

MORALITY IN EIGHTH AMENDMENT JURISPRUDENCE

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INTRODUCTION

Morality in Eighth Amendment jurisprudence is but one aspect of a more general topic: the use of moral reasoning by judges in American constitutional interpretation. Seeing the role of moral reasoning through the prism of the Eighth Amendment may help shed light on the more general topic because of three facts: a clear historical record about the Amendment, its frequent invocation in theoretical debates about morality and jurisprudence, and the way it has forced the Supreme Court to address morality directly in its opinions.

We know a great deal about the history of the Eighth Amendment. We know precisely what kind of debate surrounded the provisions that ultimately led to the adoption of the Cruel and Unusual Punishment Clause.¹ We also have a fairly specific understanding of what penalties were thought to be acceptable under the Clause at the time of its adoption. A sufficient historical record is thus available to interpret the Clause for those who choose to do so because they adhere to a narrow intentionalist theory of constitutional interpretation (as did the Justice Department under Ed Meese²). We know, for

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1. For an extensive description of the history and original understanding of the Cruel and Unusual Punishment Clause, see Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839 (1969).

2. See Edwin Meese III, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701, 701-02 (1985).

example, that the application of the death penalty to juveniles—the issue considered in *Roper v. Simmons*³—was considered acceptable so long as the defendants were at least seven years old.⁴ If original intent and history are important to a judge, a thorough record is available for use.

In part because of the extensive historical record, the Eighth Amendment has opened the door to extensive debate over so-called “interpretive intent,” drawing in such theorists as Paul Brest,⁵ Ronald Dworkin,⁶ Raoul Berger,⁷ and H. Jefferson Powell.⁸ These scholars often refer to the Cruel and Unusual Punishment Clause because the debates at the time of adoption allow competing sides to make arguments about whether the Framers intended the clauses of the Constitution to be interpreted by their own intentions. As a result, Eighth Amendment jurisprudence is comparatively well theorized.

Finally, throughout Supreme Court opinions interpreting the Clause—from *Weems v. United States*,⁹ to Justice Stewart’s opinion in *Gregg v. Georgia*,¹⁰ to Justice Kennedy’s opinion in *Roper*¹¹—one finds Justices who are self-conscious about their use of moral reasoning in their jurisprudence. The Court’s Eighth Amendment opinions, like those under the Due Process Clause of the Fourteenth Amendment, are miniature essays in judicial philosophy, so Eighth Amendment interpretation is already theorized as a moral enterprise by the judges who have interpreted it. The Eighth Amendment is therefore a good illustration of the general topic of morality in constitutional interpretation.

3. 543 U.S. 551 (2005).

4. *Id.* at 587 (Stevens, J., concurring) (“If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today.”); *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (describing the common law at the time the Amendment was adopted).

5. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212, 232 (1980).

6. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131–49 (1977).

7. See generally Raoul Berger, “Original Intention” in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).

8. See generally H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

9. 217 U.S. 349 (1910).

10. 428 U.S. 153 (1976).

11. 543 U.S. 551 (2005).

A longer article might have discussed what elements *besides* moral reasoning go into constitutional interpretation. For example, some jurists turn to the history surrounding adoption of the Constitution, mining it for either the intentions of the Framers or the beliefs of their original audience. Others turn to Supreme Court precedent, to the semantics of the constitutional text, or to its pragmatics in the context of its utterance. Some judges find a place for default rules, which Judge Frank Easterbrook calls, in a different context, “tiebreakers.”¹² These are just a few of the many things a complete theory of interpretation might include.¹³

For this Essay, I focus only on the role of moral reasoning in constitutional interpretation, analyzing this important factor through the lens of the Cruel and Unusual Punishment Clause of the Eighth Amendment. In particular, the Essay pursues three aspects of this topic: first, whether constitutional interpretation is, can, or should be value-free; second, what the sources of values might be for judges when they look to values in their constitutional interpretation; third, whether judges doing such interpretation should ever rely on their own valuations.

I. CAN CONSTITUTIONAL INTERPRETATION BE FREE OF MORAL REASONING?

On the first topic—whether constitutional interpretation is, can, or should be value-free—it is important at the outset to reject the kind of skepticism about the use of morality by judges urged at this Symposium by Professor Allen.¹⁴ We could not have a constitutional scheme like the one we have were judges to accept such skepticism about their use of moral reasoning. Values must be real, and judges must use them in their reasoning, if we are to make sense of the constitutional scheme that we have.

