlike both text and the plain meaning of text, it is controversial within constitutional theory whether the intent of the framers of constitutional language or the understanding of their original audience can be authoritative for later generations of those living under the Constitution.[33] Advocates of there being a "living Constitution" often put aside originalist meanings in favor of Chief Justice Earl Warren's "standards of decency that mark the progress of a maturing society" kind of meaning.[34] Even among so-called "originalist" theorists, however, many would disagree about the finality or determinativeness that Scalia attaches to the particular intentions or beliefs about particular practices of the framers and their audiences.

But suppose one gave all the credence to framer's intent and original understanding in determining constitutional interpretation that Justices Scalia and Thomas have wanted. Such an exclusively historical approach surely requires that one take the history as one finds it. And the history relevant here shows that crucially important framers of 1791 (for the Fifth Amendment's due-process clause) and of 1868 (for the Fourteenth's) were

29. *See* my remarks in the Law and Linguistics Symposium transcript published as *What Is Meaning in a Legal Text? A Dialogue among Scholars of Law and Linguistics*, 73 WASH. U. L.Q. 771 (1995).
30. *Id.*
31. *Obergefell*, *supra* note 1, at 7 (Thomas, J., dissenting).
32. *Id.* at 4 (Scalia, J., dissenting) (emphasis added).
33. For an introduction, *see* Michael Moore, *A Natural Law Theory of Interpretation*, 58 SO. CAL. L. REV. 277 (1985), at 352–358; Moore, *Do We Have*, *supra* note 14.
34. Trop v. Dulles, 356 U.S. 86 (1958).

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believers in natural rights in general and in a natural right to liberty in particular.[35] Given such beliefs in the reality of the rights to which they intended their language to refer, such framers of the relevant constitutional texts used language the way all language users usually use it: to refer to entities whose actual nature gives the meaning and the extension of the words used.[36] Such users may have their own ideas about the kinds of things to which their words refer. But if they use language the way the rest of us use it, they do not intend their ideas about acceptable applications to fix the meaning of the words they employ. They rather intend each audience to apply its own best understanding of the nature of the thing to which reference is made—even when that understanding differs from that of the original speaker and/or his or her original audience. *That* is the lesson of history that should go under the label "originalism," not Scalia's and Thomas's conventionalist version, which is not faithful to the actual semantic intentions of the framers.[37]

35. On the Lockean natural-rights philosophy adopted by Hamilton and Madison, *see* MORTON WHITE, PHILOSOPHY, THE FEDERALIST AND THE CONSTITUTION (1987).

36. The classic statements of the dominant semantic theory today, "K-P semantics," are SAUL KRIPKE, NAMING AND NECESSITY (1980); and HILARY PUTNAM, *The Meaning of "Meaning*," *in* MIND, LANGUAGE, AND REALITY (1975). K-P semantic theory was introduced to legal interpretation and legal theory by me in 1981; *see* Moore, *Semantics*, *supra* note 25; and has been carried on since by me and others. *See* Moore, *Natural Law Theory*, *supra* note 33; Moore, *Do We Have*, *supra* note 14; Michael Moore, *Plain Meaning and Linguistics*, 73 WASH. U. L.Q. 1253 (1995); Michael Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORD. L. REV. 2087 (2001); Michael Moore, *Natural Rights, Judicial Review, and Constitutional Interpretation*, *in* LEGAL INTERPRETATION, JUDICIAL POWER, AND DEMOCRACY (J. Goldsworthy & J. Campbell eds., 2001); Michael Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 LAW & PHIL. 619 (2002); Michael Moore, *Morality and Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47 (2008); Michael Moore, *Truth-Makers for Propositions of Law and for Propositions about Law*, *in* LAW AND TRUTH (J. Cordio & G. Sucar eds., 2014) (in Spanish), *reprinted in English in* BLURRED BOUNDARIES: VAGUENESS IN LAW (G. Keil & R. Poscher eds., 2016). Other legal theorists have since picked up the lance; *see, e.g.*, NICOS STAVROPOLOUS, OBJECTIVITY IN LAW (1996); Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1 (2004); David Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, PHIL. & PUB. AFF. 105 (1988); David Brink, *Legal Interpretation, Objectivity, and Morality*, *in* OBJECTIVITY IN LAW AND MORALS (B. Leiter ed., 2001); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORD. L. REV. 597 (2013); Scott Soames, *Vagueness and the Law*, *in* ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW (A. Marmor ed., 2012); Scott Soames, *Deferentialism, Living Originalism, and the Constitution*, *in* INFERENCE, INTENTION, AND ORDINARY MEANING: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTS AND PHILOSOPHERS (B. Slocum ed., 2015); Jules Coleman & Ori Simchen, *Law*, 9 LEGAL THEORY 1 (2003); Ori Simchen, *Metasemantics and Legal Interpretation*, *in* REASONS AND INTENTIONS IN PRACTICAL AGENCY (G. Paviakos & V. Rodriguez-Blanco eds., 2015) (this last goes after Scalia's brand of originalism specifically, concluding that it is based on bad linguistics).

37. I presented this view of originalism at the 1988 National Student Symposium of the Federalist Society at the University of Virginia on a panel chaired by Justice Scalia and attended by the then-head of the Equal Employment Opportunity Commission, Clarence Thomas. That presentation was published as Michael Moore, *The Written Constitution and Interpretivism*, 12 HARV. J. L & PUB. POL'Y 3 (1989). I gather from their subsequent judging that I failed to convince either of them of the error of their ways. Perhaps I can do better with the readership of this paper.

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D. The "Law" on Constitutional Rights is Constituted by the Distinctively Legal Meaning Imparted to Constitutional Phrases by Precedential Decisions of the U.S. Supreme Court

Charles Evans Hughes once famously opined that "the Constitution is what the judges say it is."[38] As is often pointed out, this confuses finality with correctness, power with obligation. But even when the needed corrections are made, it is indisputable that prior interpretations of the Court have *some* role in constraining its present interpretations.

There are two dimensions to precedent that have long been distinguished in jurisprudence,[39] both of which have a bearing here. These are the dimensions of holding and of weight. As to holding, it is uncontroversial within the practice of horizontal precedent that no later court should be bound by a precedent court's characterization of the breadth of its own holding. Subsequent courts reformulate such holdings by narrowing, broadening, and distinguishing as they see fit. One upshot relevant here is that one cannot with a straight face dismiss the *Griswold v. Connecticut* line of cases as being irrelevant to construing "liberty" as used in the due-process clauses, just because some of the early opinions in that line of cases speak of a right to "privacy" rather than a right to "liberty." When Roberts proclaims that "the privacy cases provide no support for the majority's position, because petitioners do not seek privacy,"[40] he allows the deciding court's characterization of its holding[41] actually to be its holding, contrary to this general wisdom about precedent. Every serious student of American constitutional law knows that she must penetrate the *Lochner*-inspired smokescreen (of privacy rhetoric) in this *Griswold* line of cases to see the true value being

38. Charles Evan Hughes, *Speech, Elmira, NY, May 3, 1907*, *in* ADDRESSES AND PAPERS OF CHARLES EVAN HUGHES, GOVERNOR OF NEW YORK, 1906–1908 139 (1908).

39. *See* Michael Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW (L. Goldstein ed., 1987).

40. *Obergefell*, *supra* note 1, at 18 (Roberts, C.J., dissenting). Like Roberts, Chief Justice Rehnquist was not above trotting out this disingenuous bit of judicial rhetoric. In his dissent in *Roe*, for example, Rehnquist complained that an operation like abortion "is not 'private' in the ordinary sense of that word" and that "the 'privacy' which the Court finds here is not even a distant relative [of true privacy]." Roe v. Wade, 419 U.S. 113, 172 (1973) (Rehnquist, J., dissenting).

41. The fiction that it was privacy that was being protected in the *Griswold* line of cases was begun by Douglas himself in his opinion for the Court in Griswold v. Connecticut, 381 U.S. 479, 486 (1965): "We deal with a right of privacy." The patent motive for Douglas' dissembling was to distance the Court's second adventure with liberty from the Court's first adventure during the *Lochner* era. Yet a majority of the Justices who decided *Griswold* understood as they made that decision that the decision really protected liberty, not privacy. *See* the concurrences of Justices White, Goldberg, and Harlan, *id.* at 502, 486, and 500, respectively. *See also* the later remembrances of Justices Stewart and Brennan: "It was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded [liberty]." *Roe*, *supra* note 40, at 167–168 (Stewart, J., concurring). "If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (Brennan, J., concurring).

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protected, which was liberty.[42] Treating alike cases that are truly alike, the essence of *stare decisis,* demands no less.

As to weight, it is also noncontroversial that precedent cases do not have absolute weight for subsequent decisions by the same court (so-called "horizontal," as opposed to "vertical," precedent). So even when (unlike *Obergefell*) there are precedent cases squarely on point, they cannot by themselves determine the correctness of an interpretation of the Constitution. Even Justice Scalia recognized the point when he acknowledged in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that overruling a precedent such as *Roe v. Wade* involved a balancing of the degree of error the precedent represented against the conservative values that urge against change.[43]

E. The "Law" on Constitutional Rights is Constituted by "Tradition"

There is now something of a tradition for the Chief Justices that succeeded Earl Warren to extol reliance on "tradition" in interpreting the Constitution. Warren Burger extensively relied on tradition in *Bowers* to disavow there being any constitutional right to engage in "homosexual sodomy";[44] William Rehnquist formulated his defense of denying any right to physician-assisted suicide in *Washington v. Glucksberg* by relying on traditional condemnation of suicide;[45] and Roberts relied most heavily on tradition as his basis for denying gay marriage rights in *Obergefell*.

One worry about relying on tradition in constitutional interpretation is the elasticity and indeterminateness of the concept. In many cases, indeed, there is room for doubt about the precision with which the content of any given tradition can be specified. "Tradition" as here used refers to a form of conventional belief. As such, it is subject to four indeterminacies of meaning and to a lot of evidentiary doubts, all of which contribute to the elasticity and indeterminateness of the concept.[46] As to the indeterminacies in meaning: (1) how unanimous an agreement must there be in the beliefs of a people to constitute a tradition? (2) Who are the people whose beliefs count in constituting a constitutionally relevant tradition—U.S. citizens, U.S. residents, all "English-speaking people,"[47] all peoples in the world,

42. Lochner v. New York, 198 U.S. 45 (1905). As I discuss below, constitutionally protected (negative) liberty is freedom from unwarranted governmental coercion. Privacy, by contrast, is the value of isolation from others in the sense that they lack information about one, attention to one, and access to one. For this latter, true sense of privacy, *see* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

43. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 US. 833, 983 (1992) (Scalia, J., dissenting).

44. *Bowers, supra* note 22, at 196–197 (Burger, C.J., concurring).

45. Washington v. Glucksberg, 521 U.S. 702 (1997).

46. I explore these indeterminacies in the context of Eighth Amendment interpretation in Michael Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J. L. & PUB. POL'Y 47 (2008).

47. Felix Frankfurter's favorite grouping. *See* Rochin v. California, 342 U.S. 165 (1952).

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some educated elite within that world,[48] and so on? (3) How long must the consensus exist through time in order to constitute a tradition? And (4) at what level of specificity in the description of the objects of traditional belief should one be operating when using tradition as a mainstay of constitutional interpretation? As to the evidentiary problem: How does a court (bereft as it is of the opinion-polling techniques of social science) ascertain what a group of people believes or has in the past believed?

These indeterminacies and evidential uncertainties are real enough in many cases but not the same-sex marriage cases. Roberts, Scalia, Thomas, and Alito are, by and large, right in their dissents in *Obergefell*: the clear, long-standing, and well-nigh universal tradition has been for marriage to be the union of a man and a woman. Even societies where gay relationships were without stigma did not recognize gay marriage.[49] The pertinent question for *Obergefell*, thus, is not the determinacy and the evidential well-foundedness of tradition; it is rather, the question of the *authority* of tradition as a major determiner of the correctness of a constitutional interpretation. With the text of the Constitution, the plain meanings of the words used in that text, and the prior interpretations of that text by precedent cases, there is little doubt that such items have a place in constitutional interpretation. With framers' intent and original understanding, there are at least plausible (if controversial) theories of the Constitution's authority that make these originalist items also legitimate ingredients in a good theory of constitutional interpretation. But of what force for judges is the fact that an institution such as marriage has been thought of—even universally thought of—in one way rather than another?

Roberts tells us that the authority of tradition in this context rests on "the need for 'judicial restraint.'"[50] It is, he intones, "the need for restraint in administering the strong medicine of substantive due process"[51] that requires the Justices to eschew their own best insights about what liberty requires in favor of the traditional view of the matter. Yet if the fear is one of judicial arbitrariness and judicial power, why use tradition as the restraint? Any standard not requiring judges to make evaluative judgments will serve as well to restrain judicial power. Indeed, a crisp and clear standard (such as the height, weight, or hair color of the litigants) would serve a restraining function even better. So it cannot be simply the restraining of judges that gives tradition authority in constitutional interpretation. There must be some more positive reason for tradition's authority in this context.

Four possible reasons come to mind. One is the kind of reason available only to the metaethical relativist. A relativist believes that natural rights exist

48. *See, e.g.*, Jerome Frank's concurring opinion in Repouille v. United States, 165 F.2d 152 (2d Cir. 1947), where Judge Frank urged the consulting of America's "moral elite" for the relevant tradition.

49. The few exceptions are noted in William Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

50. *Obergefell*, *supra* note 1, at 13 (Roberts, C.J., dissenting).

51. *Id.* at 11.

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when but only when some group of people believes that they exist. Rights, like all moral properties, entities, and relations, are *relative* to conventional belief—thus the name "relativism." On the relativist view, it requires some significant consensus of belief before there can be a tradition and thus before talk of natural rights makes any sense. There being a *tradition* in favor of a liberty right of gays to marry, on this view, is essential for there being any such right at all. Insofar as constitutional rights protect natural rights, therefore, tradition has pride of place in determining what those constitutional rights are.

Yet relativism is not a view that is or can be accepted by decently educated people.[52] It is, as my late colleague Bernard Williams once wrote, a view pretty much limited to sophomore undergraduates—and even then, only before their first ethics class.[53] It is fundamental to the moral experience of every one of us that we sense the (always potential, sometimes actual) divergence of what we believe is right from what we believe some group believes is right. The relativist's assertion that if Nazis alone had survived World War II, Nazism would be right, is anathema to almost everyone's sense of morality.

A second route to the authority of tradition is that of the utilitarian. On one well-entrenched version of utilitarianism, what most people most prefer constitutes what it is good or right to do.[54] Or as Holmes, an avowed utilitarian put it, "I am so skeptical as to our knowledge about the goodness or badness of laws that I have no practical criticism except what the crowd wants."[55] A preference utilitarian might well regard tradition as authoritative because it is an index of utility. If most people have a traditional belief that marriage requires a man and a woman, that must be because they prefer that marriage be so limited; and no one can have a right contrary to such group preference because rights are constituted by such group preference.

Like the metaethical relativist, those who espouse utilitarianism as their exclusive kind of ethics are committed to taking the social facts as they find them. If most people prefer that Jews be exterminated, then it is right and just that that be done; if women prefer not to be raped less than men prefer to rape them, then it is right that rape be decriminalized so that such justice

52. *See* the critique of relativism in Heidi Hurd, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. Cal. L. Rev. 1417 (1988).

53. Bernard Williams, Morality: An Introduction to Ethics (1972), at 20: vulgar relativism is "possibly the most absurd view to have been advanced even in moral philosophy."

54. Preference utilitarianism—where what is maximized is the satisfaction of human preferences rather than eudemonic states of happiness or pleasure or normative states of objective need—is usually dated from John Stuart Mill. It is the form of utilitarianism most easily assimilated to modern welfare economics.

55. Oliver Wendell Holmes, Jr., *Letter to Frederick Pollock, 1910*, *in* 1 Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes 1874–1932 (M. DeWolfe Howe ed., 1941), at 163.

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can be achieved.[56] Again, almost everyone's experience of morality is such that their individual moral beliefs are *not* hostage "to what the crowd wants."

A third route to defending the relevance of tradition in constitutional interpretation, lies in political philosophy rather than in metaethics (the first route) or in ethics (the second). This is the route of the kind of majoritarianism that Joel Feinberg dubbed the "conservative thesis."[57] On this view the consensus that constitutes a tradition has authority, not because it is right but rather because the majority are entitled to live by it even if it is not right.[58] The majority, on this view, have the right to be wrong so that even their erroneous moral beliefs have authority.

Such a view defends the use of tradition on the basis of democracy. Tradition, on this view, represents a kind of informal democratic decision-making process. There are "belief-votes" such that a long-term consensus has the force—the imprimatur—of majoritarian decision. The lack of authority of the political philosophies of Herbert Spencer or of John Stuart Mill (Roberts's two examples)[59] then does not lie in the incorrectness of their views; it rather lies in the fact that there have not been enough adherents to their views for long enough to constitute "a tradition."

The conservative thesis does not run counter to our fundamental experience of morality in the way that relativism or preference-utilitarianism does, for it does not counterintuitively equate the moral fact as to what is right and just with the sociological fact as to what many have long believed to be right or preferred to be done. Still, to rely on tradition for this reason is surely unjustified. If one cannot claim for a practice that it is right or morally required but only that this is how most of us like to practice it, from whence comes our authority over others to tell them that they, too, must practice as we do? What, because we need their conformity to our way of doing things in order to sustain the value we place on our doing them that way? Thus, if we deeply value our marriage to someone who is of our own race but of the opposite sex, we need everyone to be so married (and thus we can justifiably prohibit marriages to persons of the same sex but of another race)? So grounding the authority of tradition is a pathetic admission of the insecurity one must feel about his own valuations of what he does. As such, it is a poor ground for taking away another's freedom of action.

Second, the conservative thesis looks particularly unappealing in the context of judicial review. Think about it. Legislation is the output of the most

56. A famous example from another well-known utilitarian; Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

57. JOEL FEINBERG, HARMLESS WRONGDOING (1988), at 46.

58. *Cf.* Stephen Decatur on patriotism: "My country, right or wrong, but still my country." Stephen Decatur, after-dinner toast, Norfolk, Virginia, 1816, *quoted in* A.S. MACKENZIE, LIFE OF STEPHEN DECATUR: A COMMODORE IN THE NAVY OF THE UNITED STATES (1846), at 443. Mill's nineteenth-century critic, Sir James Fitzjames Stephens, is best construed as a majoritarian. JAMES FITZJAMES STEPHENS, LIBERTY, EQUALITY, FRATERNITY (1873). A more modern example is ROBERT BORK, THE TEMPTING OF AMERICA (1990).

59. *Obergefell*, *supra* note 1, at 22(Roberts, C.J., dissenting).

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democratically constituted institutions we have: legislatures. Overturning that output surely wants some justification other than that some other institution—"tradition"—is supposedly even more democratic. As John Ely urged years ago, it just makes no sense to overturn the products of the most democratic institution we have in the name of some vaguely and only arguably democratic institution of informal consensus, however long-running it may be (and that is assuming that courts are any good at ascertaining the content of that vague and informal thing, "tradition").[60]

Third, *our* tradition of judicial review enshrines the protection of minority rights. Demonstrably, our Constitution was fashioned in part out of a fear of the tyranny of the majority.[61] Minority rights are protected by judicial review in our tradition because of such fear. Now ask yourself this question: Do you protect the rights of a minority best by interpreting the content of those rights in accordance with the views of the majority, that is, the "tradition?" Indeed, is it any protection at all against popular views that those same views are used to determine the content of the rights to protection? Majoritarian justifications of protecting minority rights by judicial review make no sense, on the face of it.[62]

Fourth and finally, an unchecked conservative thesis would be an unacceptably dangerous grounding of tradition's authority. Even if such social facts (that as many long believed, slavery is just, that death is a permissible punishment, that race-segregated schools are permissible) were some reason to continue such institutions, whether such institutions should be continued would surely also be a function of just how wrong or unjust those institutions are.[63] And this latter fact is not a matter of social fact or of traditional judgment—it is a moral fact that each judge or Justice must decide for him- or herself as he or she decides how much weight to give to traditions.

The fourth route to endowing traditional beliefs with constitutional authority is Burkean in nature.[64] This is the view that traditions, although not constitutive of what is right and just, nonetheless are evidential of what is right and just. As Burke said (in answer to Locke and Rousseau specifically on the right to liberty): What intellectual power do we as individuals possess

60. Ely was eloquent on this point:

> An appeal to consensus . . . on the theory that the legislature does not truly speak for the people's values, but the court does, is ludicrous . . . we may grant until we're blue in the face that legislatures aren't wholly democratic but that isn't going to make courts [ascertaining traditional consensus] more democratic.

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), at 67–68.

61. THE FEDERALIST NO. 78 (Alexander Hamilton).

62. In Moore, *Justifying*, *supra* note 36, I put this point in terms of Lord Coke's dictum, "No man shall be the judge of his own cause."

63. As John Hart Ely once illustrated this point: "Lynching is a tradition, riding people out of town on a rail is a tradition, keeping blacks from voting is a tradition." ELY, *supra* note 60, at 21.

64. I explore the Burkean case for conforming with tradition in Michael Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J. L. & PUB. POL'Y. 263 (1996).

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that can compare with the collective wisdom of the ages? Or as John Roberts echoed after reciting the universal tradition for millennia of marriage being limited to cross-gendered relationships, "Just who do we think we are" to go against that consensus?[65]

Unlike the previous three views, there is surely something to the Burkean argument. If there are right answers to questions of morality(such as the proper extent of our liberty), one might well be quite humble about one's own ability to find those right answers. For whatever one can be right about one can also be wrong about, and the disagreement of other well-meaning people with one's own views can often be a rational indicator of one's own errors. Yet just as surely such epistemic deference can never be complete.[66] No one, judge or otherwise, can completely defer to others' moral judgments and still be a person rather than, say, a mere parrot. That almost everyone in Athens thought slavery to be just, that most people in the pre-*Brown* American South thought that segregated schools did not violate equality, that a solid majority have long thought death to be a permissible punishment, cannot preempt one's own judgment about such matters. Evidence is just that, evidence, and as such, the evidence constituted by tradition can be outweighed by evidence pointing in the opposite direction.

I conclude that there is a limited case for some reliance on tradition in constitutional interpretation, based on Burkean considerations. But this limited case does not justify preclusion of individual judgments by judges and justices of what it is that liberty truly demands. Indeed, even the combination of all five ingredients that we have considered—text, plain meaning, precedent, tradition, and original intent/understanding—cannot preclude such individual judgment. Often this is for reasons of indeterminacy—for often these materials, even in combination, are insufficient to determine unique decisions in individual cases. But even when these materials do determine a result—as tradition in particular would do on the gay marriage issue—it flouts the obligation of judges in constitutional cases to rely on those materials alone to the exclusion of their own best judgments about the rights persons possess.

Those who framed the relevant clauses in 1791 believed in natural rights, as Thomas points out in his dissent.[67] They believed that a general right to liberty was one of those natural rights and was, indeed, for those like James Wilson, the centerpiece of the entire natural-rights philosophy. Their successors also thought they were referring to such liberty when they drafted the Bill of Rights and the Civil War Amendments in the 1860s. Both sets of framers understood that people would differ in their views about the content of such rights, the right to liberty included. Such difference of opinion would exist despite the belief of these sons of the Enlightenment that (in the words of Locke) "one can demonstrate the truths of morality

65. *Obergefell*, *supra* note 1, at 3 (Roberts, Ch. J., dissenting).
66. Moore, *Dead Hand*, *supra* note 63.
67. *Obergefell*, *supra* note 1, at 8 (Thomas, J., dissenting).

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with the certainty that one can demonstrate the truths of mathematics."[68] Although moral truths about the content of natural rights may be this "self-evident," as Jefferson put it in the Declaration of Independence, some things that are self-evident are nonetheless "evident only to the wise."[69] That was why it was important to get well-educated, right-thinking citizens to act as judges.[70] Those who are neither wise nor well motivated need not apply.

John Roberts and his fellow social conservatives on the Court rightly see that their job in cases like *Obergefell* is not to apply some established, conventionally accepted political philosophy. Roberts quotes Holmes's oft-quoted remark that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."[71] Roberts then paraphrases Judge Friendly: "the Fourteenth Amendment does not enact John Stuart Mill's *On Liberty* any more than it enacts Herbert Spencer's *Social Statics*."[72] And of course Holmes (and Friendly and Roberts) are right: Their job is not to apply Spencer or Mill—or Aristotle, John Rawls, or St. Thomas Aquinas, for that matter—to resolve questions about the constitutional meaning of "liberty." What such judges do not see is what their job really is instead. They are not to apply others' views about what liberty demands, even if those others are numerous, famous, revered, or just plain old. They are to apply their own best judgments about the contents of the rights the Constitution names but does not create, rights that, as Justice Douglas noted in *Griswold*, "are older than our Bill of Rights."[73] Their job is to do the political philosophy themselves to decide what rights persons possess, not pass the job off to others. The job of judges, as Herbert Hart once put it, is—first, foremost, and always—*to judge*.[74] That that judgment invokes political philosophy in no way renders such judgment extralegal, beyond the law, or in any other way improper. It is nothing other than what the law—here, the Constitution—demands.