Support for this view can be seen by looking at those who do not hold it. Judge Robert Bork is perhaps the best-known ex-

12. See *In re Erickson*, 815 F.2d 1090, 1095 (7th Cir. 1987).

13. At the 1995 Conference on Law and Linguistics held at Northwestern University, I compiled a list of ten factors one might include in a theory of constitutional interpretation. See Symposium, *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 884–91 (1995).

14. See Ronald J. Allen, *Moral Choices, Moral Truth, and the Eighth Amendment*, 31 HARV. J.L. & PUB. POL’Y 25 (2008).

ample of a jurist who both denied objectivity to value judgments and denied that judging necessarily involves moral reasoning. At the Seventh Annual National Federalist Society Symposium, held in 1988 at the University of Virginia, I sat on a panel with the late Paul Bator, Ron Rotunda, and Justice Scalia at a kind of Irish “wake” for Judge Bork’s lost nomination for a position on the Supreme Court. I was celebrating, not regretting, that loss, for my take on Bork’s theory was that it aspired to be value-free.¹⁵ Bork appeared to think that value-free adjudication was desirable for three reasons: (1) imposition of the values of unelected judges would overturn fundamental democratic choices; (2) moral values did not exist, so all value judgments are mere impositions of subjective will and preference; (3) judges would be unable to grasp with any accuracy the nature of moral rights even if such rights did exist, and therefore such judges would simply be imposing their own views.¹⁶ Bork was thus an avowed skeptic of the use of morality in constitutional interpretation.¹⁷

Judge Bork’s theory of interpretation was a narrow intentionalism that was in vogue at the time. Under this view, clauses of the Constitution are to be seen as aimed at barring specific types of legislation, and only those laws the Framers intended to be forbidden as unconstitutional were to be held unconstitutional. Statutes that were never intended by the Framers to be banned could not later be found unconstitutional because of judicial moralizing. Judge Bork’s treatment of the Equal Protection Clause¹⁸ is an illustrative example. Senator Arlen Specter, in his well-known cross-examination toward the end of the confirmation hearings, asked Judge Bork how he could justify a ban on gender discrimination under the Equal Protection Clause based on his stated theory of interpretation.¹⁹ The honest answer should have been simple: you cannot.

15. See Michael S. Moore, *Judge Bork, A Contradiction in Terms Angling for Confirmation, He Pretends to Be Mainstream*, L.A. TIMES, Sept. 18, 1987, § 2, at 5.

16. See *id.* On Bork’s own articulation of his theory, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

17. Before his confirmation hearings, this was most clearly expressed in Bork, *supra* note 16; see also Moore, *supra* note 15.

18. U.S. CONST. amend. XIV, § 1.

19. See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong., 1st Sess. 434–38 (1987)* (questioning by Sen. Arlen Specter).

It seems relatively clear from the history of the Fourteenth Amendment that it was intended to validate the Civil Rights Act of Congress of 1866,²⁰ which in turn aimed at invalidating the Black Codes of the Reconstructionist South.²¹ Given that history, under Judge Bork's theory of interpretation, the Framers of the Fourteenth Amendment only intended to protect against those discriminations based on race that were like the discriminations of the Black Codes. As a result, sex discrimination would not be included within the scope of equal protection. This race-only view, of course, would emasculate what many believe equal protection is and should be. Such a view would emasculate the Equal Protection Clause, which says in its plain text that everyone has the right to "equal protection of the laws."²² Neither the text nor morality limits equality to *racial* equality.

The natural tendency of a moral skeptic like Judge Bork is virtually to eliminate judicial review from our constitutional scheme. If morality is a kind of sham—personal preferences masquerading as objective truths—then one should want to restrict its use by judges as much as possible. In the constitutional context, this means restricting judicial review to cases where plain facts, such as the historical fact of what was intended by the Framers, can supplant the independent moral reasoning of judges.

For reasons more of democratic deference than those stemming from moral skepticism, Justice Scalia's jurisprudence also tends to disavow the legitimacy of judicial review.²³ Justice Scalia, like Judge Bork, only reluctantly accepts the propriety of judicial review, and then only because of deference to history and tradition. Yet the Madisonian compromise²⁴ struck the correct balance between majority rule and minority rights, and if judicial review is the right mechanism with which to enforce that compromise, it is difficult to maintain that judges should not have recourse to moral reasoning. Such reasoning is essen-

20. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (1987)).