Judicial conservatives (who, in America at least, tend to also be political conservatives) often protest that this conception of constitutional judging flies in the face of democracy. Roberts's earlier quoted "Just who do we think we are?"[75] appeals to modesty of power as much as modesty of judgment. Democratic processes were at work on the gay marriage issue, on this view,

68. John Locke, An Essay Concerning Human Understanding, 3.11.16, 4.3.18–20 (1690).

69. An Aquinian saying. *See* Thomas Aquinus, *First Part of the Second Part, Q. 90, Ans. 2*, Summa Theologica, *in* 2 Basic Writings of St. Thomas Aquinas (Anton Regis ed., New York: Random House, 1945), at 774.

70. As proclaimed in The Federalist No. 78 (Alexander Hamilton):

> There can be but few men in the society who will have sufficient skill in the law to qualify them for the station of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.

71. *Obergefell*, *supra* note 1, at 12 (Roberts, C.J., dissenting).

72. *Id.* at 22 (Roberts, C.J., dissenting).

73. *Griswold*, *supra* note 41, at 486.

74. H.L.A. Hart, *The Ascription of Rights and Responsibilities*, 49 Proc. Aristotelian Soc'y 171 (1949).

75. *Obergefell*, *supra* note 1 (Roberts, C.J., dissenting).

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and the Court had no business interrupting that democratic working by imposing the views of five unelected Justices.[76]

Now this *is* a question of political philosophy! The question of whether judicial review is a desirable institution in a democracy is a much debated question examined by political theorists in America and elsewhere for two hundred years. The question is a general one about the basic design of a constitutional system. For it is judicial review *as such* that arguably challenges democracy, not just judicial review about liberty. And in truth, there is much to be said against judicial review when it is exercised to overturn the products of democratic law-making. Indeed, my longtime colleague and sometime debate partner on this very topic, Jeremy Waldron, has said quite a lot on this side of the question, proclaiming (as Waldron puts it) that the "right of rights" is the right to participate in a society's decisions as to what rights we have.[77] In a formal debate with Waldron,[78] I put forward the other side of this question, urging that an increment of rights protection can reasonably be expected in legal systems with judicial review.[79] Waldron countered that even if most rights are better protected with judicial review than without it, necessarily one right is flouted by the practice, namely, Waldron's so-called "right of rights" to participate in the decision about the content of rights.[80] And there issue is joined as to which rights are most important.

This is a close debate on a question in political philosophy about the outcome of which reasonable minds could differ. But in America this political debate is closed to serious *legal* argument. For the more than two hundred years following *Marbury vs. Madison*,[81] whether U.S. courts should exercise the "great power" of judicial review has been answered in the affirmative. That judicial review costs us something in the way of democratic decision-making but that that cost is worth bearing for the greater rights-protection such review can plausibly be thought to achieve, is foundational for American constitutional law.

Of course, by the arguments given above with respect to the weight of precedent, *Marbury* might be overruled. But unless and until it is, that our courts' actions overturning the decisions of elected representatives costs us something by way of democracy is true but irrelevant. The cost to democratic decision-making is a fixed cost of judicial review. We decided to pay that cost when we decided over two hundred years ago to have the practice, so the fact that it is a cost in a case such as *Obergefell* is no argument to decide the case one way or the other. Each and every time judicial review is exercised,

76. *Id. See also* the dissent of Justice Scalia in *id.*
77. Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993).
78. Michael Moore & Jeremy Waldron, The Rights-Based Argument for Judicial Review, Debate at the University of Pennsylvania Law School (1995).
79. My side of the debate was written up in a section of Moore, *Justifying*, *supra* note 36.
80. JEREMY WALDRON, LAW AND DISAGREEMENT (1999).
81. Marbury v. Madison, 5 U.S. 137 (1803).

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democracy is set back a bit. But if a right is truly protected by the decision of the courts, that thwarting has been judged to be a cost worth paying.

So when the dissent in *Obergefell* complains about the thwarting of the democratic process by "stealing this issue from the people"[82] —that can only be a repetitive assertion of the conclusion that there was no right there to be protected. For again, if there is such a right, we long ago decided that its protection was worth the cost to democratic decision-making. There is thus no independent "who decides" question lurking in cases like *Obergefell*.[83] There is no independent question as to whether the decision of whether a liberty right exists allowing gay persons to marry, "should rest with the people acting through their elected representatives, or with those lawyers who happen to hold commissions authorizing them to decide legal disputes according to law."[84] In our system, that decision is for the courts. Roberts is right when he says that "The Constitution leaves no doubt about the answer";[85] he is just wrong about what that answer is. As John Marshall intoned in *Marbury*, "it is emphatically the province and duty of the judicial department to say what the law is,"[86] and that includes the constitutional law on the rights that we have. That business of "saying what the law is" requires courts to delve into questions of political philosophy, which I now propose to do.

II. THE POLITICAL PHILOSOPHY GIVING CONTENT TO THE MORAL RIGHT(S) TO LIBERTY

It is one thing to urge judges to do the political philosophy needed in order to give content to rights like the right to liberty. It is another to point the way by saying how you would do that work yourself. Yet this second is a useful exercise, too. For after all, whether political philosophy can yield some persuasive yet determinate results is best answered by producing one. Such I intend to do in this section.

A. Do Natural Rights Exist?

My main concern in this section is to make the case for the existence of a natural right to liberty as well as to chart its content. Necessarily, for such a right to exist there must be such entities as natural rights. I thus briefly address this preliminary but foundational issue. There are actually two issues here. One is about objective morality generally. The other is whether

82. *Obergefell*, *supra* note 1, at 2 (Roberts, C.J., dissenting).
83. As Chief Justice Roberts proclaims; *id.* at 16 (Roberts, C. J., dissenting).
84. *Id.* at 3.
85. *Id.*
86. *Marbury*, *supra* note 80, at 177.

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the shape of that objective morality includes natural rights. I address each separately below.

1. Moral Realism and the Objectivity of Ethics

Natural rights is one variant of an objectivist metaethics about morality. Such objectivism generally is called moral realism in philosophy. A moral realist believes two things: one, that moral relations like rights and duties, moral qualities like goodness, rightness, and justice, exist; and two, that the existence of such relations, entities, and qualities is mind- and convention-independent.[87] This latter tenet asserts that the truth conditions of moral propositions do not depend on truths about what anyone or any group thinks, believes, desires, or agrees about. Such truths exist whether one believes that they exist or not.

Intuitively most people implicitly accept the mind-independence of moral qualities. Most people sense that uttering some moral propositions such as "slavery is unjust" is different from uttering some psychological or sociological proposition such as "I believe that slavery is unjust, or "most of this society agrees that slavery is unjust." What is morally true rightly refuses to be identified with either individual or social belief in most people's minds.

The existence condition is trickier for most nonphilosophers; for moral entities often seem spooky and queer. Justice Holmes caught the flavor of this worry when he likened a natural law view of the common law to a "brooding omnipresence in the sky"—a sort of aurora borealis, apparently, but without the lights.[88] In addition, to many persons, moral arguments often seem difficult, and moral disagreements, intractable. Moral skepticism looms for those afflicted with such doubts. Elsewhere I do what I can to allay these fears.[89] And they do need allaying, particularly for judges. Those sworn to uphold justice have a hard time doing their job if they do not believe there is such a thing as justice.[90] In any case, this is not an issue that can be settled here. As I argue shortly below, judges in our constitutional tradition

87. The nature of moral realism is laid out in Geoffrey Sayre McCord, *Moral Realism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006). My own definition of moral realism is narrower than McCord's; *see* Michael Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992).

88. Southern Pacific v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

89. Moore, *Moral Reality Revisited*, *supra* note 87; Michael Moore, *Moral Reality*, WIS. L. REV. 1061 (1982). Both essays are reprinted in MICHAEL MOORE, OBJECTIVITY IN LAW AND ETHICS: ESSAYS IN MORAL AND LEGAL ONTOLOGY (2004). Others did much more to resuscitate moral realism in the eighties than did I. These prominently included my good friends and colleagues David Brink, *Moral Realism and the Skeptical Arguments from Disagreement and Queerness*, 62 AUSTRALIASIAN J. PHIL. 111–126 (1984); and DAVID BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989); Nick Sturgeon, *Harman on Moral Explanations of Natural Facts*, 24 S. J. PHIL. SUPP. 69–78 (1986); Nick Sturgeon, *What Difference Does It Make if Moral Realism Is True?*, 24 S. J. PHIL. SUPP. 115–141 (1986); and Nick Sturgeon, *Moral Explanations*, *in* ESSAYS ON MORAL REALISM (Geoffrey Sayre McCord ed., 1988); Bill Lycan, *Moral Facts and Moral Knowledge*, 24 S. J. PHIL. 79–94 (1986); and GEOFFREY SAYRE-MCCORD, ESSAYS ON MORAL REALISM (1988).

90. I chart the corrosive effect on judging done by moral skepticism in Moore, *Moral Reality*, *supra* note 89; and Moore, *Moral Reality Revisited*, *supra* note 87. I represented the People for the American Way in opposing Robert Bork in his 1987 confirmation hearings on the ground

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need to be believers in natural rights, and this requires that they not be skeptics about morality generally.

2. The Rights-Based Nature of Objective Morality

The view that morality is objective is often called a "natural law" view. The label is a poor one. It suggests that moral properties must be intimately tied to natural properties to be objective; or worse, that morality must be built into human nature to be objective; or even worse, that some god has to have implanted moral inclinations in our nature for morality to be objective; or worse yet, that any inclination or action that naturally occurs is good. Yet morality can be objective even if there is no God,[91] even if it is not built into our nature,[92] even if it is not constituted by "doing what comes naturally,"[93] and even if it is not tied to natural facts.[94]

Such generally objective morality has been urged to have quite divergent shapes. On one view, it is chiefly concerned with the virtuous character of persons; on another, with the goodness or rightness of the states of affairs produced by actions; on another, with the conformity of actions (or actions-cum-intentions) with certain objective, categorical norms.[95] A natural-rights view is one form of the latter view. So even objectivists about morality might reasonably wonder whether there are any natural rights. Jeremy Bentham, for example, was an objectivist about morality but thought that talk of rights was "simple nonsense," and that talk of natural rights was "nonsense on stilts."[96]

The deontological tradition in ethics (of which natural rights is a variant) is a very intuitive view of morality for most people. It is also, in my view, a correct theory of morality's nature.[97] And within the deontological family of theories, natural-rights theories are both intuitive and plausible. As Locke said, unlike the duty-based deontological view of the Thomists, natural rights are by their nature doctrines of freedom in that they allow the holders of

that Bork's moral skepticism so warped his view of the judicial function as to disqualify him; *see* Michael Moore, *Judge Bork: A Contradiction in Terms*, L.A. TIMES, Sept. 18, 1987.

91. Argued for in Michael Moore, *Good without God*, *in* NATURAL LAW, LIBERALISM, AND MORALITY (R. George ed., 1995), reprinted in MOORE, OBJECTIVITY, *supra* note 89.

92. I disclaim human nature naturalism in my response to Waldron in MICHAEL MOORE, *Responses and Appreciations*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE, 408, 411–412 (Kim Ferzan & Stephen Morse eds., 2016).

93. The phrase is Herbert Hart's mocking of *natural* law. At a presentation by a young natural-law theorist at All Souls College, Oxford, in 1988, Hart asked, "What do you mean by 'natural'?," and receiving no satisfactory answer, then proffered, "So it is just doing what comes naturally?"

94. G.E. Moore, e.g., was famously a realist about morals but one who believed in nonnatural, moral properties. G.E. MOORE, PRINCIPIA ETHICA (1903).

95. Respectively, virtue-based, consequentialist, and deontological theories of morality.

96. JEREMY BENTHAM, *Anarchical Fallacies*, 2 THE WORKS OF JEREMY BENTHAM, excerpted in NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN (Jeremy Waldron ed., 1987).

97. *See* Larry Alexander & Michael Moore, *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (3d ed. 2016).

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such rights the choice whether to hold people to certain of their moral duties or not.[98]

In any case, it is here that tradition can do its most relevant constitutional work. The American constitutional tradition was built (and for two and a quarter centuries has been carried on) on the basis that persons have natural rights that it is the business of governments to protect. Indeed, the Madisonian Compromise was reached on the assumption that there are two intrinsically good things a just society must respect: the right of the majority to rule (democracy), and the natural rights of individuals that are beyond the reach of ordinary, democratic politics to adjust or abridge. To take an oath to defend this system is not only to take an oath to respect democratic decision-making; it is also to take an oath to protect natural rights from this very same democratic decision-making process.

This tradition makes sense only if there are natural rights to be protected by judicial review. This is particularly true with respect to the protection of *unenumerated* rights by judicial review. For with unenumerated rights (such as the right to liberty), there is no positivist account of what judicial review protects; there are only the moral facts by virtue of which persons are endowed with certain natural rights. Judges who are natural-rights skeptics are understandably bereft of any understanding of how the tradition of protecting such rights by judicial review can make any sense.

Thus, while ethical philosophers might (and do) debate the merits of virtue-based, consequentialist, duty-based, or rights-based moral theories, for judges in the American system the task is simpler. If they are not believers in natural rights, they have taken on the wrong job, and if those who appoint judges see that such judges are not believers in natural rights, judging in our legal system is not a job that should be given to them or kept by them.[99] For our basic scheme to work, judges need to join in Justice Brennan's vision that the Constitution is a "sublime oration on the dignity of man"[100] as that dignity is reflected in his possession of natural rights.

To say that natural rights exist is not, of course, to say that a general right to liberty is one of those rights. I intend to creep up on this question in the following steps. First, we need to get clear what we mean by "liberty." Second, we need to ascertain what is sufficiently good about liberty that it should be promoted. Third, we need to defuse the skeptics of liberty from both the left and the right who urge that however good liberty may be as an end to be promoted, no sense can be made of a *right* to liberty. Such skepticism is answered only by providing an analysis of such

98. *See* JOHN A. SIMMONS, THE LOCKEAN THEORY OF RIGHTS (1992).

99. As I argue was the case with Robert Bork, a contemporary natural-rights skeptic. *See* Moore, *Judge Bork*, *supra* note 90. By contrast, even if one disagrees with Justice Thomas as to his views on the natural rights we all possess, he at least should not be disqualified as a nonbeliever in natural rights generically. *See* Michael Moore, *Unnatural Brawl over Natural Law*, L.A. TIMES, Sept. 3, 1991.

100. William Brennan, Speech, Text and Teaching Symposium, Georgetown University, Washington, D.C. (Oct. 12, 1985).

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a right that does not reduce to either of the absurdities feared by liberty's skeptics.

B. What Do We Mean by "Liberty" (What Is Liberty)?

"What is" questions are notoriously fuzzy. They also invite frivolous answers disguised as profound truths, as in, "What is love?" Answer: "Never having to say you're sorry."[101] Or, "What is truth?" Answer: "The lonely voice of youth."[102] They also look linguistic in nature, as if they could be answered by describing patterns of idiomatic usage of the word "liberty," whereas, in fact, what such questions really ask is what (in the normative world of valuable things) is the valuable item(s) to which the word should be taken to refer? Is there some good or goods plausibly in the vicinity of what people mean when they speak of liberty, and if so, what is the nature of that item or items?[103]

That said, there still are some usage facts needed to get us started. Yet one has to pick carefully here. "Liberty," "freedom," and the like are honorific words, words of virtually universal commendation.[104] Like all such words ("justice," "equality," "fairness," etc.), "liberty" has been used to name all manner of things, the only common denominator of which is that someone somewhere at some time has valued them. Indeed, Isaiah Berlin purported to discover two hundred senses to the word "liberty,"[105] and I suspect that his list is incomplete. Consider in this regard what the word means when used in film scripts such as *Braveheart*,[106] where William Wallace (in 1307 no less!) is scripted to shout "freedom" at his death. Or ponder what George W. Bush meant with his various "Freedom" speeches given throughout Europe during his second term as president.[107]

As with many other useful concepts, we need to be somewhat discriminating in our selections of the facts of usage with which we begin. Consider the following usage. Some years ago, the *Wall Street Journal* reported on a group of motorcycle riders who have had great success in lobbying state legislatures to repeal the requirement that helmets be worn when riding a motorcycle.[108] The group at one time called themselves A Brotherhood Against Totalitarian Enactments, or ABATE for short. They called

101. Erich Segal, Love Story (1970).
102. Johnny Cash, "*What Is Truth?,*" *Johnny Cash Show* (ABC television broadcast Apr. 15, 1970).
103. Joseph Raz, The Morality of Freedom (1986), at 14–16.
104. Michael Moore, *Freedom*, 29 Harv. J. Law & Pub. Pol'y 9 (2005), at 10.
105. Isaiah Berlin, *Two Concepts of Liberty*, *in* Four Essays on Liberty 121 (1969).
106. Braveheart (Paramount Pictures 1995).
107. E.g., George W. Bush, Freedom and Democracy, Address at Riga, Latvia (May 7, 2005). Bush's usage seemingly was to use "liberty" in what is usually called the "liberty of the ancients" sense, viz, as a synonym for political participation.
108. *Risky Riders: Touting Freedom, Bikers Take Aim at Helmet Laws*, Wall St. J., Dec. 1, 2004, at A1. *See also* the public commentary, *Common Sense Says Wear the Helmet, Dude*, Wall St. J., Dec. 16, 2004, at A17.

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themselves "freedom riders"; they styled states where the helmet legislation has been repealed, "free states." Their leader, Sputnik (his legal name), had "Free" tattooed across his forehead.

ABATE's usages of "free" point to a familiar concept of liberty. Liberty in such usages is the absence of restraint. In particular, the restraint in question (the absence of which constitutes liberty) is the restraint given by the prohibitions of the criminal law when these prohibitions are backed by coercive sanctions such as fines or imprisonment. This (with some amending enlargements) is the sense of "liberty" that I use throughout this article, for (as Thomas points out in his dissent in *Obergefell*) this is pretty plainly the sense of liberty referred to by those framers of 1791 and 1868 when they spoke of a natural right to liberty protected by the Constitution.[109]

This sense of liberty is, of course, what is usually referred to as *negative* liberty—"negative," because its essence is given by an absence of something, namely, restraint. The contrast is to positive liberty, a liberty whose essence lies in the presence of something rather than its absence. Just what positive liberty amounts to has been a considerably contested notion in political philosophy ever since Isaiah Berlin's revival of the notion (and its contrast to negative liberty) in the 1950s and 1960s.[110] In the midst of such controversy, I simply stipulate the usage of "positive liberty" that I intend, a usage I believe to be a common if not universal one: positive liberty is that part of power or ability that we call an *opportunity*. More specifically, positive liberty is the opportunity to achieve through one's actions what one most wants to achieve. Opportunities, so understood, are to be distinguished from *capacities*, which deal with the internal characteristics of an individual. Opportunities exist when no external impediments (such as natural circumstances, economic conditions, or legal restraints) stand in the way of achieving what one wants to achieve. Such opportunities may thus exist even when the individual who has them lacks the autonomy (i.e., internal capacities) to take advantage of them.

One might think that "positive" and "negative liberty" are but two ways of describing the same thing. The thought proceeds from the insight that restraints are the enemy of abilities, in the sense that the nature of a restraint is to reduce or eliminate the ability of one to do that which he is restrained from doing. If a positive liberty to do some action A exists only when there are no restraints on the actor doing A—no psychological restraints, such as inner compulsions, no economic restraints, such as poverty, no restraints imposed by a private party, such as the threat of a thief, as much as no restraints of coercive legal sanctions—and if negative liberty similarly exists only in the absence of *all* restraints, then negative and positive liberty are one and the same thing. Yet positive liberty (as I define it) is not to be equated

109. *Obergefell*, *supra* note 1, at 3-7 (Thomas, J., dissenting).

110. *See* the extensive discussion in Ian Carter, *Positive and Negative Liberty*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2012).

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with the absence of *all* restraints but only with the absence of external impediments to action. Moreover, negative liberty is not to be thought of in the holistic way either. Rather, such liberty is conceptualized in terms of particular *kinds* of restraints the absence of which is liberty-enhancing. Thus Hohfeldian liberties are negative in that they are constituted by the absence of moral rights and obligations. More specifically, in the justly celebrated Hohfeldian logic, x is *at liberty* as against y to do A if and only if: (1) it is not the case that x is under an obligation not to do A; and (2) it is not the case that y has a (claim) right that x not do A.[111]

The restraints that we are interested in here are not the restraints on *normative powers* imposed by moral obligation, as they were for Hohfeld. Rather, we are interested in actual, physical power to cause results in the real world. Even so limited, in this context we should not be interested in the *internal* constraints imposed by psychological compulsions such as are present in addiction and obsessive-compulsive disorders. Nor are we interested in the real-enough restraints on opportunities imposed by poverty and other economic disabilities. For *political* liberty, negative liberty is the absence of coercive *legal* sanctions. So defined, negative political liberty is in no danger of being confused with positive liberty.

Once one disambiguates "liberty" so as to make clear that one is referring, in this context, only to negative liberty, there remains some vagueness in the concept even so disambiguated. More specifically, the notion of (legal) *restraint* has residual vagueness in it due to unclarity on the line between a *restraint* (which diminishes opportunities) and an *offer* (which enlarges them). Justice Thomas in *Obergefell* exploits this vagueness in his narrow construal of negative liberty. Thomas urges that the state laws in question did not actively prohibit same-sex marriage with positive sanctions attached to such prohibition—that would have been a restraint, Thomas concedes. Rather, the laws at issue in that case merely omitted to offer the marriage status to same-sex couples—a violation of positive liberty, perhaps, but according to Thomas, no violation of negative liberty because of the absence of any legal restraint in those laws.[112]

Justice Thomas's dissent raises a good question (even if, by my lights, he gets the wrong answer to that question). What is the distinction between a threatened detriment—a "restraint" which diminishes negative liberty—and an omitted offer of a benefit, which does not? A number of distinctions suggest themselves here, some more promising than others.

One immediately occurring thought might be that the state *acts* when it restrains whereas it only *omits* to act when it fails to confer a benefit. Yet a moment's reflection should show that state action is not what is at issue here. To begin with, there are some conceptual worries. When a state says to some of its citizens that they may marry, but this saying by implication means that

111. Wesley Hohfeld, Fundamental Legal Conceptions (1919).
112. *Obergefell*, *supra* note 1, at 11-12 (Thomas, J., dissenting).

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others may not, has not the state acted? Consider this old chestnut from the act/omission literature: "the nurse gave the patient one-half of the required infusion." Act (giving half) or omission (not giving all)?[113] Or suppose the state initially says that all may marry, but then amends that act by saying that same-sex couples may not. Is this now state action, whereas before, when the state initially offered only cross-gendered marriages, it was not? Second, and more important, there is a normative worry: the act/omission distinction usually matters morally because of the differential stringency of negative versus positive duties for individuals.[114] For states, that significance is significantly lessened, for states are not being punished in proportion to the degree of wrong done (which is the main normative implication of there being differential stringency of duties). If the state has a duty to its citizens, it matters little (in morality, whatever the state of the "state action" doctrine in constitutional law may be)[115] whether that duty is a positive duty to act or a negative duty to refrain from doing some act.

Another possibility for a distinction here is that threats and offers come as self-labeling items, in the sense that if one *says*, "I threaten you with" or "I offer you," these speech acts are respectively those of threat and of offer. Yet this is as far from the truth as thinking that morally binding promises are always and only made by saying, "I promise." If I "offer" to give your book back to you only if you comply with some request of mine, I have threatened you with deprivation of your book; if I "threaten" you with nonuse of my book unless you comply with some request of mine, I have offered you use of my book if you do the action requested. In the first case I have diminished your opportunities, while in the second case I have increased them.

This suggests that a second distinction is really at work here: threats promise *detriments* whereas offers promise *benefits*. The continued loss of your book is a detriment; the continued use of my book is a benefit. Yet this distinction wholly depends on there being already in place a baseline of entitlements.[116] It is because you are entitled to the use of your own book that my conditional "offer" is really a threat; it is because you are not entitled to the use of my book that my conditional "threat" is really an offer.

In its conditional spending cases the U.S. Supreme Court has seen this point with admirable clarity. Although in dicta, Chief Justice Rehnquist noted in *South Dakota v. Dole*[117] that the formal characteristic (of an *offer* of the *benefits* of federal highway funds) was not dispositive of the issue of

113. I discuss this old chestnut in MICHAEL MOORE, CAUSATION AND RESPONSIBILITY (2009), at 441–442.

114. *See id.* at 55–59.

115. Under the Supreme Court's current state action doctrine, there are certain necessarily public functions (and thus state action) for activities traditionally and exclusively performed by the state. Jackson v. Metro Edison Co., 419 U.S. 345, 352 (1974); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). This line of cases actually considers when some private entity is a state actor, not the question examined in the text of the present article, which is whether the activity is one that the state cannot omit to perform without the omission constituting state action.

116. *See* ALAN WERTHEIMER, COERCION (1987), ch. 12.

117. South Dakota v. Dole, 483 U.S. 203 (1987).

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whether the states were being coerced into compliance with a federal regulatory scheme that the federal government was without constitutional authority to impose on the states; similarly, in *Sibelius*,[118] Chief Justice Roberts more recently held that an "offer" to the states of the benefit of federal Medicaid funds was really a coercive order ("a gun to the head")[119] to have certain federally mandated medical insurance, despite the federal legislation's use of the form of offer of benefit rather than the form of threat of detriment.

Now apply this baseline notion of a restraint to the marriage issue. Justice Thomas concedes that in the miscegenation cases,[120] the Virginia statute prohibited mixed-race marriages and attached criminal sanctions to the prohibition, and thus impermissibly took away negative liberty.[121] Yet suppose Virginia had had no such criminal statute. Suppose Virginia simply "offered" the marital status to its citizens under certain conditions, one of which was that the citizens be of the same race. That, according to Thomas' analysis, would not have violated negative liberty.

This is to exalt form over substance, a bad idea even in law but a preposterous view of morality. God, if she existed, would not reason like a tax lawyer. The relevant baseline question is whether citizens of states are entitled to marital status. If they are, an omission to offer it should be treated as being as much a denial of negative liberty as is an outright prohibition on such marriages backed by criminal sanctions.[122] Keeping someone else's property that happens to come into your possession through no action of your own (i.e., not "offering" to give it to them when they ask for it) is the tort of conversion as much as was the taking of the property to start with. The baseline of entitlements (property or otherwise) determines the rightness of the conduct, not its formal characterization as an omission to offer.

In ascertaining where the baseline of entitlements is on issues such as marriage, there are two ways one might think that citizens are entitled to a certain legal status such as the marital status. One is via a theory about the minimal laws all states owe to their citizens. One might think, for example, that all states owe their citizens an enforcement mechanism for promises such as is constituted in our legal system by the law of contract.[123] Only some such form of law as contract law can give citizens the power to bind themselves by their own voluntary undertakings, to rely on others so binding themselves, and to reap the benefits of nonsimultaneous exchange

118. Nat'l Fed'n of Indep. Bus. v. Sibelius, 567 U.S. ___ (2012).

119. *Id.* at 51.(The page reference is to the slip oipinion, as is necessary due to the lack of publication of the opinion in the U.S. reports at the time of publication of this article.)

120. Loving v. Virginia, 388 U.S. 1 (1967).

121. *Obergefell*, *supra* note 1, at 11–12 (Thomas, J., dissenting).

122. Of course, if a state were not obligated to offer a benefit such as public swimming pools but it did offer such benefit only to those of a certain race, gender, or sexual orientation, that would offend equality even if it did not offend negative liberty.

123. Aquinas thought that the Divine Law required that there be a law of bailment contracts but left the determination of the details of this matter to human law. AQUINAS, *supra* note 69.

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that these powers make possible. As Lon Fuller once urged, only the state through public law can give individuals these valuable opportunities.[124]

In the *Lochner* era freedom of contract was a major ingredient in constitutionally protected (negative) liberty. As Justice Pitney once said, in one of *Lochner*'s progeny: "Included in the right of personal liberty . . . [is] the right to make contracts."[125] Thinking that, it surely did not matter whether the form taken by interference with this right was criminal prohibition (formally a threat) or one of holding such contracts void as a matter of public policy (formally a refusal to offer contract law protection to certain wage/hour or other contract terms to certain classes of contracting parties such as minors or women). Refusing validity to a contractual term (i.e., omitting to enforce it) can be just as effective a denial of liberty of contract as criminally prohibiting the making of such contracts, for in either case the citizen cannot enjoy the benefits of the contractual relation that it is the obligation of the state to provide. Indeed, conceptually there is very little room for separating a voiding from a prohibiting here: prohibiting a certain kind of contract from being made in effect voids such a contract, and voiding it in effect prohibits it from being made. The only difference would seem to be that in the prohibition of such a contract, the contract must exist for an instant so that the prohibition can be violated, whereas in voiding such a contract it need never exist even for an instant.

The second way a state may be obligated to provide certain public goods such as a law of contract is by monopolizing the production of such goods even when it was not obligated *ab initio* to provide them. Take public roads. Suppose one were of the view that no state owes its citizens the creation and maintenance of public highways; such provision could have been left, one might think, to private toll road operators. Yet in fact most modern governments have undertaken this function, and exclusively so. Given this state of affairs, suppose some state then conditioned the validity of licenses (for both motorcycles and for the driving of them) on the wearing of a helmet by the rider. Formally, this is an omission to offer a license to unhelmeted riders, not a sanction-backed prohibition on helmetless riding. Yet this diminishes the negative liberty of motorcycle riders no less than does outright prohibition by the state, given the monopoly the state has created for itself on roads on which one can ride.[126]

124. Lon Fuller, *Freedom: A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955).

125. Coppage v. Kansas, 236 U.S. 1 (1915). Much earlier, *Lochner*'s author, Justice Peckham, had concluded that:

> the liberty protected [in the Fourteenth Amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen . . . to enter all contracts which may be proper, necessary and essential.

Allgeyer v. Louisiana, 165 U.S. 578 (1897).

126. *Cf.* Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (county may not refuse parade license or condition its granting on the payment of a fee).

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I conclude that negative political liberty is indeed best conceptualized as the absence of legal restraint—so long as "restraint" is understood in the baseline-related way above outlined and not in Justice Thomas' formal way.[127] The next question is why we should think such absence of legal restraint (or provision of obligatory legal opportunity) to be good—indeed, so good that it merits constitutional protection.

C. Why Is (Negative) Liberty Good?

There are a number of reasons for thinking that negative liberty is a value, a thing to be protected and furthered by legitimate state policy. Such reasons mostly have to do with the instrumental goodness of citizens' being free of state coercion. I focus on the *instrumental* goodness of negative liberty because of the difficulties attendant on giving much content to the idea that negative liberty is an *intrinsic* good.[128] Perhaps one could think that all coercion is intrinsically bad, state coercion included, so that its absence could thus be seen as intrinsically good.[129] Yet it is more informative and less controversial to treat negative liberty as an instrumental good.

Here are five suggestions as to what the more basic goods might be to which negative liberty can be a means.[130] First, there is positive liberty itself. Negative liberty is one of the things necessary for positive liberty to exist. One has the opportunity (positive liberty) to do some action *A* only if the state does not prohibit *A* by criminal sanction. Freedom from governmental coercion is, of course, only one of the items needed to have such opportunities—one needs physical nature and the economic situation also to be favorable, for example, as leftist critics of negative liberty are so fond of pointing out. But negative liberty is needed too, so that if positive liberty is of value, then so is one of its necessary means, negative liberty.

Positive liberty is itself something good. One might plausibly view it as an intrinsic good. This would be the view that enhancement of opportunity sets

127. Although I intend a broader notion of liberty than does Justice Thomas, I intend a narrower notion of negative liberty than did Mill in his famous essay, *On Liberty*, originally published 1859; JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., 2008); for Mill included all legal and social coercion as the restraints that are the enemies of negative liberty. I intend the narrower notion so as to explore the distinctive contours given to liberty by the absence of that dominant form of legal coercion, criminal punishment or its equivalent.

128. An intrinsic good is something that is good not because it contributes to something else that is good but because it is good in itself. Every theory of value is committed to there being intrinsic values by its commitment to instrumental values, on pain of infinite regress. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997), at 157–158, 160–162.

129. This might be the suggestion of Simester & von Hirsch: "No one, including the state, should coerce others without good reason." ANDREW SIMESTER & ANDREW VON HIRSCH, CRIMES, HARMS, AND WRONGS (2011), at 19. *Compare* Samuel Freeman, *Criminal Liability and the Duty to Aid the Distressed*, 142 U. PENN. L. REV. 1455–1492 (1994), at 1484: "Surely there is nothing intrinsically valuable about the natural liberty to do wrong."

130. A summary of MOORE, PLACING BLAME, *supra* note 128, at 663–665, 746–748; and Moore, *Freedom*, 29 HARV. J.L. & PUB. POL'Y 9–26 (2005), at 11–15.

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is always good, period, at least up to the point at which one gets paralyzed by "opportunity overload." Alternatively, one might think that positive liberty is the kind of universal, instrumental good that Rawls called a primary good—something so useful to the attainment of a wide variety of ends that no matter what those ends might be, liberty would be good for their attainment.[131] In either way, positive liberty is valuable, and so thus is one of its indispensable means, negative liberty.

Second, there is what might be called Millian autonomy (so-called to distinguish it from Kantian autonomy, which is discussed shortly). Millian autonomy is the hard-to-pin-down idea that human choice gains value when freely made. Even bad choices have value in this sense, if they are free choices. The usual metaphor is that of authorship: the autonomous person is a being who is author of his or her actions, a self-determining agent in some sense. Mill's contrast case is a mere machine such as a steam engine: although it can do many things, it is not the author of any of them, so its actions possess no value as autonomously chosen.[132]

It is no small matter to flesh out the ideas of agency, autonomy, and self-determination implicit in Millian autonomy. Not wanted is some metaphysically libertarian idea of free will.[133] Even if all choices are fully determined by factors themselves unchosen by an agent, that agent's choices can be self-determined in the relevant sense(s). David Hume teaches us as much when he urges that the freedom worth wanting is not freedom from causation in our choices; rather, what is valuable is the ability to choose and to act on such choices in a way that satisfies our desires.[134] Being able to get what you want is valuable, Hume urges. Mill's addition is to find valuable the possession of such causal efficacy to one's choices when the choices are second-order choices about the kind of person one wants to become. Reflection about such matters and critical self-examination, as opposed to parroting views of others and unthinking adoption of a tradition, are part of what is needed to be self-determining in the relevant ways for Mill.

If Millian autonomy is valuable, it is easy to see how legal coercion prevents its attainment. A coerced choice is not an autonomous choice expressive of the agent's authorship. The threat of the law no less than the threat

131. JOHN RAWLS, A THEORY OF JUSTICE (1971), at 62.

132. MILL, *supra* note 127. Unlike Mill, we live in a post–artificial intelligence world; yet even in our world, where cognitive science has shown us that we are ourselves a kind of machine, we can join Mill in drawing his contrast between self-determining persons and mere (other kinds of) machines. *See* Michael Moore, *"Nothing but a Pack of Neurons": The Responsibility of the HumanMachine*, *in* NEUROLAW (Bebhinn Donnelly ed., 2017).

133. The irrelevance of metaphysically libertarian free will to everything we care about—agency, intentionality, ability, selfhood, responsibility, etc.—is explored in depth in Michael Moore, *Compatibilism(s) for Neuroscientists*, *in* LAW AND THE PHILOSOPHY OF ACTION 1–59 (2014); *see also* Michael Moore, *Stephen Morse and the Fundamental Psycho-Legal Error*, 10 CRIM. L. & PHIL. 45 (2016).

134. Significantly, Hume calls such autonomy, "liberty." *See* DAVID HUME, ENQUIRY CONCERNING HUMAN UNDERSTANDING (1748), sec 8. I explore Humean autonomy in depth in Michael Moore, *The Neuroscience of Volitional Excuse*, *in* PHILOSOPHICAL FOUNDATIONS OF LAW AND NEUROSCIENCE (D. Patterson ed., 2016).

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of a gunman can rob our actions of any of those decisional process one rightly values as autonomous choice. Duress is an excuse in the criminal law precisely because of this fact.

The third value, Kantian autonomy, is to be distinguished from Millian autonomy. For Kant, an autonomous action is a right act done for the right reason.[135] Kant's thought is that there is value not just in doing the right act but also (and mostly) in doing it for the right reason. The emphasis is on the motives for action, not the processes of choice. Although choice may well be involved whenever an act is motivated by reasons, valuing correct reasons (Kant) is quite different from valuing free choice processes (Mill).

Note that in the Kantian sense of autonomy (in contrast to Mill's sense), there is no value in "autonomously" chosen wrong action, nor is there value in "autonomously" chosen right action when that action is done for the wrong reason. No matter how free one's decisional process may have been, Kantian autonomy is not achieved in such cases, because the right reason does not motivate the right action.[136]

Again, if there is value in acting for the right reasons, it is easy to see how legal coercion can prevent the attainment of that value, for the avoidance of legal sanctions can easily supplant the more virtuous motivations for an action that might otherwise have moved the agent to act. Consider, for example, gifts to the poor. If Kant is right about the locus of value residing in reasons and not just in actions,[137] charitable giving is valuable not just because of the act of transferring wealth to those in need but also because of the benevolence motivating that act. Legally coerce such acts, and the fear of sanctions will often supplant that benevolent motivation. In such cases the virtue of benevolent giving has become the necessity of paying one's taxes.

The fourth consideration showing negative liberty to be instrumentally valuable is preference-utilitarian in character. A preference utilitarian must take seriously the simple psychological truth that people generally prefer to make their own decisions free of coercion. Apart from some largely only hypothetical happy slaves, people almost universally prefer their decision-making to be free rather than constrained. Therefore, from this fact alone, a committed preference utilitarian must give some positive evaluation to negative liberty.

Finally, there are well-known costs attendant upon the use of the criminal sanction. I refer not only to direct enforcement costs such as police, courts, and so on, although these are omnipresent costs of criminalizing behavior and punishing it. There are also less obvious costs of

135. *See* BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT (1993), ch. 1.

136. Raz, who uses autonomy in its Kantian sense, draws both of these inferences. RAZ, *supra* note 103.

137. Victor Tadros, *The Wrong and the Free*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE (J. Kim & S. Morse eds., 2016), questions this Kantian idea. I answer Tadros's criticisms in Michael Moore, *Responses*, *supra* note 92, at 356.

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criminalizing certain behaviors that are: (1) typically carried on in private and so witnessed by no one other than the participants; (2) strongly motivated so that criminalization only minimally deters the conduct in question; and (3) typically harmful to no one other than those who willingly participate. Costs of criminalizing such behaviors are well known.[138] They include invasions of privacy in enforcing prohibitions with these characteristics; costs in terms of disrespect for laws that predictably will be regularly ignored; opportunities for selective enforcement of laws that predictably will be underenforced; and the costs of funding organized crime by the "crime tariff," namely, the artificial restriction of supply of the goods or services in question in the face of relatively inelastic demand. These costs can be significant for behaviors with the three characteristics in question and add weight to the value of nonprohibition of such activities.

These values add up to a reasonable case for presumptively leaving people free of state coercion. They raise what is usually called a presumption in favor of liberty and thus against criminal prohibition.[139] As a mere presumption, their case in favor of staying the state's hand can be overcome.

D. Skeptics About Any Right to Liberty

The argument so far is insufficient to establish that there is any moral right to political liberty. For one can be a moral realist in one's metaethics, a believer in natural rights in one's substantive ethics, and a subscriber to the values behind the presumption of liberty—and yet still deny that there is any natural right to liberty.

Skeptics about there being a natural right to liberty appear from both sides of the political spectrum. Such a general right to liberty was famously conceptualized by Justice Brandeis to be: "as against the government, the right to be let alone—the most comprehensive of rights and the one most valued by civilized men."[140] From the right side of the political spectrum, those social conservatives of a Burkean persuasion accurately see that such a general right to liberty—which is, after all, a right to be free of state coercion in all of one's actions—would be a recipe for anarchy. For a natural rights' normative force is such that it cannot be overcome by countervailing considerations as easily as can a mere presumption.[141] Seemingly a general

138. These costs and the literature on them are summarized in MOORE, PLACING BLAME, *supra* note 128, at 663–665.

139. The presumption of liberty is discussed in JOEL FEINBERG, SOCIAL PHILOSOPHY (1973), at 20–22. *See also* Douglas Husak, *The Presumption of Freedom*, 17 NOUS 345–362 (1983); MOORE, PLACING BLAME, *supra* note 128, at 749–750.

140. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

141. This is true even if natural rights are not treated as "absolutes" but are treated as overcomable by bad consequences over some threshold. *See* the discussion of "threshold deontology" in Alexander & Moore, *supra* note 97.

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right to liberty therefore gives each of us the right to rob, pillage, and murder free of state coercion.[142]

There is a limited number of strategies available with which to blunt this obvious but powerful Burkean challenge. One is to lessen the *force* of rights (the right to liberty included) to be only "prima facie," "pro tanto," or presumptive.[143] Yet if this strategy is pursued to the extent needed here, this would be to eliminate what is distinctive about rights-based approaches to morality.[144]

A second strategy is that professed on the left side of the political spectrum by egalitarian liberals such as Rawls[145] and Ronald Dworkin.[146] On this view, there is no *general* right to liberty; there are only discrete rights ("liberties") to engage in discrete activities, such as the right to speak freely, the right to exercise the religion of one's choosing, and so on. This "liberties, not liberty" strategy seems to be motivated by three concerns. One is to blunt the force of the Burkean *reductio* of liberty to anarchy; this is done by restricting the domain of actions to which the right to liberty applies to just some discrete liberties, and these need not include the anarchical liberty to murder, and so on. The second proceeds from the thought that there is no value to be found in being at liberty to do immoral actions.[147] The thought is that liberty is valuable only when and to the extent the action (one is at liberty to do) is valuable. The third is the desire of egalitarian liberals to erode any basis from which to complain about the kind of big government needed to sustain egalitarian programs of redistribution.

Yet this second strategy, too, is flawed. The balkanization of liberty done by the discrete-liberties approach defies the intuition that there must be something common to free speech, free exercise of religion, and so on, that makes those activities meriting of special protection from state coercion. As to the second thought held by egalitarian liberals here, liberty as such

142. This *reductio* of there being a natural right to liberty seems to have been the chain of reasoning leading Robert Bork to abandon his initial enthusiasm for *Griswold*'s 1965 revival of there being a constitutional right to liberty. *Compare* Robert Bork, *The Supreme Court under a New Philosophy*, FORTUNE (Dec. 1968) at 138 ("the Court [must] have . . . a theory of natural rights," and among these rights must be "an enclave of freedom" such as *Griswold* protected), with Bork, *supra* note 57.

143. The "prima facie" rights approach is most famously associated with W. DAVID ROSS, THE RIGHT AND THE GOOD (1935). I discuss this view of rights briefly in Alexander & Moore, *supra* note 97, and in more depth in response to another critic of mine, Philip Montague, *Moral Dilemmas and Moral Theory: Towards a Viable Deontology*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE (J. Kim & S. Morse eds., 2016); *see* Moore, *Responses*, *supra* note 92, at 401–405.

144. This seemed to be Ronald Dworkin's main reason for refusing to grant the existence of a natural right to liberty. *See* RONALD DWORKIN, *Liberty and Liberalism*, *in* TAKING RIGHTS SERIOUSLY (1978), ch. 11.

145. RAWLS, *supra* note 128.

146. Ronald Dworkin, *We Do Not Have a Right to Liberty*, *in* LIBERTY AND THE RULE OF LAW (R. Cunningham ed., 1979).

147. *See* Freeman, *supra* note 126 ("Surely there is nothing intrinsically valuable about the natural liberty to do wrong"). *See also* Tadros, *supra* note 137, where Tadros finds liberty to do wrong of not even presumptive value. My reply is Moore, *Responses*, *supra* note 92.

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is generally valuable; one can see that by adverting to the values standing behind the presumption in favor of liberty. Of those values, only Kantian autonomy is lessened by the badness of the actions one is at liberty to do. The other values uniformly urge the state to stay its hand irrespective of the moral status of the action contemplated. And last, such staying of the government's hand is presumptively a good thing, however much it increases the burden of argument for those seeking to justify various redistributive schemes.

I thus find both of these answers to the Burkean *reductio* inadequate. Yet Burke deserves some answer. The two answers I pursue below are as follows. The first is to characterize the right to liberty as protecting one against certain *reasons* for the state prohibiting some action; the doing of such actions themselves is not protected by such a right, so there is no anarchical worry about a liberty right to murder, and so on. The second strategy is (in a way distinct from the "liberties, not liberty" strategy of the egalitarian liberals) to restrict the domain of actions protected by the right to liberty. This is to seek Mill's (and the Supreme Court's) proverbial "sphere" or "realm" of actions immune to legitimate state regulation. As long as such a sphere does not include all actions, there is no Burkean *reductio* transforming liberty into anarchy.

E. The First (or "Derived") Right to Liberty: The Right to Have Behavior Regulated for Only Some but Not Other Reasons

The opinions of the U.S. Supreme Court in its liberty decisions (whether of the *Lochner* or of the *Griswold* era) move seamlessly between discussions of the goodness/badness of the *reasons* for certain prohibitions and discussions of the importance/unimportance of the *actions/choices* being regulated.[148] The same ambiguity of topic pervades political philosophy. Take the most influential Western text on this topic, Mill's *On Liberty*.[149]

As is well known,[150] Mill famously distinguished four kinds of actions that legislation might seek to regulate: actions harmful to people other than the actor and his consenting coparticipants; actions harmful to the actor himself; actions harmful to no one but that are offensive to others; and actions that need be neither harmful nor offensive to anyone but which are immoral to do. Mill's famous "harm principle" is the twofold principle urging, first (and positively), that regulating the first of these kinds of actions

148. *See, e.g.*, the discussion of Justices Blackmon and Stevens in dissent in *Bowers*, *supra* note 22.

149. MILL, *supra* note 127.

150. In his magisterial four-volume treatise, JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW (1984–1988), reformulated Mill's harm principle in terms of four possible reasons for use of state coercion. *See* JOEL FEINBERG, HARM TO OTHERS (1984), at 26–27; JOEL FEINBERG, OFFENSE TO OTHERS (1985); JOEL FEINBERG, HARM TO SELF (1986); and JOEL FEINBERG, HARMLESS WRONGDOING (1988).

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is the state's business, and second (and negatively), that regulating any of the other three kinds of actions is *not* the state's business.

As articulated both by Mill and by later Millians, both parts of the harm principle are susceptible to two related but distinct readings. On the first it states a criterion for the proper subject of legitimate state regulation: the regulation must regulate behaviors harmful to others. On the second the principle states a criterion for proper legislative aim: legislators should aim in their legislation to prevent harms to others. On the first the harm principle delineates a sphere of action immune to state regulation no matter what the reason might be for that regulation; on the second, any action can be regulated but it must be regulated for a certain reason, namely, in order to prevent harm to others, and not for any other reason.

It is easy to see why those two different interpretations of a legislatively limiting principle like the harm principle are conflated. After all, when Mill's targeted audience was legislators, the difference disappeared: legislators are of course to aim at whatever is the proper justification for legislation, because that justification will define the sphere of actions protected by liberty. If the correct justification for state coercion is to prevent actions harmful to others, then legislators should aim to prohibit all and only those kinds of actions, because that is the boundary of legitimate regulation. Yet Mill's targeted audience for the harm principle was not always or only legislators. And when that principle is viewed from the point of view of those who are not legislators—such as citizens—the two interpretations come apart. It is one thing for citizens to complain that legislation regulates behavior that in fact is not harmful to others; it is another to complain that although the legislation in fact regulates behavior harmful to others, preventing such harm was not the reason motivating the regulation.

I urge below that the right to liberty encompasses both of these kinds of restrictions on legislation. Citizens are morally entitled to do certain things free of state interference however that interference is motivated, and they are entitled to be free of certain reasons for being coerced out of doing anything. I examine the "subjective" or reasons-oriented right here. In the next section, I address the "objective" or action-oriented right.

I have long called the right to properly motivated state coercion, the *derived* right to liberty.[151] The label is because this *right* of each citizen is derivative of its more basic correlative, a legislator's *duty* to aim at certain ends as she legislates. One should think of such legislative duty as part of the theory of legislative role. Every principled legislator must use such a

151. Moore, Placing Blame, *supra* note 128, at 751. Notice that this right, being derivative of a more basic correlative duty, lacks two of the characteristics of most natural rights: (1) such rights usually ground correlative duties rather than being grounded by such duties, as here; and (2) such rights are usually accompanied by the power of the right-holder to waive the right and thus relieve the duty-holder of her duty, which is not true here. Yet the claims made for the derived right still qualify it as a right by virtue of its peremptory force and its being grounded in the interests of the right holder in properly democratic representation.

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theory of their role to do her job, much as a theory of proper judicial role is something every principled judge must operate with as he decides cases.

It is perhaps not obvious why there is value in legislators aiming at the right things independent of them in fact regulating the right things. The case for this starts with the Kantian insight that the reasons for an action are important to assessing that action's moral worth.[152] Properly motivated legislation is thus of greater value than improperly motivated legislation of identical content. That case is strengthened if we turn to the content of the legislator's duty in this regard. Needed is some more determinate source for this obligation of legislators in order to give any content to it.

Mill's influence here has been both fortunate and unfortunate. The good effect of Mill's political philosophy here was to turn the theory of legislative role away from the purely proceduralist theories of majoritarians like Mill's contemporary, Sir James Fitzjames Stephens. For Stephens denied that there could be any defensible *substantive* principles limiting legislation in a democracy.[153] The idea was that the only proper item for legislators to aim at in their legislation was to reflect accurately the views of a majority of their constituents. Mill, of course, stood for the opposite view. His was the (in Teddy Roosevelt's language) "bully pulpit" view of democracy. On this view, democracy works best when elected leaders lead by their own substantive vision of how things should go, including the limits of their own role in passing laws; then, if the majority does not like those views, despite the use of the "bully pulpit" of elected office to promote them, that majority can throw such leaders out of office.

Mill's less beneficial and downright unfortunate influence here stemmed from his presentation of his principle of proper legislative motivation, the "harm principle," as if it were a relatively freestanding principle of political philosophy—freestanding in the sense that its justification lay in its own intuitive plausibility and not because of its relation to other, more basic principles of political philosophy. Yet surely one's most general principles about the proper ends of all legislation in a democracy should govern the formulation of any principles about proper legislative motivation for the use of state coercion.

Mill, of course, had such a general theory of proper legislative ends—he famously was a utilitarian. Mill was thus formally committed to the view that coercive legislation, like all legislation, is proper when it is aimed to enhance utility. For a subjectivist, preference utilitarian like Mill, that meant that coercive legislation should aim at maximizing the net sum of satisfied preferences.

How did Mill get from his general utilitarianism to his harm principle as a limit on the proper aim of coercive legislation? Recall that the harm principle has two parts, one positive and one negative. The positive part

152. *See* HERMAN, *supra* note 132.
153. Fitzjames Stephens, *supra* note 57.

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states that aiming to prohibit behavior harmful to others is legitimate; the negative part states that any other aim is illegitimate (including specifically legislating prohibitions to prevent behaviors harmful only to the actor, to prevent behaviors offensive but not otherwise harmful to others, or to prevent behaviors that are immoral). One should seek the connection of the harm principle to utilitarianism separately with respect to each of these two parts of the harm principle.

As to the positive part of the harm principle, the connection is pretty straightforward. Both threatening and delivering on threatened state coercion (i.e., punishing offenders) are evils for a utilitarian; doing so can, for him, be justified only by preventing something sufficiently harmful that the good of its prevention overbalances the harms of coercion and punishment. Preventing harm to victims can fit the bill, so long as the harms prevented are greater than the harm done to prevent them.

As has long been recognized, connecting the negative part of the harm principle to utilitarianism is trickier for Mill.[154] Consider, first, behaviors that do not cause physical, economic, or even reputational injury to others, but such behaviors do disgust and offend people when they witness them or even learn less directly of their existence. Cannot—do not—many people strongly prefer that such behaviors not take place, and cannot the strength and near-universality of their preferences outweigh the harm caused by punishing those who so offend? Perhaps Mill wanted us to assume that the "soft" harm of psychic offense (prevented by punishment of offensive actions) can never outweigh the "hard" harms imposed by the threatening and the inflicting of those punishments; yet some very careful dance through various ideas of welfare (pleasure, happiness, preference satisfaction) would have to be done to make this assumption at all plausible. The latter-day Millian, Joel Feinberg, refuses to attempt this dance. Feinberg invites his readers (all of us) to take a ride on his "bus of disgust"; we are then to ask ourselves whether the truly disgusting behaviors done on his bus may not be legally prohibited.[155] Despite his generally Millian outlook, Feinberg urges that some behaviors offensive to others could be legitimately prohibited by law. This is particularly true if some liberty is preserved by prohibiting such behaviors only when done in public but allowing them to be done in private (where none need be offended except those with vivid imaginations).

Or consider a second aspect of the negative part of the harm principle: denying that prevention of harm to the actor can be a legitimate reason for state coercion. What justifies Mill in his assumption that the harms to self prevented by paternalistically motivated punishment will always be less than the harms of threatening and inflicting that punishment itself? Mills backs this assumption with the supposed epistemic superiority of each individual vis-à-vis the state in judging what is harmful to him,[156] but surely (as Herbert

154. *See, e.g.*, Gerald Dworkin, *Paternalism*, 56 MONIST 64 (1972).
155. FEINBERG, OFFENSE, *supra* note 150, ch. 1.
156. MILL, *supra* note 127, at 70, 77.

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Hart points out)[157] that is a very optimistic assumption about the degree of each person's self-knowledge. As Gerald Dworkin points out,[158] Mill really seems to have a nonutilitarian argument in mind with which to back the antipaternalist part of his harm principle.

I would construe Mill's nonutilitarian argument here in the following way. Millian autonomy (one of the goods giving instrumental value to negative liberty) requires that we be the authors of ourselves in the sense that we shape our first-order desires in light of our second-order desires about the kind of person we want to be. Paternalistically motivated state coercion goes directly against such Millian autonomy. When the state is paternalistically motivated, it substitutes its judgment of what desires a person should have for the ones he in fact has and thus gives no value to the person's own second-order desires in this regard. In such a way, the state says it knows the kind of person each of us should be. That we have not chosen to be that kind of person is given little or no credence. This cuts the heart out of Millian autonomy, which bases self-authorship on each person's own, genuine, second-order desires.

Now consider the third aspect to the negative part of Mill's harm principle, that which enjoins prohibiting behavior because of its immoral status. The first thing to get clear is just exactly what Mill's principle was here. Although my friends and Mill scholars, Richard Fumerton[159] and David Brink,[160] each tell me that Mill never said what I am about to say, I remain convinced it is what he was committed to thinking here.[161]

Recall that for utilitarians like Mill and Bentham, utilitarianism was not just a principle of legislation; it was also a (indeed, *the*) principle of ethics.[162] For them, utilitarianism fully determined what was morally right and wrong (and not just what could justifiably be legally coerced). So when Mill rails against prohibiting behavior "for no better reason than that it is immoral,"[163] he cannot be railing against using the law to coerce the true, correct morality—for by Mill's own lights, that morality is exclusively utilitarian in character. Mill's actual target here thus must be *conventional* morality, or *mores*, not critical morality. Moreover, insofar as such conventional moral

157. H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963).
158. G. Dworkin, *supra* note 154.
159. Wendy Donner & Richard Fumerton, Mill (2009).
160. DAVID BRINK, MILL'S PROGRESSIVE PRINCIPLES (2013). Brink will concede, at least, that Mill never explicitly denied what I think he is committed to thinking even if he did not positively say it.
161. I draw some comfort from Gerald Dworkin's seeing that at least it is not clear whether Mill made "the distinction between 'positive' and 'critical' morality," when he was condemning "morals" motivations. Gerald Dworkin, *Moral Paternalism*, 24 LAW & PHIL. 305 (2004), at 306–307. Dworkin refers to Mill's well-known passage in which he holds that no one can "rightfully be compelled to do or to forbear because . . . *in the opinion of others* to do so would be . . . right." MILL, *supra* note 127, at 13 (emphasis added). Although I was the editor for Dworkin's article, I did not suggest this point to Dworkin.
162. The title of Bentham's first volume (of a projected 10) on legislation; JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND OF LEGISLATION (1789).
163. MILL, *supra* note 127.

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beliefs differ from the dictates of utilitarianism, it must be Mill's view that such beliefs are in error. Consider Mill's ridiculing of the Americans for their 1850s suggestion of sending an expedition to the wilds of Utah to stamp out the practice of polygamy by the Mormon settlers there.[164] Mill's scorn is for the belief that polygamy is morally wrong, and it is that moral error that gives force to his animus against using state coercion for this reason.

So construed, it is easy to see how this part of Mill's harm principle follows from his utilitarianism. For promoting nonutilitarian goods (i.e., moral error) cannot be justified as what should be aimed at by a utilitarian's principle of legislation.

I am spending this time on Mill's theory of proper legislative aim because it is an historically important illustration of what kind of theory could provide content to the derived right to liberty. Yet Mill's theory has flaws debarring it as *the* theory of the restraints liberty places on coercive legislation in a liberal state.

One of the flaws Mill's theory (of proper legislative reasons for coercion) does *not* have is that first enunciated by Sir James Fitzjames Stephens[165] and repeated many times since.[166] This is the objection that "no action is without some harmful effects on others besides the participants." Whatever the force of this objection when it is directed against using the harm principle to define a sphere of *action* immune to state regulation for any reason,[167] it is ill-suited as an objection to using the harm principle to state the proper and improper *reasons* for the use of state coercion. For even if all actions have some harmful effects on others, that does not make such harmful effects the reason for legislative prohibition. Riding a motorcycle without a helmet may increase medical insurance costs for nonriders, for example, but even if that is so, a legislature may well prohibit the practice not for that reason but for the paternalistic reason that such actions are not good for motorcycle riders.

The real worries about the harm principle lie elsewhere. If we focus on the preeminent form that coercive legislation takes—namely, that of criminal prohibition—the problems with the harm principle originate in the problems for utilitarianism as a theory of punishment.[168] *Harm* is the wrong

164. *Id.*

165. FITZJAMES STEPHENS, *supra* note 57.

166. *See, e.g.*, Bruce Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

167. Even in this context, the objection is not the knockdown winner that Mill's critics often think that it is. Mill himself anticipates the objection when he argues that it is only actions whose "chief" or "proximate" effects are not harmful to others that are immune from state regulation; MILL, *supra* note 127. Later Millians answer (alternatively but on Mill's behalf) that the only actions immune from state regulation are those that have no injurious effects on those interests of others worthy of protection as legal rights. John C. Rees, *A Rereading of Mill's* ON LIBERTY, 8 POL. STUD. 113 (1960). Since I substitute the moral-wrong principle for Mill's harm principle below, I do not have a dog in this fight and so leave the issue unresolved here.

168. I advert to these familiar problems in MOORE, PLACING BLAME, *supra* note 128, ch. 2.

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focus for a theory of criminal legislation; *moral wrongdoing* is the proper focus. One can see this intuitively by thinking of the criminalization of wrongs that harm no one—such as abuse of a corpse, cruelty to animals, destruction of a dead person's reputation—and by thinking of harms that it is not wrong to cause—such as destruction of a competitor's business by opening up a better store nearby.[169] One can see this theoretically by adverting to the problems faced by utilitarianism, such as the problems surrounding omission liability: on one form of utilitarianism (so-called "negative utilitarianism"), we have no obligations of positive aid to others,[170] while on another, we have as many obligations to aid others as we have not to harm others. What utilitarianism has difficulty with is our actual practice (which is also quite intuitive): we generally have fewer and less stringent positive obligations, but we do have some. (Mill himself attempts to finesse this problem by making an undefined "common social duty" separate the latter omissions from the former).[171]

More broadly, utilitarianism as a theory of punishment has deep and unresolved problems with it, in that it seemingly licenses both punishment of the innocent and nonpunishment of the guilty.[172] Needed is a notion of moral wrongdoing as at least a *necessary* condition of punishment to make punishments just (thus alleviating the first problem); making such wrongdoing *sufficient* for a just punishment alleviates the second problem. Two theories of punishment alternative to utilitarianism alleviate these problems: the purely retributive theory alleviates both; the mixed theory of punishment alleviates the first only (although many regard the punishment of the innocent as the most serious of the two). I touch on each theory of punishment briefly to illustrate the limits on permissible reasons for coercive legislation that each implies.

Retributivism is the view that criminal punishment is justly imposed on all those who deserve it but only on those who deserve it.[173] Such desert, in turn, is cashed out in terms of two moral properties, wrongdoing and culpability: one's degree of desert is determined by the seriousness of the wrong done and the degree of culpability with which that wrong is done.[174]

Retributivism so construed leads to legal moralism—the theory that all and only moral wrongs should be prohibited by the criminal law—as its

169. I advance these counterexamples (of harmless wrongs and wrongless harms) at an intuitive level in MICHAEL MOORE, *Liberty and Drugs*, *in* PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997), ch. 18.

170. The attempt to limit utilitarianism to obligation to not making the world worse (negative utilitarianism), rather than there also being an obligation to make it better, begins with Bentham. *See* the discussion in ANTHONY QUINTON, UTILITARIAN ETHICS, (1989).

171. MILL, *supra* note 127.

172. MOORE, PLACING BLAME, *supra* note 128, ch. 2.

173. MICHAEL MOORE, *The Moral Worth of Retribution*, *in* PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997), ch. 3.

174. MOORE, PLACING BLAME, *supra* note 128, pt. II.

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theory of legislation. It does this via two other assumptions.[175] First, one must assume that a principle of legality is good independently of the good of retributivism. Such a principle requires prospective, clear, noncontradictory legislative rules before punishments may be exacted. Such a principle arguably side-constrains the attainment of retributive justice, allowing punishments giving such justice to be given only if the morally wrong act was legally prohibited beforehand. Such an assumption thus requires that, prima facie, *all* moral wrongs be prohibited by the criminal law, for otherwise wrongdoers doing those wrongs could not (under the principle of legality) receive their just deserts.[176]

The second assumption is that law as such does not obligate citizen obedience, not even prima facie.[177] This means that the legislative enactment of a legal prohibition cannot make (morally) wrong an act not morally wrong before. The upshot is that citizens do no wrong in violating the criminal law unless that law is reflective of an antecedently existing moral wrong. Since retributivism bars punishment of the innocent as much as it requires punishment of the guilty, and because one is innocent if he does nothing morally wrong, therefore retributivism bans the prohibition of acts that are not morally wrong.

Retributivism with these two assumptions yields what I shall call the "moral wrong principle": criminal legislation must exclusively aim at preventing or punishing moral wrongs, and this it can do by prohibiting all and only those behaviors that are morally wrong.

It is fruitful to compare the moral-wrong principle of the retributivist with the harm principle of the utilitarian. They both purport to give a necessary and sufficient condition of the justified criminal legislation at which all legislators should aim, one in terms of harm to others, and the other in terms of moral wrongs. It could turn out that the two principles are extensionally equivalent in the laws that they justify; if all moral wrongs consisted of actions harming others, and if all actions harmful to others constituted moral wrongs, then the two principles would justify aiming at exactly the same legislation. In fact, however, there is only a large overlap in the two notions, not a perfect congruence. There are wrongless harms, such as competitive injuries in capitalist economies; and there are harmless wrongs, such as cruelty to animals, abuse of a corpse, extinction of a species.[178] So

175. *Id.* at 70–73, ch. 16. My argument connecting the retributivist theory of punishment to the legal moralist theory of legislation is critically examined in David Brink, *Retributivism and Legal Moralism*, 25 RATIO JURIS 496–512 (2012); in Antony Duff, *Legal Moralism and Public Wrongs*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 97–109 (K. Ferzan & S. Morse eds., 2016); and in Tadros, *supra* note 137, at 79–94.

176. The side constraint by legality is not absolute; we may dispense with legality when the claims of retributive justice are sufficiently strong, as at the Nuremberg trials and in the "rough justice" achieved in the execution of Osama bin Laden.

177. A now widely shared view of the "new anarchists," Michael Smith, Heidi Hurd, Joseph Raz, and others. M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?* 82 YALE L.J. 950 (1973); Heidi Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991); RAZ, *supra* note 103.

178. Described in some detail in FEINBERG, HARMLESS, *supra* note 150, at 20–25.

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while largely coextensive, the two principles diverge in these two classes of cases.

The principles also diverge in their modes of reasoning to Mill's three negative corollary principles. Whether paternalistically motivated legislation is permissible according to the moral-wrong principle depends on the question of whether we are ever morally obligated not to cause harm to ourselves. While there are certainly diverging views about this in ethics, one plausible view denies that there are deontic duties to self[179] and thus denies that there can be wrongdoing involved in actions harming the actor only. On this view of moral wrongdoing, the moral-wrong principle can be as condemning of paternalistically motivated legislation as can the harm principle.

Of course, if the Millian liberal has independent grounds for condemning paternalistically motivated legislation—grounds independent of the absence of a motivation of preventing harm to others—there is nothing preventing the legal moralist from adopting those independent grounds too. If paternalism independently insults liberty (because it insults one of the main values behind liberty, Millian autonomy), as I argue above is plausible, then a retributivist can condemn paternalism on this ground too, as well as can any Millian.

With regard to the prevention of offense as a reason for criminal legislation, how the moral-wrong principle applies depends on what one thinks of the moral status of causing offense to others. Surely sometimes intentionally causing serious psychic distress to others for no good reason is morally wrong, in which case it may be prohibited by a legal-moralist legislator. As noted above, latter-day Millians such as Joel Feinberg reach this same result by assuming that such serious psychic distress can be a greater harm than the punishment needed to prevent it.[180] Here, too, the two principles need not diverge in their justification of (some) punishment/prevention-of-offense–motivated criminal legislation.

With regard to Mill's third corollary—prohibiting behavior because it is immoral—the two principles seem to diverge dramatically. What the moral-wrong principle requires—prohibiting all and only morally wrongful behavior because it is morally wrong—the harm principle seemingly condemns. Yet, as I argue above, all is not as it seems here. Above I speculate that Mill's animus against morals-motivated legislation seems largely to be directed at legislative reliance on erroneous if conventionally accepted moral shibboleths such as that abhorring polygamy.[181] Indeed, I argue that for Mill, that is all his third corollary can be directed against. As a dedicated utilitarian, Mill had to see his harm principle as an implication of his utilitarianism generally. Utilitarianism generally was his single, ultimate principle of morals.

179. *See* Heidi Hurd, *Duties beyond the Call of Duty*, 6 ANN. REV. L. & ETHICS 3 (1998).
180. FEINBERG, OFFENSE, *supra* note 150.
181. *See also* Michael Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523–1569 (2007), at 1545.

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He must have thought that the touchstone of his harm principle was also the touchstone of morality. Behavior harmful to others was not only the only behavior prohibitable by the criminal law; it was also the only behavior that was morally wrong, according to his own view of the one true (utilitarian) ethics. Because of this, behaviors not harmful to others could not really be morally wrong—they could be thought to be morally wrong only by irrational people who did not see the truth of utilitarian ethics.

When Mill thus rails against behavior being criminalized because it is morally wrong, his real target is against criminalization of behavior that is incorrectly believed to be morally wrong by many or most people. His animus, in other words, is directed at moral error being crammed down people's throats for no better reason than that the majority subscribes to such error.

If erroneous moral belief is Mill's real target here, the retributivist/legal moralist can heartily join in its condemnation. Retributivist justice is achieved only by the punishment of morally wrongful behavior. If behavior is not really morally wrong but is only thought to be wrong by some sizable percentage of the population, only the appearance of retributive justice is achieved by punishment of such behavior. Retributivism, as I have long urged,[182] enforces real morality, not conventional moral beliefs. So Mill and the legal moralist can happily agree both in their rejection of conventionalist morality as the basis for criminalization and in their acceptance of real morality as that basis, while they significantly disagree as to the basic shape and the content of real morality.

The most widely held theory of punishment is neither purely utilitarian nor purely retributive in nature. Rather, it is a mixed theory that requires that both some net social gain and some retributive justice be produced by punishment in order for that punishment to be justified.[183] For completeness, consider briefly what theory of legislation such a mixed theory of punishment implies. It implies what I am calling the "wrongful harm" principle. On this principle, criminal legislation is rightly motivated only insofar as it aims both to prevent future harms to others and to achieve punishment of the deserving. Actions may thus be prohibited only if they are both acts causing harm to others and acts that are morally wrong to do—"wrongful harms," for short.

The wrongful-harm principle has many contemporary adherents[184] —no surprise, given the popularity of the mixed theory of punishment on which it depends. Notice that the principle shares with the moral-wrong principle the limiting of criminal prohibitions to those acts that are morally wrong.

182. Moore, Placing Blame, *supra* note 128, at 177–180.
183. On mixed theories of punishment, *see id.* at 92–94.
184. *See, e.g.*, Dennis Baker, The Right Not to Be Criminalized: Demarcating Criminal Law's Authority (2011); Simester & von Hirsch, *supra* Note 129. Arguably included here is Doug Husak, for his internal principles limiting criminalization include harm, evil, wrongs, and desert; Douglas Husak, Overcriminalization: The Limits of the Criminal Law (2008), ch. 2.

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Thus acts harmful to others but not morally wrong to do are insulated from criminal prohibition by both principles, in contrast to the harm principle. Similarly, the wrongful-harm principle can also condemn paternalistically motivated legislation, on the Millian ground that there is no harm to others sought to be presented, on the legal-moralist ground that (since there are no duties to self) there are no moral wrongs to be punished, or on the ground that paternalistically motivated legislation independently insults Millian autonomy and thus liberty. Similarly, the wrongful-harm principle can follow the Millian and the legal moralist in (wholly or partly) condemning offense-motivated legislation and legislation motivated by erroneous but popular moral beliefs.

My own view on the content of the first, or "derived," right to liberty is that of the retributivist/legal moralist. It is generally the right of each citizen to be free of improperly motivated criminal legislation, and what is more specifically prohibited is the use of the coercive apparatus of law when that use is motivated by anything except prevention and punishment of moral wrongdoing. Legislation aimed at social betterment in any other way—such as that aimed at preventing nonwrongful offense, nonwrongful self-harmings, or the satisfaction of popular but erroneous moral beliefs and preferences—is forbidden by such a principle.

Such a view of course requires a great deal of fleshing out to be complete. Two items in particular warrant detailed attention. The first concerns the nature of moral wrongdoing. Very generally, moral wrongdoing involves breach of moral obligations. It is not constituted by nonadherence to prudential reasons[185] nor is it concerned with aretaic failures of virtue.[186] The moral obligations breach of which constitutes wrongdoing include both those that are most stringent (agent-relative, categorical, deontological) and those that are as a class less stringent (consequentialist duties, such as the duty of rescue).[187]

Even so limited, the criterion of moral wrongdoing has been criticized by some political theorists as being both too lenient and too restrictive in what it allows in the way of legislation. The too-lenient point is that some morally wrongful actions—the "nongrievance wrongs"[188] or the "private wrongs"[189] —may seem ineligible for criminalization because they are said to be "not the state's business." The too-restrictive

185. For some thoughts in these directions, *see* JOSEPH RAZ, PRACTICAL REASONS AND NORMS (1975).

186. Michael Moore, *Liberty and Supererogation*, 6 ANN. REV. L. & ETHICS 111 (1998).

187. MOORE, CAUSATION, *supra* note 113, at 37–38.

188. Joel Feinberg divides up wrongs between grievance and nongrievance wrongs, urging that only the former are the proper subject of criminal legislation. FEINBERG, HARMLESS, *supra* note 150, 18–19.

189. Antony Duff, Sandra Marshall, and Douglas Husak further divide up grievance wrongs between public and private wrongs, urging that only the former are the proper subject of criminal legislation. S.E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CAN. J. L. & JURISPRUDENCE 7 (1998); Duff, *Legal Moralism*, *supra* note 172; HUSAK, OVERCRIMINALIZATION, *supra* note 184, at 135–139.

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point is that many *malum prohibitum* crimes seem needed to solve coordination problems, prisoner's dilemmas, and other collective-action problems, yet they do not criminalize preexisting moral wrongs. I seek to defuse both of these criticisms elsewhere,[190] and do not here repeat the exercise (necessary as it is to a complete working-out of the content of the derived right to liberty).

The second item crucial to any complete working-out of the content of the derived right to liberty concerns paternalism. Political philosophy since Mill has been rich with distinctions both as to what is and what is not paternalistic state motivation and as to what is and what is not *permissible* paternalistic state motivation. As I read that literature, seven such distinctions stand out.

(1) In the first place, there is the permissible, "soft" paternalism consisting of using state coercion to restrain people long enough to be sure that they are making the kind of choice that liberty rightly protects.[191] In the kind of examples made familiar by Mill,[192] if someone does not have relevant information (such as damage to a bridge over which he chooses to walk), or if he has mistaken beliefs (such as that he will float upward rather than fall to the earth if he exits a window), then interference for the actor's own good is only "softly" paternalistic and is permissible.[193]

(2) Likewise, when the actor's capacities to make rational decisions are impaired in ways more permanent than merely having a lack of information, as in the conditions of youth, retardation, and mental illness, then such disabled choices, too, are not fully worthy of protection, a point Mill himself also concedes in finding paternalistically motivated state coercion permissible for these traditional classes.[194]

(3) Relatedly, there are "weakly" paternalistic motivations, also often thought to be permissible.[195] These are cases where the state does not replace a person's desires with ends the state finds better for them; rather, it is said, the state only compels use of *means* to satisfy the actor's own desires better than those means chosen by the actor herself. So if the state requires seat belts in automobiles for adult passengers, for example, not because the state rejudges the desirability of safety versus freedom of movement but rather because the state believes the subject herself most values safety, then the state is said to be only "weakly" paternalistic. For the state in such a situation is only furthering the subject's own desires with its coercive power.

190. As to the first, *see* Michael Moore, *Liberty's Constraints on What May Be Made Criminal*, *in* CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros eds., 2014); Moore, *Responses*, *supra* note 92. As to the second, *see* MOORE, PLACING BLAME, *supra* note 128, at 760–761.

191. The label is Feinberg's. *See* FEINBERG, HARM TO SELF, *supra* note 150.

192. Mill, *supra* note 127.

193. As the Court held in *Casey*, *supra* note 43, at ("the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated so long as their purpose is to persuade the woman to choose childbirth over abortion.").

194. Mill, *supra* note 127.

195. The phrase "weakly paternalistic" is Gerald Dworkin's. Gerald Dworkin, *Paternalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2014).

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(4) Consented-to paternalism is often thought to be a permissible kind of paternalistic motivation (or even to be nonpaternalistic). In the classic example of a Ulysses contract, the actor at t_1 "binds himself to the mast" by consenting to the use of state coercion later on if or when it proves necessary to get him to accept what he accepted earlier. When the state at t_2 does use its coercion for the reason that it is best for the actor if he performs the action to which he earlier consented, it is said not to act paternalistically, because it acts in the subject's own name.

(5) If Ulysses contracts are validly enforced by the state, why, then, cannot one sell himself into slavery? From Mill onward, choices to deprive oneself permanently of the capacities that make liberty valuable may justifiably be prohibited on paternalistic grounds, although some of us find the point contestable.[196]

(6) Much has been made in recent literature this past decade of the legitimacy of paternalistically motivated state *influencing* (rather than coercing) of human choice (such influencing going under the name of "nudging").[197] Such nudging approaches force one to draw lines between those permissible state interventions that aid individuals to make better decisions in the way that better information does, on the one hand, and those that so manipulate the decisional process (by using techniques of subliminal perception and the like) as to undermine the authorship of the subject so "nudged," on the other.

(7) Last, one must distinguish permissible legal moralism from impermissible moralistic paternalism[198] (or "moralistic legal paternalism").[199] Moralistic paternalism exists when coercive legislation is aimed at improving the *moral* welfare of citizens even when those citizens do not agree that it is an improvement. The idea is paternalistic because the state presumes to know what is good for someone's moral health, contrary to their own best judgment of the matter; the view is moralistic because it is not concerned with any subjective notion of welfare such as pleasure, happiness, or preference satisfaction but rather with the *moral* well-being of the actor. By contrast, the legal moralist aims to make the world better by preventing and requiting moral wrongs. The difference lies between making a person morally better and making the world (or "things" in general) morally better. These, in fact, are not the same motivations: the state of the world being morally better is not to be identified with the state of some person(s) being morally better persons—(or things being morally better *for them*).[200]

With these (admittedly only lightly sketched) clarifications, the content of the derived right to liberty can be made complete. I thus turn to the basic right to liberty and its content. As a reminder, the second, or "basic," right to liberty is not concerned with the subjectively motivating reasons for legislative prohibition of certain activities. Rather, it is concerned with the

196. Argued on the other side in Michael Moore, *Liberty and Drugs*, *in* DRUGS AND THE LIMITS OF LIBERALISM (P. de Greiff ed., 1999).

197. This literature begins with Cass Sunstein & Richard Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1166 (2003). This move is critically examined from a libertarian perspective in Heidi Hurd, *Fudging Nudging: Why "Libertarian Paternalism" Is the Contradiction It Claims It's Not*, *in* GEO. J.L. & PUB. POL'Y (forthcoming 2016).

198. Gerald Dworkin's label; G. Dworkin, *Moral Paternalism*, *supra* note 161.

199. Feinberg's label. *See* FEINBERG, HARM TO OTHERS, *supra* note 150, at xiii.

200. Dworkin, *Moral Paternalism*, *supra* note 161, at 308.

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freedom to do those activities without state interference, no matter how that interference might be motivated. Still, there should be some relationship between the content of the two rights to liberty, as we see in what follows.

F. The Second (or "Basic") Right to Do Certain Actions Free of State Coercion, However that Coercion Is Motivated

It will be helpful to divide the sphere of free action protected by the basic right to liberty into three parts, at least initially. One motive for doing so is to separate actions that should be free because of the *absence* of any good reason to coerce them (the first part) from actions that should be free because of the *presence* of reasons not to coerce them (the second and third parts).

1. The Absolute Right to Be Free of Coercive Prohibition of Behavior That Is Not Morally Wrong

In all three parts of this discussion we are concerned with the absence or presence of good reasons justifying state coercion. One should not confuse such objective, justifying reasons with the subjective, motivating reasons that were the subject of the derived right to liberty.[201] Motivating reasons are in the head of the actor and they causally explain his action; justifying reasons are not in the head of some particular actor and they do not explain that actor's behavior. Rather, they justify actions as good or permissible things to do. Still, it is natural to think that there should be a relationship between the propriety of acting on certain motivating reasons and the correctness of justifying an action on the basis of certain justifying reasons. Put simply, should not permissibly motivating reasons also constitute good reasons with which to justify an action? Likewise, should not impermissibly motivating reasons also constitute bad reasons with which to justify an action?

There is no strictly *logical* necessity that we so restrict the kinds of reasons that go into the balance of reasons that determines the basic right to liberty. One could have the view that because the derived right to liberty deals with *motivating* reasons while the balance defining the basic right deals with *justifying* reasons, the content of the proper reasons in the two rights could be different. Indeed, in his debate with me when we were coteaching ethics years ago, Joseph Raz explicitly defended a distinction of this kind. According to Raz, when morality requires us to act for certain reasons and not others, that is without implication for the kinds of reasons usable to justify the actions we do.[202] Raz urged that we should celebrate serendipitous

201. Distinguishing subjective, motivating, explanatory reasons from objective, justifying, normative reasons is a staple of modern philosophy. *See generally* Maria Alvarez, *Reasons for Action: Justification, Motivation, and Explanation*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016). My own acknowledgment of the distinction is in MICHAEL MOORE, EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE (2000), at 141–142.

202. Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153 (1989). Raz is replying here to Michael Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827 (1989). The issue that Raz and I were debating has received considerable discussion in the contemporary

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situations where we do our duty by not acting for some prohibited (motivational) reason, and yet we achieve by that action just that state of affairs that was the object of the objectionable motivation. For Raz, the goodness of that state of affairs could constitute a justifying reason to do the action in question even though aiming to achieve that state of affairs was prohibited. For example, John promises Mary that when he buys her a present he will not choose the present for the reason that it will be pleasing to Mary's mother; John buys the present and in fact is not motivated by the desire to please Mary's mother; yet the present does indeed please Mary's mother, and this fact still operates as a reason justifying the choice of that present.

Raz's position here is not contradictory; it is just peculiar. On my view,[203] when morality requires that we act for some reasons and not others, it does so only because the first are good justifying reasons and the second are not. On this view, one is properly motivated in making some choice when one aims at all and only those states of affairs that justify the choice as rightly made.

On the view just argued for, there will thus be a tight connection between the content of motivating versus justifying reasons in the derived and the basic rights to liberty, respectively.[204] The only good justifying reasons will be the only proper motivating reasons, and vice versa. More specifically, since the only proper aim of coercive legislation is the prevention and punishment of moral wrongdoing, so, too, the goods that can justify coercive legislation are limited to the retributive goods of preventing future wrongdoing and requiting past wrongdoing.

This makes the balance of reasons that define the basic right to liberty more determinate. One's basic right to liberty is to do those actions whose moral wrongness is sufficiently minimal that the good of its prevention/punishment is outweighed by the goods standing behind the presumption in favor of liberty.

Using this restriction on the reasons that can justify state coercion results in a requirement that actions the state would prohibit and punish must

philosophical literature following on Mark Schroeder's hypothetical of the surprise party in MARK SCHROEDER, SLAVE OF THE PASSIONS (2007). *See, e.g.*, Julia Markowitz, *Acting for the Right Reason*, 110 PHIL. REV. 201 (2010), examining whether "any action is morally worthy if and only if my motivating reasons for acting coincide with the reasons morally justifying the action."

203. *See* my rejoinder to Raz's reply to me in MOORE, EDUCATING ONESELF, *supra* note 201, at 25–29.

204. In concession to Raz, there will be some occasions when my view of the tight connection between the contents of justifying and motivating reasons will not hold. Raz gives one of them: on the normative powers view of promises (which I reject for reasons explored in Heidi Hurd, *Promises, Schmomises*, LAW & PHIL. [forthcoming 2017]), a promise not to act for a certain reason does affect proper motivation but is without effect on the force of justifying reasons. Another is provided by the example in Schroeder, *supra* note 202, of the surprise party: someone has a justifying reason to go home, given that there is a surprise party there awaiting him (and he likes only surprise parties, not regular parties), yet he cannot go home for the reason that there will be a surprise party (because being so motivated would require knowing of the party and ruining the surprise). Neither of these rather recherché situations is present in the case of legislative motivation discussed in the text.

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be morally wrong. If they are not, the state has no legitimate reason to prohibit them. Much thus turns on the content of our moral obligations. As I hint above, on my view of morality we do have what are sometimes called "public" obligations, such as the obligation to support just institutions, the obligation to seek and to support the solutions to certain coordination games, the obligation not to free-ride on public goods and to solve prisoner's dilemmas and games of chicken, and so on. This allows for criminalization of a wide variety of instrumental wrongs as *malum prohibitum* crimes.[205] On the other hand, one of the areas popularly regarded as the subject of detailed moral obligations, sexual conduct, strikes me as belonging to the morally indifferent category, not any other aretaic category and certainly not the category of deontic moral obligations. It diminishes morality to think that it obligates us to practice sex one way rather than another. Indeed, it strikes me that morality is indifferent about what organ we insert into what orifice of what gender of what species. These are at most matters of taste and of aesthetics but not of morality.

The upshot for one with my views of morality is that the basic right to liberty protects much of what we do from criminalization. It also condemns large portions of existing criminal codes, namely, those portions that prohibit morally permissible behavior. We should regard this aspect of the basic right as one safe harbor of liberty. Within such harbor there is no balancing to be done, no trade-offs to be made. Liberty should be categorically protected against such illegitimate legislative intrusion.

Notice how different is the liberalism defined by this basic right to liberty from the more standard Millian liberalism. The standard liberal rejoinder to social conservatives on the issues of criminalizing abortion, homosexual sex, suicide, and the like is to complain that social conservatives make the wrong *kind* of argument in supporting the criminalization of these behaviors. Social conservative support such criminalization on the grounds that such behaviors are immoral.[206] Millian liberals rejoin that immorality is not a proper justification for criminal prohibition of action. Liberals thus seek to keep the social conservatives off the tournament field by disqualifying their entrants at the start.

Liberalism rightly conceived (along the non-Millian lines described above) has no such maneuver available to it. The immorality of an action is a very good reason in favor of criminalizing that action;[207] indeed, it is the only good reason there is. If liberals are to disagree on the issue of criminalizing abortion, homosexual sex, suicide, and the like, that can only be because they do not agree with the morality of the social

205. MOORE, PLACING BLAME, *supra* note 128, at 760–761.

206. *See, e.g.*, the defense of Proposition 6 on the 1978 California ballot (banning gays from public school teaching) by its sponsor, Senator John V. Briggs, *Save Our Schools,* L.A. HERALD EXAMINER, Sept. 14, 1978.

207. As Senator Briggs reminds his readers. *Id.*

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conservatives.[208] There is nothing wrong with the *form* of argument relied on by social conservatives in these contexts; they just have the wrong moral views about such practices. And is it not a refreshingly more honest liberalism that owns up to its real commitments of substantive morality (as opposed to pretending that it is prescinding from the moral debate)?[209]

2. Morally Wrongful Behavior That Nonetheless Ought Not to Be Criminalized

If legislation aims at prohibiting moral wrongdoing and in fact what it prohibits is morally wrong, is it necessarily true that there is no principled objection to make against such legislation? Nothing in the two rights to liberty as so far articulated show any ground for complaint here. Yet our rights to liberty encompass some right to be free of state coercion even in our doing of certain wrongful actions. Do we not, in short, sometimes have the right to be wrong? If so, then while liberty is secure when we do no wrong, our liberty does not end where our obligations begin. That is the possibility I want to explore next.

According to the harm and the wrongful-harm principles, we of course have liberty to do some morally wrong acts, namely, any such acts as are not harmful to others. But I am interested in illustrating the retributivist view about such things. How, for a retributivist believer in the moral-wrong principle, can it be true that we have a right to be free of state coercion for any morally wrongful actions? In such cases the state admittedly has, in fact, good reason to punish, and in cases where it is motivated by that reason, how can it be nonetheless wrong for the state to proceed?

Some would argue that it is conceptually impossible for us to be at liberty to engage in morally wrongful behavior. The basis for this objection is pretty straightforward: a wrong act is an act we were obligated not to do; if we were obligated not to do that act, we were not permitted to do it; if we were not permitted to do it, we had no right to do it. Yet we can side-step this otherwise potent objection by noting that the liberty right we seek is not literally a right to do a wrongful action. Rather, the right we need is a right against the state coercing us out of doing a wrongful action. There is no contradiction in the possibility that it would be more wrong of a state to coerce me out of doing some action *A* than it is wrongful of me to do *A*. Indeed, such "two-level" arguments abound in the literature on liberty. For

208. As I argue in my response to Briggs; Michael Moore, *The Briggs Amendment: It Discriminates against Homosexuals*, L.A. HERALD EXAMINER, Sept. 14, 1978, at A18. Ronald Reagan eventually joined my side of the debate in Ronald Reagan, *Editorial: Two Ill-Advised California Trends*, L.A. HERALD EXAMINER, Nov. 1, 1978, at A19.

209. A point on which Michael Sandel and I have long agreed. *Compare* Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989), *and* Michael Moore, *Sandelian Anti-Liberalism*, 77 CAL. L. REV. 539 (1989). Our only disagreement here is terminological: Sandel defines liberalism so as to limit it to the Millian version that I reject.

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example, "It is wrong for a woman to obtain a late-term abortion, but it would be more wrong for the state to coerce her out of that choice."[210]

Removing this conceptual objection only makes space for there being a liberty to do some wrongful actions; it does not show that we actually have such liberty. Indeed, legal moralism rightly understood shows that there is some reason to criminalize behavior stemming from the fact that the behavior is morally wrong and thus in need of prevention and punishment.

Even Joel Feinberg, who argues that some wrongs—the "non-grievance wrongs"—do not merit criminalization, makes what he calls a "grudging concession to moralism,"[211] which is to concede that "the prevention of an evil, any kind of evil at all, is *a* reason for criminal legislation."[212] About this, surely Feinberg is right. The world is a better place if any evil is not brought into existence and any wrong is not done. (We should add the retributivist's distinctive insight that *punishing* the wrongful causing of an evil, any kind of evil and any kind of wrongful causing at all, is also *a* reason for criminal legislation.) Still, the goodness of preventing and punishing *minor* moral wrongs is, well, minor—small potatoes, morally speaking. Breaches of promise and negligence torts are, by my lights, only minor moral wrongs, despite the ridiculous emphasis on promise-keeping in many traditional ethics texts.[213] As Feinberg points out, the minor goodness of such prohibition may at least sometimes be outweighed by the standing case for not prohibiting behavior, that is, the standing case for liberty.

We already have a list of the latter kinds of goods in the five values standing behind the presumption in favor of liberty, values giving that presumption moral weight. Each of these values argues against criminalization, and if the only good of criminalization is the minor retributive justice achieved by the punishment of minor wrongs, surely sometimes such values win out and forbid criminalization. There are two ways this could work. The simplest way would be for the five values standing behind the presumption of liberty to speak uniformly (across all kinds of actions) in the weight they give in favor of not criminalizing. Then the line between wrongs that may be punished by criminal law and those that may not would be drawn simply by the degree of wrongdoing instantiated by different kinds of action. The presumption in favor of liberty, in such a case, would operate like a fixed threshold of wrongfulness below which liberty is to be found. To know whether the state could criminalize any action, one would only need to know the degree of wrong such kind of action typically instantiates. This invariance in the strength of the presumption of liberty was Feinberg's seeming view of the matter, reflected in his judgment that the value of liberty

210. A paraphrase of Justice Sandra Day O'Conner's apparent moral view on abortion.
211. FEINBERG, HARMLESS, *supra* note 150, at 20.
212. *Id.*
213. Exploding the conventional pieties about promise-keeping seems to be the major point in Hurd, *Promises, Schmomises*, *supra* note 204.

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always outweighs the goodness achieved by punishing and preventing the minor moral wrongs constituted by nongrievance wrongdoing.

The more intriguing but more complicated possibility is that the weight of the values standing behind the presumption in favor of liberty varies depending on the kind of action involved. Then the threshold of wrongfulness (below which liberty is to be found) will vary, depending on the kind of action and how strongly the presumption-of-liberty values speak against criminalization of that kind of action. Elsewhere I examine this latter possibility with regard to each of the five values earlier surveyed;[214] without duplicating that effort here, suffice it to say that one ends up with a very context-sensitive, complicated calculus about the liberty to do minor wrongs. To be protected from criminalization on this basis, an action must be a sufficiently minor wrong that the good of its punishment and prevention is outweighed by the costs the state incurs in achieving such punishment and prevention. What makes the calculation so complicated is that the characteristics of actions making them costly to criminalize are so various: degree of opportunity set diminishment, omissions rather than actions, importance of Millian autonomy, importance of Kantian autonomy, degree of desire to be free of state coercion, degree of division or of clarity in popular opinion about moral status, commonality of the behavior, depth of motivation, secrecy in execution, all have a place in this calculation. Still, the barrier made up of these many ingredients is a plausible interpretation of the liberty each of us has to do some minor moral wrongs free of state coercion.

3. Serious Moral Wrongs and the Costs to Moral Agency in Prohibiting Them

From the previous section's discussion, we see that our liberty does not end where our obligations begin. We should be free of state coercion even for some actions that constitute minor moral wrongs. Even a relatively weak presumption of liberty gives us this much. Yet it is intuitive that the presumption operates more strongly than this, protecting even behaviors that are seriously wrong from being criminalized.

Several examples support this intuition.[215] One is the woman's liberty to have an abortion. One might think that women do serious wrong in aborting their fetuses. The extreme view is that abortion is murder because the fetus is a person. But less extreme views also illustrate the point: even if fetuses are not persons, they could still be regarded as serious moral interests that it is seriously wrong to harm. Despite such judgments about the wrongness of abortion, one might nonetheless think that women have the right to do this great wrong. The thought would be that it is an even worse wrong for the state to coerce the woman's choice here than is any wrong that choice could do.

214. Moore, *Liberty's Constraints*, *supra* note 190.
215. These are culled from MOORE, PLACING BLAME, *supra* note 128, at 763–764.

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Another example is suicide. It is plausible to think that when children or others depend on the actor, it is a serious wrong to suicide. Yet even accepting this, I find equally plausible the view that each of us has the right to do this wrongful act. Our life is our own, and it would be a greater wrong for the state to dictate its ending than it would be for the person whose life it is to end it wrongfully.

A third example is liberty of speech. The child's slogan, "sticks and stones may break your bones but words can never harm you," is surely false. Acts of speech can do great harm, as when one reveals private and embarrassing facts about another whose precariously reconstructed life is then destroyed. Such acts, when done for no better reason than to sell magazines, strike me as seriously wrongful; yet one might think it would be worse for the state to compel these wrongful actors not to speak.

Last, consider parental decisions about how to raise and educate their own children. Bad parenting (well short of physical abuse) can cripple children for life and is a serious wrong. Yet many believe parents are within their rights to be harmful in myriad and unsubtle ways, in the sense that it would be worse for the state to coerce better parenting.

These examples all suggest that liberty can extend to some choices no matter how seriously immoral may be the wrongful exercise of that choice. Here, too, it is more important that one choose freely than that one choose rightly, even when "choosing rightly" is a high-stakes matter, morally speaking.

The key to understanding the nature of those choices where freedom is crucial lies in Mill's idea of autonomy. Recall that Mill likens human beings who are not self-determining in some sense to mere machines like steam engines. Choices of such beings lack the value of the choices of free persons. What Mill saw is that uncoerced choice at key points is necessary for any of us to develop into beings whose subsequent choices can have value.

Aristotle said that every choice determines who we are. Perhaps, but surely not all choices are created equal in this respect. My choice for an extra dessert no doubt contributes its little bit to the constitution of my gluttonous character. Yet it compares poorly in the degree of its contribution to that character with the choice about what skills and talents I should develop, what education I should seek, what career I should undertake, what forms of friendship, love, and sexual intimacy I should indulge, whether I should marry, whom and when I should marry, whether I should have children, how my body is treated while I am alive, what is done with my body after I am dead, and how and when I die. A creature denied all of these latter kinds of choices could rightly complain that he never got to live his own life, never got to choose what kind of person he would be, never got to be the artist whose best creation was himself.

How formative different kinds of choices are is surely a matter of degree. That this is so does not mean that the latter kinds of choices are not on the

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upper end on the scale of importance that they not be coerced—they are. It is so important that choices on this upper end of the scale not be coerced that even serious immorality should be tolerated so as to allow such choices to be made freely. Yet this last right to be free of state coercion is arguably continuous with the right to do minor wrongs discussed in the last section. On this view, there would be only one right to do the wrong thing, with the force accorded to the right varying by the degree of immorality of wrongful exercises of the choice protected by the right and varying by the degree of Millian autonomy, positive liberty, Kantian autonomy, and so on, taken by coercion of that choice.

This would be a troubling view of the basic right to liberty because it would call into question whether the right had the peremptory force needed to be a natural right at all. That is, even though possessed of the other characteristics of a natural right—grounding the correlative duty rather than being grounded by that duty, being itself grounded in the interest of the right-holder to be let alone, enforced at the discretion of the right-holder—still, the worry is, the right might lack that priority over the maximization of good states of affairs characteristic of any truly deontological ethics, natural rights included.

This is not much of a worry for the first part of the basic right to liberty, the right to be free of state coercion in the doing of morally permissible actions. It is also not much of a worry for the third part of the basic right, the right to make self-defining choices. But notice that even for the middle ground, the second part of the basic right, there still is a preclusion of full-blown consequentialist justification of behavior protected by the right. This, because the justifications for state coercion even here are limited to the punishment and prevention of moral wrongdoing, which is a far cry from the broader range of justifications available to a true consequentialism.

G. The Limited Force of the Two Rights to Liberty: Threshold Deontology and Consequential Overrides

Like all moral rights, the two rights to liberty are not plausibly construed to be "absolute." Although the Kantian injunction that "it is better that humanity perish from the earth than that a single right be violated"[216] is the kind of stirring hyperbole that gets people to the barricades, it is surely false. Indeed, if the Kantian injunction were the only version of deontology, I would be a thoroughgoing consequentialist in my substantive ethics.

There are two ways in which the natural rights to liberty are not absolutes in this Kantian sense. One is within the theory of the right; the other is

216. IMMANUEL KANT, *The Metaphysical Elements of Justice*, METAPHYSICS OF MORALS pt. 1 (J. Ladd trans., Indianapolis: Hackett, 1965), at 100.

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within the theory of the good.[217] Starting with the first, a more plausible deontology is what I and others call "threshold deontology."[218] According to threshold deontology, rights (and their correlative duties on others) are immune to violation only up to a threshold of awful consequences; over such a threshold, "all bets are off," in the sense that averting true moral horror justifies violating the rights of one or a few. If the only way to learn of the location of a terrorist nuke somewhere in New York is to torture the innocent child/spouse/parent of the terrorist who planted it there, such rights-violating torture is not only permissible but, in my view, even obligatory.[219]

Many have sensed the lumpy, ad hoc feel to threshold deontology and have therefore questioned its rationality.[220] My defense of it is not only Churchillian (it may be ugly but it is preferable to the alternatives) but is also (and more positively) in terms of the idea that obligations have different degrees of *stringency* such that the obligation to avert severely awful consequences can be sufficiently stringent as to override the less stringent even though categorical obligations of deontological morality. Such a defense, however, is for another occasion.[221] Pertinent here is the fact that this route to defending the rationality of threshold deontology commits one to what I call "sliding scale threshold deontology."[222] This is the view that the location of the threshold (over which consequentialist justification holds sway) varies depending on the degree of stringency of the categorical obligation being violated. If, for example, the stringency of the obligations correlative to the two rights to liberty varies with the kinds of choices at issue in a given case—the liberty to make "fundamental" choices demanding greater stringency of obligation than the liberty to make "nonfundamental" choices, for example—then the threshold over which violation of such liberty rights can be violated will also vary.

With respect to the degree of rights protection within the theory of the good, consider Ronald Dworkin's fetching metaphor that rights "trump" utility.[223] Although it is not clear that Dworkin so understood the point, the best interpretation of his metaphor is *not* to be referring to the categorical nature of deontological moral norms. Rather, rights trump utility in the different sense that between two states of affairs, a right not being violated

217. I explore this distinction (between categorical force of deontological norms, on the one hand, and degrees of intrinsic goodness of states of affairs in consequentialist ethics, on the other) in MOORE, PLACING BLAME, *supra* note 128, ch. 4.

218. Alexander & Moore, *supra* note 97.

219. Argued for in Michael Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280 (1989), revised and reprinted in MOORE, PLACING BLAME, *supra* note 128, ch. 17.

220. Such as my sometime public debate partner Jeremy Waldron most recently. *See* Michael Moore & Jeremy Waldron, *The Ethics of Targeted Killings*, University of Illinois, November 2, 2015, https://www.youtube.com/watch?v=7ssEX5hEzyQ.

221. Michael Moore, *The Rationality of Thresholds within Deontology*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES; ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER (H. Hurd ed., forthcoming 2018).

222. Alexander & Moore, *supra* note 97.

223. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

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and net human welfare being enhanced, the former is significantly more valuable. A plausible consequentialism can think that both rights protection and welfare enhancement are intrinsically good states of affairs and think that the first is much more valuable than the second.

In my own view of deontic ethics, one reaches such consequentialist trade-offs once one is outside the agent-relating obligations and prerogatives of deontological morality.[224] Government officials are sometimes in just this position. There are no categorical obligations in the budget room, for example, for everyone in there is outside the scope of deontological obligation. There, governments must trade off enhancement of welfare against protection of various kinds of rights and justice. Surely even Kant, if he were sitting on the Königsberg City Council, would have funded services and facilities for enhancement of welfare, for protection of corrective justice, for prevention of rights-violating crime, along with funding services and facilities to achieve his favored retributive justice.

In making such trade-offs, rights protection (and justice generally) gets a "trumping" position vis-à-vis enhancement of welfare. Yet such trumping is hardly absolute; at some point alleviating human misery outweighs the enhancement of rights protection. When officials are outside the scope of deontological obligation and are considering how best to protect the natural rights to liberty, they thus are not obligated to eschew all trade-offs of utility as against rights.

III. CONSTITUTIONALIZING THE TWO NATURAL RIGHTS TO LIBERTY

One might think that if the two natural rights to liberty exist, this moral fact should ipso facto dictate a legal fact, namely, that there are two constitutional rights to liberty of equivalent content. Yet intimate as the relationship is between law and morality,[225] it is not so intimate as to make such inferences automatic. We cannot truthfully say, as Blackstone said of the common law in England,[226] that for every violation of a natural right there is a legal (in this case, constitutional) remedy. There are three hurdles a natural right must surmount to become a legal (and more specifically, a constitutional) right.

First of all, there is the question of legal reference: moral norms must have some form of "institutional recognition" if they are to be the legal norm of some particular legal system. Such recognition can take the form

224. We can be outside such obligations and prerogatives because of exceptions, scope limitations, or simple absence of any norm in the vicinity. *See* Michael Moore, *Patrolling the Borders of Consequentialist Justifications: The Scope of Agent-Relative Restrictions*, 27 LAW & PHIL. 35 (2008).

225. I give an overview of my own and others' past work on the general relationships between law and morality, in Michael Moore, *The Various Relations between Law and Morality in Contemporary Legal Philosophy*, 25 RATIO JURIS 435 (2012) (Bologna University Symposium on Michael Moore's Perspective on the Relations Between Law and Morality).

226. WILLIAM BLACKSTONE, COMMENTARIES ON THE COMMON LAW OF ENGLAND (7th ed. 1825).

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of direct reference: terms in authoritative legal norms, such as "good moral character," "best interest of the child," and "equal protection of the laws," as they occur in deportation statutes, child custody statutes, and the Fourteenth Amendment, are plausibly taken to refer to the moral facts of virtue, welfare, and equality, respectively.[227]

Alternatively, such institutional recognition can arise by implication. Those moral facts that (1) resolve indeterminacies in meaning due to gaps, vagueness, or conflict in or between legal texts; (2) determine the weight and breadth of holding of the common-law rules that arise out of precedent; (3) determine the "spirit" (purpose, function, value) behind a legal rule or body of legal rules; or (4) constitute the common sense needed to save a legal interpretation from moral absurdity—these kinds of moral facts also have the kind of institutional recognition needed to be legal (and not just moral) facts.[228]

What kind of institutional recognition there is for the two natural rights to liberty within U.S. constitutional law is a matter of some dispute. There is now a growing chorus of constitutional-law scholarship that finds direct reference to liberty in the national Privileges or Immunities Clause of the Fourteenth Amendment.[229] Older views were that liberty is referred to directly by the text of the Ninth Amendment, reserving to the people rights other than those explicitly enumerated in the Bill of Rights.[230] Still older views place the reference to liberty in the state Privileges and Immunities Clause of Article IV.[231] However, the now settled constitutional law of the United States treats the word "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments as referring to a substantive natural right to liberty that cannot be intruded upon no matter how fair the procedural means for doing so.

This is doubtlessly not ideal, for the reasons that judicial conservatives on and off the Court are so fond of remarking upon. John Hart Ely's aphorism is much-quoted: "substantive due process," said Ely, makes as much sense as, "green pastel redness."[232] Justice Scalia throughout his career continued Ely's mocking of the phrase "substantive due process," saying, for example, "Only lawyers can walk around talking about substantive due process, inasmuch as it is a contradiction in terms. If you referred to substantive process or procedural substance at a cocktail party, people would look at you funny."[233]

227. Some of the examples given in Moore, *Various Relations*, *supra* note 225.

228. I summarize these four modes of institutional support, together with direct reference, as together constituting the five ways morality is required to interpret and apply legal texts, in *id.*

229. KURT LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

230. This is Justice Goldberg's view in his concurring opinion in *Griswold*, *supra* note 41.

231. *See* Corfield v. Coryell, 4 Wash. C.C. 371, 6 F. Cas. 546 (C.C.E.D.Pa. 1823) (Washington, J.).

232. ELY, *supra* note 60, at 18.

233. Antonin Scalia, Constitutional Interpretation, Speech Given to the Woodrow Wilson International Center for Scholars, Washington, D.C. (Mar. 16, 2005).

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Yet unless and until one is willing to overrule fifty years of Supreme Court precedent (starting with *Griswold*), this is idle talk. Liberty is referred to in the Fifth and Fourteenth Amendments' Due Process Clauses, and hundreds of cases have held that reference to be substantive and not just procedural. If the *Slaughterhouse Cases*[234] were overruled and the reference to liberty is then taken to be in the national Privileges or Immunities Clause, that would probably be in better harmony with our history than taking the reference to be from the Due Process Clauses.[235] Yet, as even Scalia recognized on occasion, absent such re-placement of textual reference, what we have with substantive due process is "good enough for government work."

Even if there were no direct textual reference to the natural rights to liberty in the text of the Constitution, such rights could still be part of American constitutional law by virtue of the four other, indirect forms of institutional support mentioned above. Particularly relevant here is the third item on that list:[236] one might plausibly urge that the Constitution as a whole best makes sense as aimed at securing "the blessings of liberty," as it says in its preamble. Justice Douglas in *Griswold* gave a poor rendition of this view, the sloppiness of which has haunted us since. Douglas urged that there were "emanations" from "penumbras" of five various amendments from which the right of "privacy" (read: liberty) should be implied.[237] What he might have done instead is to show how liberty was indeed in the forefront of the minds of those who conceived each of the more particular aspects of our Constitutional scheme.

Liberty was at the core of the rationale for creating a federal government of enumerated and divided powers.[238] The Federalists' idea was that the absence of governmental power protected liberty as effectively as the presence of a bill of rights. Despite this view, liberty was also one of those expressly described "unalienable rights" with which all persons are endowed that motivated our revolution and that was mentioned in the Declaration of Independence.[239] It was one of the "inherent rights" of which no one can be deprived, according to the Virginia Declaration of Rights.[240] Securing its blessings was one of the purposes for forming the Union mentioned

234. *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

235. So argued some years ago in Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. LAW & PUB. POL'Y 63 (1989). The definitive modern historical study on this issue is Lash, *supra* note 229.

236. This is the purpose, value, or spirit that animates a body of rules. I explore the dimensions of this form of institutional support in Michael Moore, *Legal Principles Revisited*, 82 IOWA L. REV. 817 (1997), reprinted in MOORE, EDUCATING ONESELF, *supra* note 201.

237. *Griswold*, *supra* note 41, at 484.

238. *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Neil H. Cogan ed., 1997).

239. THE DECLARATION OF INDEPENDENCE (U.S. 1776). Like Justice Thomas in our own day, Abraham Lincoln urged that the Constitution should be interpreted in light of the Declaration. *See* JAMES MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1991), at 126.

240. THE VIRGINIA DECLARATION OF RIGHTS sec. 1 (1776).

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in the Preamble to the Constitution.[241] James Wilson, the legal architect of the American Revolution, gave pride of place among all natural rights to the natural right to liberty; indeed, he noted that "liberty is frequently used to denote all the rights of man." Wilson defined the right to liberty as the right of each individual to exert his intellectual and active powers so as to further the happiness of himself and of those near and dear to him, "in such a manner, and upon such objects, as his inclination and judgment shall direct, provided he does no injury to others, and provided some public interests do not demand his labours."[242] It is this central place in our constitutional scheme that justifies the opening lines of Justices Kennedy's and Justice Thomas's opinions in *Obergefell*—that "the Constitution promises liberty to all within its reach,"[243] and "the Framers created our Constitution to preserve . . . liberty."[244]

Such an indirect showing helps to bolster whatever uncertainty might linger about the Constitution's recognition of liberty. Beyond the question of institutional recognition, the second set of considerations relevant to whether a natural right should be construed also to be a legal and constitutional right is those of administerability. This is a factor for courts administering legal rights that has no analogue for individuals' moral decision-making. One problem here is the adequacy of the standard that allows courts to have confidence that a dispute is "justiciable," that is, properly handled by an institution with a court's characteristics. Another problem of administerability is the problem of evidence, again a problem unique to law. For example, when courts must divine some morally relevant fact (such as an intention), that fact may be more readily evidenced to those whose intention it is and who guide their own actions in the moral sphere. These and like considerations incline Waldron to deny that some moral norms, even when those norms confer rights, are "apt for law."[245]

Third, for a natural right to be a *constitutional* legal right requires some consideration be given to comity between coequal branches of government. We have constitutional rights only when the courts are obligated to protect them,[246] and courts' obligations in this regard surely include some appropriate level of deference to the views of the other branches or levels of

241. "We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America"; U.S. CONST. pmbl.

242. JAMES WILSON, *Of the Natural Rights of Individuals*, 2 LECTURES ON LAW: COLLECTED WORKS OF JAMES WILSON pt. 2, ch. 12 (K.L. Hall & M.D. Hall eds., 2007).

243. *Obergefell*, *supra* note 1, at 1. In light of this tradition I find the scorn heaped upon Kennedy's opening sentence by the ultimate traditionalist, Antonin Scalia, to be peculiar (such "mystical aphorisms of the fortune cookie [as Kennedy's quoted sentence]" would make Scalia "hide my head in a bag" if he had to sign onto them). *Id.* at 7-8 n. 29 (Scalia, J., dissenting).

244. *Id.* at 1-2 (Thomas, J., dissenting).

245. Jeremy Waldron's idea in his recent efforts to deny such moral justifications as may exist for "targeted killings," any capacity to justify a legal practice of targeted killings. *See* Moore & Waldron, *Ethics*, *supra* note 220.

246. I defend this tie of law to judicial obligation in Moore, *Responses*, *supra* note 92, at 419–424.

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government. Some degree of step-back is thus required for courts as they second-guess legislatures and executives in the latter's best judgments of what the Constitution demands.

Taking the institutional support of the right to liberty to be secure, in what follows I examine the second and third sets of considerations with respect to the two natural rights to liberty above-described.

A. Constitutionalizing the Derived Right to Liberty

1. The Old Problem of Adjudicating Legislation Motivation in Constitutional Review of Legislation

It is one thing to urge as a matter of political philosophy that each citizen has the right not to be coerced by the legislature except for proper reasons; it is another for a court to undertake a review of the reasons that motivate coercive legislation to see if they are proper. For the political philosophy about the derived right of liberty is addressed to individual legislators (and to those who advise or criticize them); such legislators can easily apply the injunctions of such political philosophy as they formulate what they personally are trying to achieve with the legislation they are considering.

A court's job is more difficult if it is to review the legislation on the basis of the enacting legislature's motivation. This is not just the difference that the motivation in question is not that of the reviewing court's (so that it does not have the epistemic advantages legislators enjoy about the contents of their own states of mind, although that difference is, of course, also present). Rather, the difference lies in the difficulties attendant upon discerning the motivations of a body that itself literally has no motivations (even if the individual members comprising that body do).

The Supreme Court has been alive to these difficulties throughout its history, but it has waffled on whether they are of such magnitude as to disqualify legislative motive as a ground for invalidating legislation. John Marshall thought not, urging in famous dicta that "should Congress ... under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the government,"[247] those badly motivated laws would be unconstitutional. Although such a motivational enquiry has not been pursued under the positive Commerce Clause, such a motive test has long been used under the negative commerce clause. If a state legislature is motivated by a "protectionist purpose," then without adverting to balancing, the legislation so motivated unduly burdens interstate commerce.[248] Similarly, for a while at least, the Court required an enquiry into legislative

247. McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819).

248. Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981). Justice Rehnquist's dissent in that case puts its finger on some of the difficulties of ascribing a motive for a composite body like a legislature: doing so "assumes that individual legislators are motivated by one discernible 'actual' purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons." *Id.* at 702–703 (Rehnquist, J., dissenting).

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motive in ascertaining whether a putative tax was in reality coercive regulation of the activity taxed; indeed, in the *Child Labor Tax Case* the Court went so far as to recognize that legislatures, like people, could act for mixed motives and held putative tax measures constitutional if their "incidental motive" was regulatory, so long as the "primary motive" was the raising of revenue.[249]

In finding whether a law or legal practice unconstitutionally discriminates on the basis of race or gender under the Equal Protection Clause, the Court has also allowed an in-depth enquiry into legislative motivation. In *Gomillion v. Lightfoot*,[250] for example, Justice Frankfurter for the Court found the Alabama law (redrawing the city boundaries "from a square to an uncouth twenty-eight-sided figure" and having the result of removing from the city all but a few of the four hundred black voters in the old city) unconstitutional because of the nearly "mathematical demonstration that the legislation is solely concerned with segregating white and colored voters" rather than with any more legitimate purpose.[251] Likewise, the Court took a careful look at the motive behind civil service job preferences for veterans mandated by Massachusetts law and was quite sophisticated in its psychological distinctions between an illicit intention or motive (of disadvantaging women), on the one hand, and a predictive belief by the legislature that such a law would in fact disadvantage women more than men. As Potter Stewart stated for the Court:

> discriminatory purpose ... implies more than ... awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[252]

In the present context of the right to liberty, the Court during its first adventure with liberty[253] was also willing to invalidate legislation based on impermissible legislative motivation. Justice Peckham's opinion for the Court in *Lochner* invites such a motivational enquiry quite openly.[254] Peckham nicely distinguishes justifying reasons from motivating reasons, then opines that the proper enquiry is into the actual reasons that motivated the legislature. The state might later plausibly enough claim that the sixty-hour-per-week limit on the hours bakers could work was justified by the health

249. Bailey v. Drexel Furniture Co., 259 U.S., 20 (1922). It is far from clear that the present Court is so enthusiastic about such a motive test for valid uses of the taxing power. *See Sibelius*, *supra* note 118, at 36, where Chief Justice Roberts for the majority upholds the health insurance mandate even though "it was plainly designed to expand health insurance coverage."

250. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

251. *Id.* at 341.

252. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

253. The Court's first adventure with liberty is conventionally dated from 1897 (Justice Peckham's opinion for the Court in Allgeyer v. Louisiana, 165 U.S. 578 (1897)) to the mid-1930s (somewhere between Nebbia v. New York, 291 U.S. 505 (1934) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

254. *Lochner*, *supra* note 42.

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of workers and/or by the wholesomeness of the bread that nontired bakers can bake. Yet such justifying reasons Peckham rejects as mere pretexts and evasion if they were not the actual reasons that motivated the legislation:

> When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare. . . . It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.[255]

Peckham then divines a paternalistic purpose to New York's limitation on the hours bakers could work and sees none of the characteristics of disabled persons that could justify such paternalistic state concern:

> There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, on the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state.[256]

It appears that like Mill before him, Peckham found paternalistically motivated coercive legislation to be one of the main enemies of liberty.

There is thus good authority for constitutionalizing some form of a motive test for liberty's protection (suspending until the next section just what motives ought to be considered constitutionally illicit). Yet unanswered by this (more than occasional but hardly uniform) Supreme Court chorus affirming motive analysis in constitutional law is the nagging question of just what a legislature's motive might be and how it is to be ascertained. The Supreme Court, as just shown, has been quite alive to the psychological distinctions by which we distinguish motives from other kinds of mental states in individual persons. Motives (or intentions) are distinct from predictive belief, even though both deal with anticipated consequences of action; motives are not mere desires for some state of affairs to obtain, but they must be causally operative desires; moreover, there can be more than one such desire motivating a given action ("mixed motives"); moreover, like other concurrent causes, in mixed-motives cases some motives may be more important ("primary") than others ("incidental"); and the motives of some action are not to be confused with mere effects of that action. These are all good distinctions, true to the psychology of persons that we use throughout law, morality, and daily life.

255. *Id.* at 62–64.
256. *Id.* at 57.

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Yet nowhere does the Court tell us how all of these distinctions can meaningfully isolate a motive (or intention) of a *legislature*.[257] To be sure, if composite bodies such as legislatures and corporations were really moral persons, then there would be no problem here. But aside from a few (really quite daffy) gestures in this direction,[258] no one thinks that legislatures, corporations, or other assemblages of persons are themselves really persons. They do not feel pain, get angry, fall in love, or intend, like real persons do; their existence is not of a value equal to that of real persons.[259] That leaves one having to construct some concept of a legislature's motives that will be an acknowledged construction (or function) of the motivations of individual legislators. Justice Rehnquist's skepticism about there being any such constructed notion that makes any sense[260] has deep resonances in legal theory,[261] and it deserves an answer.

One might think that one can get some traction on this issue by adverting to the much better established practice of courts looking to the intent of the enacting legislature to *construe* (rather than review) a statute. Since the same problem of attributing a mental state to a composite body exists there, what has been meant there by a "legislature's intention"? Unfortunately, the answer to that question is, "pretty much anything including the kitchen sink." Virtually any plausible ingredient in a theory of statutory

257. *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) at 170: finding that "the thought of an artificial body must stagger the most advanced of the ghost hunters."

258. As in, e.g., Peter French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207 (1979). French, Waldron, and I had a three-way debate on the issue of legal personhood at the 1995 Greater Philadelphia Philosophy Consortium, University of Pennsylvania.

259. Thus Waldron asked French at the Consortium referenced above whether one such as himself (who holds corporations really to be moral persons) would prevent a wrongful corporate dissolution or save a human life if he could only save one of these two "lives."

260. *Kassel*, *supra* note 248 at 702–703 (Rehnquist, J., dissenting). *See also* Justice Black's earlier opinion in Palmer v. Thompson, 403 U.S. 217 (1971), rejecting motive analysis for equal-protection contexts on Rehnquist-like grounds: it is "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choice of a group of legislators." *Palmer*, 403 U.S. at 224–225. Justice Black's backup reason for rejecting motive analysis was that:

> there is an element of futility in a judicial attempt to invalidate a law because of the bad motive of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

This second worry of Black's sounds better than it is. For none of us has much power to choose the reasons for which we act (in marked contrast to our considerable power to choose the acts themselves). Purging oneself of some illicit motivation is not a matter of telling oneself a little story about why one is doing what one is doing and thereby make that story be true, as the courts have held in the context of landlords attempting to purge themselves of retaliatory motives for evicting tenants (under property law's retaliatory eviction doctrines).

261. Starting with Max Radin in his debate with James Landis; Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); James Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886 (1930).

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construction has been called "legislative intent" by some court somewhere. Witness "legislative intent" being used to refer to the following:[262]

(1) The spirit purpose, function, or value "behind" a statute that it should best be construed to serve;
(2) The all-things-considered safety value of common sense and obvious justice saving a construction of a statute from absurdity;
(3) The intention the enacting legislators would have had if they had thought about the question occupying the interpreting court;
(4) The intention "in" the statute itself, as an artist's intention can be "in" her painting but not in the actual psychology of the painter;
(5) The intention of the present, sitting legislators;
(6) The ordinary meaning of the words used in the statute;
(7) The legal meaning imparted to the statutory language by prior courts' interpretations.

And so on. The problem with these ingredients is not that they might not have their place in an overall theory of statutory interpretation. Rather, the problem is transplanting them from that context to the present context of constitutional review. For there is more than a whiff of fictionalism about each of the items on this list really being about anything properly called an intention. Courts, if they like, might well *presume* that legislatures pass statutes in ways that:

(1) Serve some intelligible value or set of values;
(2) Do not produce absurd or manifestly unjust results;
(3) Reflect what reasonable people would think when confronted with novel applications;
(4) Reflect some intelligible goal in their apparent structure;
(5) Do not go too far against present legislative wishes;
(6) Do not use words in deviant, nonordinary ways;
(7) Know of and respect the meanings given to statutory language by prior court interpretations of that language.

Yet these are court-created constructs about what the legislature will be presumed to intend; they are court-imposed aids for courts to do their job, construction of a statute so that it makes sense. They do not even purport to answer the question of whether the enacting legislature actually intended what it is presumed to intend. And it is that latter, psychological fact that is crucial in the review of statutes on motivational grounds. If a statute is to be invalidated because of the illicit motivations behind its passage, actual, psychological, explanatory motivations are needed. Fictional posits—helpful as these might be to construing a statute favorably so as to integrate it into existing law—will not cut the mustard when it comes to invalidating a statute because of the illicit reasons motivating its passage. As Kant would say, when acting for the right reasons is of value independently of doing the right

262. The list is culled from Moore, *Semantics*, *supra* note 25, which gives citations and examples.

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action, the reason adding that value has to be the actual, motivating reason for the action, not some fictional posit.

Since in the constitutional context one needs real mental state causation (i.e., motivation), and since legislatures are not among the kinds of things that can have real mental states, that leaves us with Rehnquist's question: How do you construct a legislature's intention out of the only relevant items really having intentions here, namely, individual legislators? As I urge elsewhere, there are only two real possibilities here.[263] The most obvious is to equate the intention of a legislature to the shared intentions of that group with power to enact a statute, namely, the majority of legislators in the legislature. Necessarily some majority voted in favor of any piece of valid legislation, and the question then is: What did that group intend? Yet this is truly a hopeless enterprise.[264] Many of those voting for a bill have no intention about its construction; they have at most an expectation, which is a predictive belief but not an intention. Others with intentions may not have public, role-appropriate intentions. And there could easily be different intentions motivating different legislators. And there remain what I call "dumb counting questions" that need to be resolved even once these other questions are answered.[265]

The other possibility is what I call the delegation model.[266] Corporations can constructively have intentions because certain of their officers are delegated authority not just to act for the corporation but to speak for it as well, and when such officers speak, the intentions with which they speak might well be considered "the corporation's." Insofar as contracts require actual intentions of the contracting parties (to be bound, if not always as to content), the intentions useful both to construing corporate contracts and to reviewing them for validity on grounds of public policy are plausibly taken to be the intentions of the relevant corporate officers. Legislatures have no such explicit agency relations set up for any officers, of course—the only expressly authorized "voice" of the legislature is the language a majority of the legislators intentionally voted for.[267] Yet some participants in the lawmaking process have much more to do with the passage of individual pieces of legislation than do others. Sponsors of bills, drafters, committee chairs, and even executives who must sign off on such bills (such as presidents and governors)[268] all have more to do with a bill's passage than do the average legislators who vote for the bill.

263. *Id.*

264. For reasons that are by now well established; *see id.*; Radin, *supra* note 261; Ronald Dworkin, *The Form of Principle*, 56 N.Y.U. L. Rev. 469 (1981).

265. Moore, *Semantics*, *supra* note 25.

266. *Id.* The idea is also explored in Gerald MacCallum, *Legislative Intent*, *in* Essays in Legal Philosophy (R. Summers ed., 1968).

267. As Max Radin persuasively urged many years ago. *See* Radin, *supra* note 261.

268. *See Kassel*, *supra* note 248, when the statements made by the Iowa governor were deemed relevant to ascertaining Iowa's protectionist purpose in prohibiting triple trailers of trucks on its highways.

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In constitutional contexts it makes some sense to treat such persons' motivations as the legislature's motivations when a court asks whether a given statute was illicitly motivated. If such persons' motives were illicit, then although such legislators and executives alone could not enact a valid law, still the passage of the legislation is tainted by the illicit motivations of the bill's prime movers and key players. This should be so, for example, when a court is assessing whether the Massachusetts legislature was intending to disadvantage women in its statute giving preference in state employment to veterans;[269] it should also be so when a court is assessing whether a legislature's ban on riding a motorcycle without a helmet is motivated by a concern for health insurance premiums for the general public or rather by a judgment that "wind in the hair" is a poor reason for riders to risk their lives.

2. Constitutional Prohibiting the Reasons That Insult Liberty: Giving Content to the Derived Right to Liberty

In general terms, the content of any derived right to liberty protected by the Constitution should be clear from the earlier discussion in political philosophy: any reason for state coercion other than to prevent or punish moral wrongdoing is illicit. As a derived right (dealing with legislative reasons), that does not mean the state has to get it right in its moral judgments; for the derived right it is enough if it *aims* to prevent or punish such wrongdoing.

Included in such prohibited reasons would be the motivating of coercive legislation by aiming to enforce moral views that the legislature does not itself share but which it knows are widely held by the citizens it represents. As Mill protests so strongly, coercing behavior for no better reason than that it offends certain irrational and erroneous moral beliefs held by the majority violates our liberty. The Connecticut birth control statute at issue in *Griswold* perhaps was motivated in this way; it is possible that the movers and shakers in the Connecticut legislature that passed this regulation did not themselves believe that nonprocreative sex was immoral ("sinful") and only thought that their Catholic constituents had such beliefs and that that was enough to justify passage of this statute. If this is so, surely Mill is right that this is an improper reason with which to motivate coercive legislation. Justice Blackmun certainly thought so, rejecting (in his dissent in *Bowers*) the idea that "the fact that the acts [described in the Georgia antisodomy statute] 'for hundreds of years, if not thousands, have been uniformly condemned as immoral' is a sufficient reason to permit a state to ban them today.[270] Religious morality particularly came in for Blackmun's condemnation as an acceptable motive for coercive legislation: "The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. . . . A

269. *Feeney*, *supra* note 252.
270. *Bowers*, *supra* note 22, at 210 (Blackmun, J., dissenting).

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State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."[271]

Justice Stevens, too, held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[272]

Yet surely much of so-called "morals" legislation is not motivated by a legislative desire to coerce conformity to popular moral views that the legislature itself knows to be erroneous. Far more common is the situation where the legislature shares the moral errors of its populace. And in these kinds of cases there is no offense against the *derived* right of liberty, because in these cases the legislative *aim* is proper (even if it is poor in the accuracy of its shooting).

Salient among the reasons particularly offensive to liberty are paternalistic reasons. As shown above, not only are such reasons *not* aimed at preventing/punishing moral wrongdoing, the one thing at which coercive legislation may permissibly be aimed; but such paternalistic motivation also independently insults liberty by its insult to Millian autonomy. Justice Peckham saw as much in his opinion for the Court in *Lochner*, and that part of that overly discredited opinion should be revived. Indeed, some of the holding of *Lochner* should even be held to be good law if one changes the setting a bit. Suppose Justice Peckham's antipaternalistic fire were directed toward regulating the maximum hours that professionals could work—lawyers, say, rather than bakers. Suppose the New York legislature were to judge that many lawyers working in large law firms in large cities like New York were simply working too long and too hard to lead a properly balanced and good life (a judgment many including myself would agree with, incidentally). Would not a paraphrase of Peckham's earlier quoted language be persuasive today?

> There is no reasonable ground for interfering with the liberty of persons or the right of free contract, by determining the hours of labor, on the occupation of a lawyer. There is no contention that lawyers as a class are not equal in intelligence and capacity to persons in other professions, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state.[273]

Being moved by paternalism or by respect for known-to-be-erroneous moral beliefs does not exhaust the constitutionally suspect motivations with which coercive legislation may be passed. Nakedly redistributive and race- or gender-based discriminatory motives come to mind as other illicit motivations. But these last are not unique to the kind of coercive legislation that

271. *Id.*
272. *Id.* at 216 (Stevens, J., dissenting).
273. A paraphrase of Justice Peckham in *Lochner*, *supra* note 42, at 57. Notice that Peckham himself invites the application of such a maximum-hours law to lawyers as a kind of *reductio* of applying it to bakers.

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takes away negative liberty; intentionally disadvantaging Latinos or women because they possess traits distinctive of those classes, or passing a law of any kind simply so that some person A is wealthier and some person B is poorer, are illegitimate motives for any kind of legislation, as the Supreme Court has held or at least suggested in dicta.[274] It is paternalism and obeisance to popular but known-to-be-erroneous moral beliefs that are the motives distinctively affronting the derived constitutional right to liberty.

B. Constitutionalizing the Basic Right to Liberty

1. Overview: The Sliding Scale of Liberty's Protection Based on the Strength of the Legitimate Reasons for Regulation and on the Importance of the Choice Regulated

As we see from the discussion in political philosophy, the basic natural right to liberty is one thing, not two or three things. It is the right to do those actions where the values behind the presumption in favor of liberty outweigh the values in favor of the state coercively prohibiting such actions. This balance gains more precision when we restrict the reasons that might justify state coercion (the second half of the balance) to those reasons allowed by the derived right to liberty to be proper motivating reasons.

That balance can become a quite delicate affair. Yet there are two easy cases here that constitutional law should seize upon as safe harbors of constitutionally protected liberty. One is where the act the state would prohibit is not morally wrong (and so the relevant good of its punishment would be nil). The other is where making the choice free of interference is of such value (as determined by the values behind the presumption of liberty) that choosing wrongly pales in comparison with choosing freely. I consider each "safe harbor" of liberty below.

2. Liberty's Safe Harbor in Cases Where There Is No Legitimate Reason for Prohibition (Although the Legislature May Believe There Is)

The Connecticut law prohibiting the use and dispensing of birth control devices at issue in *Griswold* is a convenient point of departure here. For, as concluded even by the dissents in that case who would have upheld that law, this was "an uncommonly silly law."[275] And, as Justice Harlan reiterated in his concurrence, "the liberty guaranteed by the Due Process Clause . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints."[276]

So construed, *Griswold* was a very easy case. If there is *no* reason justifying state restraints of an action, the balance in favor of a person's liberty to do that action becomes very easy—because there is nothing on one side of the

274. *Feeney, supra* note 252; the redistributive example is a long-used *reductio* by the Supreme Court ever since Justice Chase used it in Calder v. Bull, 3 Dall. (3 U.S.) 386 (1798).

275. *Griswold, supra* note 41, at 527 (Stewart, J., dissenting).

276. Originally stated by Justice Harlan in Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

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balance against which to weigh the values standing behind the presumption in favor of liberty. Of course, the Connecticut legislature did not pass this statute for no reason. It thought it had a reason. Above I speculate that that reason may well have been to appease the moral beliefs of the Catholic constituents of some legislators, even though those legislators did not share those moral beliefs. On that supposition the statute violated the derived right to liberty, as I argue above. But now make the alternative assumption about the Connecticut legislators: suppose they, too, believed that nonprocreative sex was immoral. Then there is no violation of the derived right to liberty, because the legislature is aiming at what it should be aiming at with coercive legislation: the prevention and punishment of moral wrongdoing.

Even so, the basic right to liberty is plainly violated, because the legislature gets the morality wrong. It is not in fact immoral to engage in sex even when the purpose is intimacy, pleasure, curiosity, and so on, and not procreation, and therefore any state coercion based on a contrary moral judgment is illegitimate and unconstitutional. The problem for courts lies in the enormous difficulty judges have in saying just that, even when they deeply believe it. As Justice Harlan expressed this reluctance:

> if we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit is the application of the present statute to married persons was a sound one, the very controversial nature of these questions would I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has.[277]

Judges hate openly admitting that their legal decisions are based, even in part, on their own first-person moral judgments. They instead pretend that they are doing something else. In the context of substantive due process, the standard pretense of liberal justices is to follow the popular (mis-)construal of Mill described earlier, which is to urge that states like Connecticut have no business criminalizing behavior for reasons of morality.[278] The standard pretense of conservative justices, by contrast, is to pretend that they are only doing a sociology of other people's evaluations when such justices find the morals they need in *tradition*.[279] Whereas in actuality both sets of justices are making their own first-person moral judgments but are too embarrassed to admit it.

277. *Id.*

278. This dismissal of preventing/punishing immorality as a proper reason for criminalizing often takes the form of refusing to acknowledge the obvious fact that the statute before the Court is justified by the legislature that passed it on precisely these moral grounds. *See, e.g.*, *Griswold*, *supra* note 41, at 505 (White, J., concurring): "There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral . . . in itself." *See also* Justice Blackmun writing for the Court in *Roe*: regarding the argument that a state's abortion prohibition could be justified as a means to discourage immoral sex, Blackmun retorted, "no court or commentator has taken the argument seriously." *Roe*, *supra* note 40, at 148.

279. *See* the discussion of tradition in Section I *supra*.

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This judicial reluctance is something that judges need to overcome. They cannot do the job they have been assigned to do in our legal system if they abstain from making such moral judgments in this context. Or they will do their job poorly by pretending to themselves that they are doing something else when they make such judgments. In the present context of substantive due process, judges cannot protect the natural right to liberty if they refuse to judge the correctness of the moral judgments that are the only proper basis for restraining that liberty. Indeed, no natural rights could be constitutionally protected if judges were morally abstemious in their judging. No punishment is cruelly disproportionate to desert, no speech is restrained, no search is unreasonable, no protection of the laws unequal, but that some judges morally judge it to be so.

Judges who are moral skeptics have a particularly difficult time here. For on their views of morality, there is nothing there to judge, no truths to be reasoned about, no correctness to which they can at least aspire. For such skeptics, their moral judgment is just their preference about how things should go, and it is hard for decent people to think it right to use the power of their office to force their own views down the throats of their more numerous fellow citizens who have different views.

Judges who are not moral skeptics need not fear that using their own best moral insights as they do their judging will necessarily make them so-called "activist" judges. After all, the values such judges are not skeptical about will include those rule-of-law values that give weight to principles such as those of stare decisis, legislative supremacy, and popular sovereignty. Giving the proper weight to these conservative principles insulates judges from becoming "activist" just because they use their own best moral insights to flesh out the law when the law calls for some moral conclusion to be drawn.[280]

For those nonskeptical judges with the moral stomach for the job, there will be easy, substantive due-process cases, like *Griswold*, where there simply is no good reason justifying state coercion once the moral error of the legislature is recognized for what it is. Much of the state's regulation of sexual

280. As I argue in my surprisingly influential and successful criticism of California's then-Chief Justice, Rose Elizabeth Bird. *See* Michael Moore, *Politics Is Not the Basis for Judging the Judges*, L.A. TIMES, July 29, 1985; Michael Moore, *Justices' Personal Values Must at Times Give Way*, L.A. TIMES, July 30, 1985; Michael Moore, *Rose Bird Should Go*, L.A. TIMES, July 31, 1985; these editorials were amalgamated into an article, Michael Moore, *Activist Judging and Retention Elections*, USC LAW (Fall-Winter, 1986), at 24–27. Commissioned by the L.A. TIMES to review Bird's fifty-nine consecutive votes and opinions to reverse death penalty sentences, I came to the conclusion that she insufficiently weighted the conservative values of vertical precedent (to the U.S.Supreme Court's death penalty decisions) and of popular sovereignty (to the California electorate's amendment to the California Constitution making clear that death was a permissible punishment under that constitution) and should not therefore serve as a judge. There are two pertinent lessons that should be drawn from this tale: (1) there is some *psychological* danger that some judges will start dispensing unrestrained Kadi justice under a tree if they accept the lessons of this article (as did Rose Bird), even though (2) there is no *logical* implication that they should do so.

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conduct falls into this category. The idea that almost half of American states criminalized heterosexual, oral sex (as "sodomy") until only thirty years ago makes most foreigners smirk at the peculiarly sex-obsessed morality of the political right in America.[281] Once a judge grasps the moral truth here—namely, that real morality (as opposed to the moral opinions of some sizable segment of the populace) is indifferent as to what bits of whom go into what—then such prohibitions can easily be seen to offend liberty. The New York Court of Appeals saw this clearly, forthrightly making the required moral judgment and thus holding that "disapproval by a majority of the populace . . . may not substitute for the required demonstration of a valid basis for intrusion by the State."[282]

3. Liberty's Safe Harbor in "Fundamental" Choices Even Where There Are Good Prima Facie Reasons for the State to Regulate Those Choices

Absence of legitimate reason to legislate provides one safe harbor of liberty, just examined. *Presence* of good reasons *not* to legislate constitutes the other. Unlike the first safe harbor, this second safe harbor has been the subject of intense scrutiny by the Supreme Court during its second and present adventure with liberty. With some missteps, the Court on the whole has done an admirable job of isolating intuitively compelling examples of safe harbors of this second kind. The familiar list goes like this.

1. *The right to be blamed or punished only for chosen actions and the choices behind them:* Fundamental is the right not to be blamed or punished for what we are but only for what we choose to do and do.[283] Choice as such must be the fundamental touchstone for legal responsibility. Then, within the category of choice, some sorts of choices are also beyond the reach of the state's coercive powers. See below.
2. *The choice to marry*: Whom one wants,[284] how many times (over time, not—yet—simultaneously),[285] of whatever age (above the youth that invalidates consent generally), of what intelligence (above the retardation that invalidates consent generally), of what race,[286] and now, of what gender.[287]

281. My good friend, the late John Kaplan, was addressing a collection of German criminal law professors at the Max Planck Institute at Freiburg in 1984 on the topic of ignorance of the law, and in the course of illustrating the widespread nature of legal ignorance noted the surprise of his Stanford law students when he told them that twenty-two states then considered oral sex to be the crime of sodomy. The German professors visibly tittered, not at the law students' reactions but at the fact that America's criminal law was so comically puritanical. John responded to the tittering with the charge that the Germans were not less puritanical than the Americans, just less imaginative.

282. People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980).

283. The resting place for the disputed holding of Robinson v. California, 370 U.S. 660 (1962). *See* Powell v. Texas, 392 U.S. 514 (1968). Choice is necessarily involved in acting because of the voluntariness required for any bodily movement to be an action. *See* MICHAEL MOORE, ACT AND CRIME (1993), ch. 6.

284. Turner v. Safley, 482 U.S. 78 (1987).

285. Zablocki v. Redhail, 434 U.S. 374 (1978).

286. *Loving*, *supra* note 120.

287. *Obergefell*, *supra* note 1.

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3. *The choice to live with whom one pleases*: Even if there is no marital relation, who one's "significant others" are should not depend on the existence of the legal relation of marriage.[288]
4. The choice to have the friends and associates whom one wants.[289]
5. *The choice of forms of sexual intimacy*: Whether to have sex of any form, whether with the same or opposite sex,[290] whether with anyone else at all,[291] whether in conventional styles,[292] although not (yet) with any species of one's choosing.
6. *The choices about bodily integrity*. Including prominently the right to refuse medical treatment (even when that treatment is medically necessary)[293] and the right not to have one's body carry an unwanted fetus to term.[294]
7. *The choice about whether to arm oneself for the protection of self or others*:[295] A preparatory, constitutional right that does not yet include the (currently only state law) right to use such arms to defend oneself or one's family from deadly assaults by others.[296]
8. *The choices as to bodily appearances*: To wear what one wants, to have hair of any chosen length, and generally to appear as one wants to appear (including with no clothes at all).[297]
9. *The choices as to moving about*: To travel or reside where one chooses (within the confines where such a right can be legally enforced, which is within the territory of the United States).[298]
10. *The choice whether to have children*: Including the decision to have sex at all, to have procreative or nonprocreative sex,[299] or to abort prior to carrying a fetus to term after conception.[300]
11. *The parental choices about how to raise and educate one's own children*: Including what religion(s) they are exposed to,[301] if any, what languages they learn,[302] what educational goals they seek, together with all "decisions concerning the case, custody, and control of their children."[303]

288. Suggested in Moore v. City of East Cleveland, 431 U.S. 494 (1977).
289. NAACP v. Alabama, 352 U.S. 449 (1958).
290. *Lawrence*, *supra* note 2, overruling *Bowers*, *supra* note 22.
291. Stanley v. Georgia, 394 U.S. 557 (1969).
292. *Onofre*, *supra* note 282.
293. Cruzan v. Dir., Missouri Dept. of Health, 497 U.S. 261 (1990).
294. *Roe*, *supra* note 40; *Casey*, *supra* note 43.
295. Dist. of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. Chicago, 561 U.S.742 (2010).
296. The Court has understandably been reluctant to federalize substantive criminal law, as Thurgood Marshall made explicit in his opinion for the Court in *Powell*, *supra* note 283. Yet the right to use deadly force to defend oneself or one's family was for centuries regarded by the common law as a natural right possessed by all persons and thus a legal right, even though not mentioned in English homicide statutes until the middle of the nineteenth century. Given modern libertarians' persuasive insistence on the existence of such a right (as in, e.g., Heidi Hurd, *Can It Be Wrong to Do Right When Others Do Wrong?*, 7 LEGAL THEORY 307 (2001); and Heidi Hurd, *Stand Your Ground*, *in* THE ETHICS OF SELF-DEFENSE (M. Weber ed., 2015)), the Court's beginnings in this direction should be seen as just that, beginnings, and not the full extent of our constitutional rights here.
297. Schad v. Mt. Ephraim, 452 U.S. 61 (1981).
298. Saenz v. Roe, 526 U.S. 489 (1999).
299. *Griswold*, *supra* note 41.
300. *Roe*, *supra* note 40; *Casey*, *supra* note 43.
301. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
302. Meyer v. Nebraska, 262 U.S. 390 (1923).
303. Troxel v. Granville, 530 U.S. 47, 65 (2000).

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12. *The choice as to whether to allow oneself to die*: Under present law, a spin-off from the right to bodily integrity.[304] If and when *Glucksberg*[305] is overruled, as it should be,[306] this right would be expanded to its proper scope, which is as a right to determine when and how each of us brings to a close the adventure that each life represents to its holder.
13. *The choice of careers and employment*: Including the basic choice of where one will invest that huge portion of both time and creative energies in that activity we call *work*; and how long and how hard we pursue our chosen calling—a right correctly prized by the Court during its first adventure with liberty,[307] but mistakenly undervalued both before[308] and after[309] that first adventure.
14. *The choice of what to create*: Some kinds of work are constitutionally protected even in today's post-*Lochner* world. These are the cerebral employments of artists, playwrights, authors, scholars, journalists, and the like (as opposed to blue-collar laborers such as butchers, bakers, and candlestick makers). We should each be free to create the art, literature, scholarship that we want.[310] And behind that right of expression is our freedom to think whatever thoughts we choose.[311]
15. *The choice about educating and entertaining ourselves*: We each need (and, by and large, have) the right to read what we want, watch the plays or see the art that we want, and to entertain ourselves with the sometime delights of more popular culture.[312]
16. *The choice to give meaning to our existence*: One sort of thinking/expressing/consuming ideas traditionally gets special mention. These are our decisions about "what it all means," that is, what our place in the universe is, what the "grand scheme" of things is, indeed, whether there is such a grand scheme. We each find the need to ponder our relation to the larger existence in which our existence is embedded. Such musings can take the form of the conventional religious beliefs of organized religion,[313] but surely they do not need to do so to be protected from state intrusion.[314]

304. *Cruzan*, *supra* note 293.
305. *Glucksberg*, *supra* note 45.
306. Argued at length in Michael Moore, The Nature of a General Constitutional Right to Liberty as Applied to the Right to Die, Keynote Address, Third Annual Student Congress of Constitutional Law and Theory, University of Chile, Santiago, Chile, August 23, 2007. The view there defended is that the prohibition of assisted suicide is triply invalid: such prohibitions are typically paternalistic in their motivation (thus violating the derived right to liberty); most suicides are not immoral to perform or assist (although some are) (thus violating the basic right to liberty's first safe harbor); and whether and how one ends one's existence is a fundamental choice as any we ever face (thus violating the basic right to liberty's second safe harbor).
307. *Lochner*, *supra* note 42.
308. *Slaughterhouse Cases*, *supra* note 231.
309. W. Coast Hotel v. Parrish, 300 U.S. 379 (1937).
310. *See* Zachariah Chafee, *Book Review*, 62 HARV. L. REV. 891 (1949); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).
311. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("freedom to think as you will" is protected as much as the "freedom . . . to speak as you think").
312. *Id.* at 375 (Brandeis, J., concurring) ("the final end of the State was to make men free to develop their faculties.").
313. As in most of the Court's Free Exercise Clause cases.
314. As the Court held (as a matter of statutory, not constitutional construction) in its conscientious objector decisions of the Vietnam War era. United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970).

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These sixteen choices find their protection under diverse clauses of the Constitution. Many are grounded in substantive due process; but others are grounded in the national Privileges and Immunities Clause, in the fundamental rights branch of the Equal Protection Clause, in the First Amendment's Free Speech or Free Exercise of Religion Clauses, in the Second Amendment's clause protecting the right to bear arms, in the right to private property embedded in the Fifth Amendment's Takings Clause as well as the Due Process Clauses, and in the Eighth Amendment's Cruel and Unusual Punishment Clause. Yet despite this diversity of textual homes, the Court's protection of these sixteen choices should be seen as one unified effort to delineate the sphere of liberty in terms of "fundamental" choices.

What such choices have in common, and why (or whether) that common feature merits the extra protection of being liberty's other safe harbor are the questions that should now occupy us. As to the first of these questions, the Court has not engaged in any extensive theorizing about what makes a choice "fundamental" and thus largely immune to state regulation of it. This despite the fact that "fundamentality" defines that "certain private sphere of individual liberty [that] will be kept largely beyond the reach of government."[315]

The Court has given various expression of the "sphere of individual liberty" largely immune to governmental regulation. In *Roe* and *Griswold* themselves, the Court rather sparely noted that only those rights to make choices that are "fundamental" or "basic" are included in this protected sphere. In *Eisenstadt* this was fleshed out slightly: the sphere includes "matters so fundamentally affecting a person as the decision whether to bear or beget a child."[316] Only in the dissenting opinions of Justices Blackmun and Stevens in *Bowers* do we get any real attempt to articulate the boundaries of the sphere of protected liberty.[317]

Justice Stevens continued to flesh out his earlier idea of basic or fundamental decisions immune to state regulation in terms of the effect on the decision-maker's own life of such decisions: the individual has the "right to make certain unusually important decisions that will affect his own, or his family's, destiny"[318] Thus, because the decisions whether to conceive a child (*Griswold*), whether to carry it to term (*Roe*), and with whom and in what way one will be sexually intimate (*Bowers*), all have large effects on one's life, they are strongly protected decisions.

Perhaps Justice Blackmun had such an objective, causal, quantitative analysis in mind when he too described the sphere of strongly protected liberty in terms of decisions that "form so central a part of an individual's life,"[319] and

315. *Bowers*, *supra* note 22, at 203 (Blackmun, J., dissenting).
316. *Eisenstadt*, *supra* note 41, at 953.
317. And that, as Justice Blackmun once admitted, was in part due to the work of his then–law clerk, now Professor Pamela Karlan, who wrote the first draft of the opinion.
318. *Bowers*, *supra* note 22, at 217 (Stevens, J., dissenting), quoting Fitzgerald v. Porter Mem. Hosp., 523 F 2d 716, 719 (7th Cir. 1975) (Stevens, J.).
319. *Bowers*, *supra* note 22, at 204.

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when he partially defined centrality in terms of a decision that "contributes so powerfully to the happiness of individuals."[320] Yet more likely centrality to one's life is to be given a rather different reading in Blackmun's hands. A decision is central, or important (or fundamental, or basic) not because it has major consequences for one's life but because it determines the very sort of person one will become. In Blackmun's language, these are decisions that alter "dramatically an individual's self-definition";[321] protection of such decisions protects one's "ability independently to define one's identity";[322] these are decisions that are "central to ... the development of human personality."[323]

What Blackmun was driving at was the idea that some decisions make us who we are and are in that sense self-defining. As discussed above, John Stuart Mill had the same idea insofar as he defended liberty on the grounds that we have to be allowed to make those choices about what we shall desire, feel, and believe, on pain of our having no character at all: "A person whose desires and impulses are his own ... is said to have a character. One whose desires and impulses are not his own, has no character, no more than a steam-engine has a character."[324] Our desires, feelings, and moral beliefs are not our own, according to Mill, if they are merely the product of social coercion or a mere conformist imitation of social convention: "He who lets the world ... choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. ... But what will be his comparative worth as a human being?"[325]

Both Blackmun and Mill are articulating a version of one of Aristotle's ideals, what I call above the ideal behind Millian autonomy. This is the ideal of the self-made individual, in a distinctly noneconomic sense of the phrase. It is the ideal of each of us choosing our characters without undue influence of others (including the heavy-handed influence of state coercion). It is the ideal of the autonomous individual freely choosing the kind of person she will be, in a sense of autonomy that is considerably richer than the spare, Kantian notion (of acting for right reasons) that I employ as one of the other goods justifying the presumption of (negative) liberty.

There are two ways of conceptualizing the Mill/Blackmun idea of self-defining choices. One is objective and harks back to the causal, quantitative notions of Justice Stevens: some choices have more impact on our lives, and in that sense, such choices are more determinative of our character than others. Decisions about whom we marry, whether to become a parent, what schools to attend and what courses of study to pursue, how to raise our children, what careers to pursue, when and how to die have a lot more impact on our lives than decisions about where to take a vacation or which

320. *Id.* at 205.
321. *Id.* (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984)).
322. *Id.*
323. *Id.* (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).
324. MILL, *supra* note 127, at 76.
325. *Id.* at 75.

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route we take to work. The other conceptualization is subjective, in that character is the object of our choice and not simply the product of it. On this latter view, self-defining choices involve mental states (of desire, belief, and intention) whose objects are not actions but are further mental states or general traits of character.[326] On this view, our choices to become more considerate, to count material things less, to be more caring towards others, to believe the best about people, or to become more trustworthy are self-defining choices. Correspondingly, choices to do some particular kind action, to visit our parents tonight, to ignore evidence of a disreputable sort about a friend, and not to disclose a friend's secret to another are not self-defining choices, because the objects of such choices are particular actions.

There are attractions and problems for both of these views. A minor problem with the objective or purely causal conceptualization is its degree of vagueness. Except for those existentialists who believed that a few large choices determine the rest of our lives, most of us rightly sense that the degree of causal impact that choices may have on a life varies along a smooth continuum. Still, this is a minor problem in the sense that all line-drawing problems are minor. A whole great big bunch of stones plainly make up a heap even if one cannot precisely say how many stones it takes to make a heap.

More serious is the seeming fortuity lurking in the fact that some choices have very large impacts upon our lives. Watching a particular movie, reading a particular book, deciding to switch airlines at the last moment from a plane that, as it turns out, crashes, deciding to pick up your Social Security check on a day when the Social Security office is bombed, all can change one's life forever. The fortuity of the degree of causal impact that any choice may have does not match our intuitive sense that some choices are more worthy of protection than others.

One might think that this problem can be eliminated by saying that any particular choice that instantiates a *type* of choice that is *typically* large in its impact on persons' lives is a character-forming choice and therefore subject to the protections of the basic right to liberty. Yet without some restrictions on *types* of choices beyond simple causal judgements, any particular choice that does have a large impact on the subject's life is an instance of *some* type of choice that typically has a large impact. Take the choice of route to work where the route chosen produces an accident and confinement to a wheelchair for life.[327] Such a particular choice is not only an instance of the type "choosing one's route to work," which is not typically a choice having a large impact; such a particular choice is also an instance of the type "choosing a route in the circumstance that one or more possible routes will

326. This roughly corresponds to Harry Frankfurt's notion of "second-order" mental states. *See* Harry Frankfurt, *Freedom of the Will and the Concept of the Person*, 78 J. PHIL. 5 (1971).

327. The subject of a well-known book, RICHARD BRICKNER, MY SECOND TWENTY YEARS: AN UNEXPECTED LIFE (1976).

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result in disaster if chosen," which type of choice does typically have a large impact.

Of course, one might say, but the actor did not *choose* to court disaster by her selection of route. Yet this is to leave the causal question—What effects does a choice produce?—for the subjective question: What was the object of the choice? This takes us to the second and subjective conceptualization of a self-defining choice. It is only in choices where the choosing subject knows of the relevant circumstances and of their power to alter his life and chooses in light of that knowledge that we have a self-defining choice in this subjective sense. One who chooses his route to work in ignorance of the life-changing potential of his choice does not make a self-defining choice, despite it being a choice that alters his life forever.[328]

Unfortunately, the subjective conceptualization of self-defining choice, as so far conceptualized, seems to protect large numbers of trivial choices, too. If I choose to believe a friend on a given occasion, resolve not to think of some obsessively recurring melody, or choose to still my rage at a sudden remark, these are pretty trivial choices even though their objects are mental states and not actions. Needed is some restriction in the objects of the choices beyond simply the restriction to the object of the choice being mental states or character traits. Needed is a restriction to those choices that the choosing subject knows will have a broad impact over a long term on her life, or at least, she intends that they have such an impact (while perhaps recognizing the possibility in some cases that she may well be unable to fulfill that intention in the future).

One might question whether such subjectively self-defining choices are really possible for us as a matter of psychology. I seek above to put away one sense in which one might say that we *cannot* choose our character. This is the incompatibilist's contracausal sense of "can," where we *can* do something only if there are no causes of our doing it (other than our own choices, desires, or intentions to do it, in which event such mental states must themselves be uncaused, on this view). The relevant question is not whether our choices are caused by factors themselves unchosen; as a determinist, I assume that they are—we are not godlike magicians who can operate uncaused in a sea of causation. Rather, the question asked here is whether our own characters are among the effects in the world that we can intentionally cause.[329]

Our abilities here are plainly fragile. We have limited capacities to will individual mental states of belief, desire, or emotion into existence, although

328. Still, my sense is that one who chooses to have children—even if done thoughtlessly and on a moment's whim—makes a self-defining choice because of the large causal impact such a choice will have on his life. Such large impact will predictably accompany the latter type of choice but not the former, even when the maker of the choice fails to make the prediction.

329. In Michael Moore, *Responsible Choices, Desert-Based Legal Institutions, and the Challenges of Contemporary Neuroscience*, 29 SOC. PHIL. & POL'Y 233 (2012), I separate the view that our choices are caused by factors themselves unchosen (determinism) from the view that our choices do not cause the object of those choices to be realized (epiphenomenalism).

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there are sometimes some indirect causal routes that we can employ to this end.[330] Our capacities to bring about long-term changes in our mental makeup and in the actions that this makeup will cause are surely at least as limited. That the best examples of weakness of will reside here evidences how often we fail at our various resolutions to change our character.

Our causal power over our characters is thus plainly limited. We have limited power to cause ourselves to have a certain character initially, and we have limited power to change an already formed character that we do not like. Yet the value of being unfettered in the making of self-defining choices may not be wholly dependent on our causal powers in this regard. Some of the value of being Mill's author of our own selves and lives lies in the value of having a character of integrity and coherence. Having one's actions, emotions traits, and mental states together possess some minimal threshold of coherence is necessary for a being to have any character and to being a person. Possessing such minimal coherence and integrity is of great value because being a person is of such great value. Yet above such minimal threshold of coherence, marked by our concept of mental illness, ever greater coherence of character is of ever greater value.

If this is so, then to the extent that our sense of who we are and wish to be itself has coherence, and to the extent that we have the causal power to change our character with choice made in light of such ego-ideal, then that power to choose will also have value. It has value because it is the means by which we bring greater integrity and coherence into our character, that is, into who we are (and not just who we think we are). Yet there is a second way in which our unfettered power to make self-defining choices has value, other than the production of a character of integrity that has value. This can be seen if we advert to a well-known thought experiment raised by Thomas Huxley. Suppose, Huxley says, we could have a virtuous character programmed into our hardware through no effort of our own. Should we not "instantly close with the offer," as Huxley thinks?[331] What we would lose, of course, is the pride of authorship—that we were the authors of our own virtues.

Such pride of authorship reveals who we think we are. The "we" who would be the author of our own character is the we of self-consciousness. Given the general importance of consciousness to our sense of self, it is not surprising that our strongest identifications are with the experiences of reflexive consciousness, where the objects of our musings are (the rest of) ourselves.

Given this locus of identification in self-consciousness, it becomes of great value to achieve congruence between our actual character and the sense possessed by self-awareness of who we are and wish to be. Yet the process of

330. *See* Michael Moore, *Authority, Law, supra* note 202, at 878–882.

331. T.H. HUXLEY, *On Descartes'* DISCOURSE ON METHOD, *in* METHODS AND RESULTS (1893), ch. 4.

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achieving such congruence is very much a two-way interaction. Sometimes, we change our character in response to what we choose; perhaps as often, we change what we choose in light of the character we come to see ourselves as having. In either case, whether we "change for the better" (the first route) or "come to like ourselves better" (the second), we merge who we are with who we want to be. Not only is such congruence of great value, but in this way it demands less of the causal power to remake ourselves in our own image.[332]

Of the sixteen kinds of choices receiving protection at one time or another by the Supreme Court, mentioned above, the one most strongly demanding insulation from state coercion is the one the Supreme Court has protected least: the right to choose the time and the manner of one's ending. We each have no choice as to whether we come into this world; but we surely should have the choice of when to leave it. It is the signature that we put onto our life, our last and most dramatic chance to exhibit who we have been. It is not that there are not in some cases obligations to stick around, particularly when young children are involved. But even then no one has a *right* to our continued existence, no one has the right to compel us to do what would be the right thing to do (which in some cases is to soldier on).

Not every item on this list of sixteen choices is so clearly a violation of our right to define ourselves and our life. There is some variation in the importance to self-definition of the items on this list. Indeed, one might think not only that there is some variation in the importance of the choices on this list inter se, but also that there are other choices, ones not on the list, almost as important to self-authorship as these. In this case one might doubt the cogency of the idea that there can be this second kind of safe harbor for liberty.[333]

One might also think that no single item on the list is so essential to our being authors of our own lives that it must be protected when considered in isolation. The thought is that liberty is a fungible good in the sense that how much of it we have matters more than that we have any particular piece of it.[334] If this is correct, then whether any given choice should be constitutionally insulated from state intrusion depends on how much protection has been accorded other items on this list.

Yet none of these thoughts should much change present Court practice with regard to the items on this list. Recognizing that there is something of

332. For other explications of the value of self-definition, *see* STANLEY I. BENN, A THEORY OF FREEDOM (1988), at 155–156, 170–183; John Gray, *Mill's Conception of Happiness and the Theory of Individuality*, *in* J.S. MILL: ON LIBERTY IN FOCUS (J. Gray & G W. Smith eds., 1991); THOMAS E. HILL, JR., AUTONOMY AND SELF-RESPECT (1991), at 29–37, 43–51.

333. Randy Barnett sees choices as varying on a smooth continuum in the degree of insulation they deserve to preserve liberty. Randy Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1429 (2008); RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

334. The apparent view in RAZ, MORALITY, *supra* note 103 (although Raz is here speaking of the autonomy that gives value to liberty and not liberty itself).

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a continuum in the importance of the rights on the list, both inter se and between items on and off the list, is to recognize a fact that runs throughout our law; the "safe harbors" contemplated here are only, after all, epistemic guides to making good decisions about how the balance of reasons (in favor and against state coercion) come out in particular cases. Such safe harbors exist when the judgments about such a balance are easy and can be made with a relative degree of certitude. They need not exist as major break points in the outcome of such a balance. There surely is a continuum here, but constitutional law in this dimension differs little from all law[335] in thinking that judicial decisions will often be better made if what in reality is a continuum is treated as if it were qualitative rather than quantitative in its differences and distinctions.

As to the Razian point about the fungibility of liberty, notice that it can have only a limited truth in light of Randy Barnett's point about the continuity of liberty. If some choices are more important or less important than others to self-definition, then trade-offs between choices lying on different points on the continuum would not be possible. Beyond that, there is an intuitive importance to each of the liberties currently on the list of fundamental liberties that belies their fungibility with other such liberties. It is counterintuitive to think that women having the liberty to abort diminishes in any way the case for their having the liberty to choose the timing and mode of their own deaths, for example. What makes some such list of basic liberties plausible is precisely that each such liberty seems essential to one owning oneself and not being merely a tool for collective purposes. It is true that we can rank nations and states by the degree to which they protect liberty in terms of how many of these liberties they protect; but that we can so measure how much states fall short from securing the blessings of liberty in no way supports the view that such liberties are fungible.

4. The Nuanced Middle Ground on Liberty's Sliding Scale

Where the Barnett point just discussed above really makes a difference to present practice is with respect to choices not on the upper end of the spectrum of importance to self-definition. Here Barnett persuasively argues that the uniform (and uniformly weak) rational basis level of protection is insufficient. Even if a choice is not on the list of choices deemed fundamental to self-authorship, still such choices can be coercively regulated for manifestly insufficient reason. When that is done, the state has unjustly taken liberty.

The real trick here is to articulate the appropriate level of epistemic deference the courts should give to legislative judgment in these cases lying outside the two safe harbors of liberty. If "rational basis" is too much deference, what is the right level? Part of what the Court has often reserved to fundamental liberties cases (as an aspect of its "strict scrutiny" standard) should be a routine question for all of the cases in this middle range; that is,

335. *See* LEO KATZ, WHY IS THE LAW SO PERVERSE? (2011), for examination of the rationality of imposing bivalent or trivalent categories on phenomena that is continuous.

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the subjective question of whether the legislature was actually motivated in its use of coercion by paternalistic or other improper motivations. The separate, derived right of liberty demands such review here no less than in the safe harbors of liberty. The current Court practice of not asking the subjective question definitive of the derived right of liberty in this middle range of cases and looking solely to objective, justifying reasons for a "rational basis" is thus inappropriate.

Beyond that reminder of the ubiquity of the question that must be asked and answered to protect the derived right to liberty, there remains the question of the standard of review for the basic right to liberty in cases outside the two safe harbors of liberty. The complexities and nuances of the analysis done above in political theory constitute the basis for an argument in favor of caution here. There I conclude that because of these complexities and nuances one faces a "complicated calculus about the liberty to do minor wrongs," a calculus depending on variables such as "degree of opportunity set diminishment, omissions rather than actions, importance of Millian autonomy, importance of Kantian autonomy, degree of desire to be free of state coercion, degree of division or of clarity of popular opinion about moral status, commonality of the behavior, depth of motivation, secrecy in execution," all balanced against the degree of good obtained by preventing/punishing the moral wrong being prohibited by some state regulation, itself a function of the degree to which the action prohibited is wrong. A court might well be reluctant to judge de novo a legislature's balancing of such complexity and nuance. So some significant step back is surely justified. Even so, the Court's New Deal "rational basis" step back[336] is so toothless as to be no review at all and thus no protection of some liberties that are almost as important as those currently receiving strict scrutiny.[337]

C. Making Sense of Liberty's Being Overridden by a "Compelling State Interest" in Light of Threshold Deontology and/or the Limited Trumping by Rights over Utility

As set forth above, no natural right can plausibly be viewed as absolute in its force. Even when the correlative duty-holder is within the scope of a deontological (as opposed to a consequentialist) duty, that duty is justifiably overcome if the avoidance of truly horrendous consequences is in the offing. This is true of even the most stringent rights we have, such as the right not to be tortured or murdered; it is a fortiori true of the two natural rights to liberty that we all possess.

336. As exemplified in, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

337. "Toothy rational basis" review is about as specific as one should want here. For we do not need a new talisman for the standard of review; rather, we need a new attitude by judges about the degree of the appropriate step back from their own judgment as they review the work of legislatures here.

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It is also true that state actors are sometimes outside the scope of deontological obligation, and thus the duties that they hold to respect the rights of their citizens take on a holistic, maximizing shape: they are to minimize rights violations and maximize the rights-correlative duties being kept in the policies they adopt in such situations. In such maximizing calculations, rights protection will be one good balanced against other goods, including welfare; in such balance, rights will "trump" utility, but only up to a point.

One might think that these two before-discussed points of moral and political theory would imply (and thus justify) the Supreme Court's current doctrine of overriding even fundamental liberty rights when there is a "compelling state interest." The facts are otherwise, however, because the fit between doctrine and moral theory is not a clean one. Consider in this regard the abortion cases, where the Court has used its compelling-state-interest doctrine most extensively.

In *Roe*, Justice Blackmun for the Court identified three interests of the state in limiting a woman's liberty to choose to abort: "a state may properly assert important interests in safeguarding health [of the mother], in maintaining medical standards, and in promoting potential [i.e., the fetus's] life."[338] These state interests ripened, Blackmun further opined, as the pregnancy wore on, the first becoming a *compelling* state interest at the end of the first trimester, and the third achieving that status at the end of the second trimester. Sandra Day O'Conner's opinion for the Court in *Casey* modified this analysis by focusing on the last of Blackmun's three state interests, finding that interest in potential life to be a "profound" one throughout pregnancy and one compelling enough to proscribe abortion once the fetus has achieved viability (which is roughly towards the end of the second trimester).

Whatever one thinks of the Court's characterization of the state's interests here, it is plain that they do not rise to the level of moral catastrophe measured by the thresholds of a threshold deontology. Deontology's kind of "compelling state interest" would perhaps be reached by items such as the population explosion—one might well think that global human society has reached the point in its population growth forecast by Malthusian predictions centuries ago and that therefore the liberty of persons to choose the number of their progeny is overridden by that looming catastrophe.[339] However, even if this is so, the woman's liberty to choose to abort would not be affected; rather, it would be her liberty to choose *not* to abort that such compelling state interest would override.

338. *Roe*, *supra* note 40, at 162.

339. This point was driven home to me by the reactions of my Chinese hosts to my lecture on liberty given to the Law, Philosophy, and Political Science Departments of Hong Kong University in 2013; the Chinese experience with overpopulation has made their views on the liberty to choose family size much more subject to the kind of consequentialist override discussed in the text.

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In any case, perhaps the Court's compelling-state-interest analysis can be likened to "rights trumping utility," even if not to threshold deontology. A logically prior question to how that balance comes out is the question of how a court gets to balance the importance of rights against welfare here; for if women have a natural right to choose whether to carry a fetus to term, the state's correlative duty is seemingly categorical, precluding any consequentialist balance (short of the threshold of disastrous consequences just discussed).

The answer to this preliminary question has to be because the relevant state actors make their decisions outside the scope of categorical obligations. Consider legislators first. Except for the passage of private bills, legislatures are never in the position of overriding the liberty of some particular woman to choose whether to have an abortion. In passing legislation that is by its nature general, legislatures are always dealing with classes of persons, not individual persons. Because of this, legislatures are outside the scope of deontological (or categorical) obligations and may thus justify their decisions morally by the goodness of their consequences.[340]

Appellate courts sometimes share this moral position of legislatures in being outside the scope of deontological obligations. The abortion cases give one instance of this. Because of a procedural anomaly about those cases—the shortness of pregnancy vis-à-vis the length of time it takes to prosecute an appeal—no particular woman's decision is ever being restrained by an appellate court order, because technically the named petitioners' complaints are moot. In such situations as in *Roe* itself, the Court, too, is free to balance the consequences.[341]

340. Why this is so is a complicated business. I urge elsewhere that deontological morality is not only "agent-relative" (each moral norm is directed to each one of us requiring that we not contaminate our own moral agency) but is also "victim-relative"; MOORE, ACT, *supra* note 283, at 362. Briefly, the argument is that when we do the same kind of wrong with a single act—as by killing multiple victims with a single shot—we do not one but multiple wrongs because we do a separate wrong to each victim. Separate wrongs must be for breach of separate obligations, because it is not open to us to argue that one obligation was breached multiple times; the latter, because there was only one act. For agreement with this, *see* Gideon Yaffe, *Moore in Jeopardy Again*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE (K. Ferzan & S. Morse eds., 2016); for disagreement, *see* Alvin Goldman, *Action and Crime: A Fine-Grained Approach*, 142 U. PENN. L. REV. 1563 (1994). Even if legislators are outside the scope of deontological norms by reason of the generality of their actions, one might think that legislatures nonetheless will often foresee or even intend that other legal officials (i.e., judges) will be ordering particular women not to have an abortion if they, the legislators, prohibit abortion by general legislation. Yet such foreseen or intended aiding or procuring of another to violate his categorical obligations is not itself categorically prohibited, even when the aider/procurer subsequently benefits from the violation; *see* MOORE, CAUSATION, *supra* note 113, at 42–51.

341. Trial courts applying legislation restricting some particular woman's right to have an abortion do not have this luxury. *Their* moral calculation is thus different from the calculation of legislatures and appellate courts in *Roe*-like situations. This might sound counterintuitive until one remembers that generally there can be a "gap" in the moral spaces inhabited by different institutional players. *See* Larry Alexander, *The Gap*, 14 HARV. J. LAW & PUB. POL'Y 695 (1991).

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Legislatures (and occasionally appellate courts) are thus free to balance consequences, and when they do so, they balance the goodness of not violating natural rights (such as the woman's right to choose to abort) against the utility gained by overriding that right. And when they make such balances, "rights trump utilities" in the sense that not violating the woman's right to make the decisions herself must be given great although not conclusive weight.

This moral balancing is closer to the Court's "compelling state interest" analysis. How close depends on one's assessment of the weight properly to be attached to the interest the Court finds "compelling" after viability, namely, the protection of fetal life and potential personhood. As the Court tells us in *Roe*, that interest is not to be seen as the protection of a *right* in the fetus to life[342] —for then we would be balancing right against right.[343] Rather, the fetus constitutes only an interest the law should protect.

The weightiness of this interest is conveniently explored via Judith Thomson's famous violinist example. You go to the symphony as a member of the audience, fall asleep during the performance, and awake to find that the lead violinist has been hooked up to you with some life support system that only you can provide and that will kill him if it is withdrawn before nine months has passed. May you unhook the device anyway, even knowing that the violinist will die? Should the state allow you to do so? Thomson intends that your intuitive answers should be in the affirmative, in which case even the life of a full-fledged person is an interest less weighty than your right to determine whether your body will be used as a life-saving device. If, like me, you agree with Thomson here, that makes it difficult to think that fetal life (or potential personhood) can be morally weighty enough to become a "compelling" justification for overriding the woman's liberty and that makes it difficult to think that the Supreme Court's compelling-state-interest doctrine maps very closely onto morality's trumping of welfare by rights.

Yet abortion may be a special kind of example with which to gage the fit between legal doctrine and morality here, in possibly two ways. One is the opportunity for women to have exercised their liberty of choice with respect to child-rearing at a time prior to the time of abortion, except in cases of rape. This opportunity, of course, is when the decision to have sex was made, particularly if that decision involved unprotected sex. One might generally think that when we are at liberty to decide something fundamentally important to our lives, but we have two times when we can exercise that liberty—an earlier time when no other interest is involved and a later time when some other interest will be adversely affected—our liberty is of lesser weight at the second time than it would have been absent

342. *Roe*, *supra* note 40, at 156–158.

343. And even here the woman's right might well prevail, as Judith Thomson's famous violinist example was intended to show; Judith Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

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that first opportunity. The discount given the liberty to speak when one had other times, places, or manners of speaking that were less costly to the public is of this nature. (I do not myself think this about abortion because I do not think knowingly taking some risk of a consequence is the same as affirmatively choosing that consequence, but many others seem to find this feature of abortion to lessen the weightiness of the woman's right to abort.)

The second possible difference is that the right to decide to have an abortion is perhaps one of those fundamental rights that is "less fundamental" than other liberties on the earlier list of fundamental liberties. And if this is why the right to abort can be overridden by the interest in fetal life, one need only show that how compelling an interest need be varies with how fundamental is the liberty being protected. This would be to see, once again, the sliding scale on which our liberty judgments are made.

IV. CONCLUSION

In the context of statutory interpretation (where the question was whether the Court should go with the plain meaning of a statute or interpret it by the "spirit" of the statute, as Aquinas recommended to the judges of his day), Chief Justice Burger quoted Robert Bolt's Sir Thomas More in opting not to seek the value served by the statute:

> The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh, there I'm a forester.[344]

I suspect that if there is one dominant reason for refusing to follow me to the conclusions of this article, it is this kind of worry about morality. Of the dissenting Justices in *Obergefell*, at least Scalia and Roberts are rather plainly affected by this kind of skepticism about there being any knowable truths of morality. This motivates them—and many who have preceded them on the Court, such as Burger, Rehnquist, Holmes—to refuse to embark on the "voyage" of theoretical discovery that alone can chart the shape of liberty. Bereft of the comforting marker-buoys of tradition, framer's intent, precedent, clear text, or plain meaning, they feel literally "at sea" in their own freedom of judgment about such matters. They are in the position immortalized by Socrates two thousand years ago in describing lawyers, like our current Chief Justice, who shun the help of political philosophy: although "keen and shrewd" in the technical "thickets of the law," when such a lawyer is drawn:

> into upper air . . . out of his pleas and rejoinders into the contemplation of justice and injustice in their own nature and in their difference from one

344. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978).

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> another and from all other things..., that narrow, keen, little legal mind is ... dizzied by the height at which he is hanging, ... and laughed at, not by ... uneducated persons, for they have no eye for the situation, but by every man who has not been brought up a slave.[345]

Nowhere does such antiphilosophical disdain and resultant moral skepticism take its toll more than in a judge's reasoning about the constitutional right to liberty. For liberty is such a general value, its content so dependent on knowledge of all of deontic morality definitive of wrongful action, that knowing its nature can seem a steep challenge. Yet rather than refusing the challenge, judges who in our system are charged to protect liberty should emulate Harry Blackmun more than our current Chief Justice—the Blackmun who would spend time reflecting on the literature of liberty (such as the Hart-Devlin debate in England in the 1950s and sixties) in order to better form his own view of the nature of liberty.[346] Moreover, in achieving such knowledge, none of us are limited to what we can read in books.[347] Experience—either our own or the vicarious experience offered to us by great art, literature, and biography—is sometimes a better educator to moral wisdom than the classical texts of political philosophy. In my own case the demands of liberty in *Obergefell* were easy to see. Raised by two mothers, one of them biological and the other her lesbian life-partner of forty-five years, I found the unjustifiability of state denial of the sanctity of marriage to those of the same sex was obvious and palpable. For those with such experience, Justice Scalia's incredulity—that anyone could claim to "*know* that limiting marriage to one man and one woman is contrary to reason,"[348] or to "*know* that an institution as old as government itself ... cannot possibly be supported by anything other than ignorance and bigotry"[349] —falls on deaf ears. The Justices in the majority in *Obergefell* did know such things, as do I, with a certainty (as Locke said) "as great as that of a demonstration in mathematics."

Exercising the "great power" of judicial review must look troubling in the extreme to those who think that knowledge of morality is either impossible or so difficult as to be incapable of any certainty in its achievement. The job of relying on the nature of rights such as the right to liberty so as to overcome contemporary democratic enactments must look both impossible and unjustified. That job is hard enough even for judges who believe otherwise and who have sought to educate themselves on issues like the nature

345. PLATO, THEAETETUS (Benjamin Jowett trans., 1898).

346. Justice Blackmun co-founded the annual Justice and Society Seminar of the Aspen Institute, e.g., which discussed such items as the Hart-Devlin debate in England on the legal prohibition of homosexuality.

347. Or put more exactly, sometimes books can speak only to those who have passed through certain experiences. *See* RICHARD HARE, FREEDOM AND REASON (1963), where Hare in his preface admonishes his readers that they may need to return to his book only after they have had sufficient moral experience to understand its questions and its answers.

348. *Obergefell*, *supra* note 1, at 7 (Scalia, J., dissenting) (emphasis in original).

349. *Id.* (emphasis in original).

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of liberty. But if one disdains the attempt and then, no surprise, lacks any confidence about morality, all one thinks one has with which to work is one's own preference, a solitary preference that must be pitted against the more numerous preferences of one's fellow citizens. In that frame of mind, one might well ask, "Who do we think we are?"[350] with a crippling sincerity. Yet liberty is the loser with such judging. One of the basic values for which our revolution was fought—and the value by which we still define ourselves to be the leader of the "free world"—goes begging. This, by the very officials whose role in our constitutional system was conceived to be a "bulwark" of liberty.[351]

350. *Id.* at 3 (Roberts, C.J., dissenting).
351. THE FEDERALIST NO. 78 (Alexander Hamilton).

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