21. See generally THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* (1965).

22. U.S. CONST. amend XIV, § 1.

23. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

24. See generally Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (1995).

tial to policing the balance that is at the heart of our constitutional scheme.²⁵

A glance at Eighth Amendment jurisprudence reveals that judges continually engage in moral reasoning. They do this because they must. Under Eighth Amendment proportionality review, for example, courts repeatedly face questions like the one in *Roper*: Does anybody deserve to die when that person lacks the mental maturity that marks moral agency?²⁶ This is surely a moral question. The proportionality questions posed in *Atkins v. Virginia*²⁷ with regard to mental retardation, and in *Coker v. Georgia*²⁸ with regard to the imposition of the death penalty for the crime of rape, are the same. If judges are prohibited from engaging in moral reasoning, they will have no way of answering these difficult questions rooted in morality.

Questions of moral desert are unavoidable in proportionality review. If judges are to make reasoned proportionality judgments, they need a coherent theory of punishment. Defining *excessive* punishment can be done only if a judge is able to determine punishment that is of proper severity—in other words, punishment that is *not* excessive. Any plausible theory of the proper amounts of punishment will have moral desert as at least a limiting condition. A retributivist believes moral desert to be a sufficient condition too, but desert is surely at least a limiting condition of punishment in any just punishment scheme.²⁹ Judgments of excessiveness thus require judgments of what quantity of culpable wrongdoing deserves what quantity of punishment, and there is nothing more moral than that question.

Another set of Eighth Amendment cases deals with *kinds* (rather than amounts) of permissible punishments. One might think, for example, that a torturer may deserve to be tortured (on the old *lex talionis* view of desert, for example), and yet that such kind of deserved punishment nonetheless is excessive because it is violative of basic human rights against certain kinds of pun-

25. I discuss the advantage for justifying review, if one is not a skeptic about morality, in Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *FORDHAM L. REV.* 2087 (2001), and in Michael S. Moore, *Moral Reality Revisited*, 90 *MICH. L. REV.* 2424, 2469–80 (1992).

26. See 543 U.S. 551 (2005).

27. 536 U.S. 304 (2002).

28. 433 U.S. 584 (1977).

29. I argued at length for this proposition in MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

ishment. What those kinds of punishment are that are excessive by their very nature is itself a moral judgment, requiring nothing less than a full theory of the substance of human rights. This Eighth Amendment issue again illustrates how impossible it is to have value-free constitutional adjudication.

II. POSSIBLE SOURCES OF VALUES FOR MORALLY-LADEN CONSTITUTIONAL INTERPRETATION

My second inquiry is what source of values should be used by judges making moral judgments in the constitutional context. We need first to separate the forest from the trees. Here, the forest is the most basic distinction between so-called “critical morality” and “moral sociology.” Judges can rely on their own moral judgments—what some observers call critical morality, and what I prefer to call committed, first-person judgments about morality.³⁰ In contrast, judges may also practice what I call moral sociology—this is a third-person judgment about what some other group of persons believes is morally right. Justice Stewart’s opinion in *Gregg* and Justice Kennedy’s opinion in *Roper* clearly distinguish these two sources of moral values, and in fact use both first-person and third-person judgments quite explicitly.³¹ They have tried to make Eighth Amendment jurisprudence a mixture of both kinds of moral reasoning.

Let me now turn from the overview of the forest to examine the trees in more detail. Those of us who are today called moral realists distinguish two kinds of first-person moral judgments.³² The first is characterized by an attitude that says, “It is right because I judge it so.” Such an attitude is illustrated by the baseball umpire who says, “They ain’t nothing ‘til I call ‘em.” The second type of first-person moral judgment is characterized by an attitude that says, “I judge it is right because it is right.” This would be the baseball umpire who says, “I call ‘em as I see ‘em.”

In order for the second kind of judgment to be possible, it has to be antecedently true or false that the Eighth Amendment prohibits, for example, the application of the death penalty to

30. Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1541 (2007).

31. See *Roper*, 543 U.S. at 560–75; *Gregg v. Georgia*, 428 U.S. 153, 168–87 (1976).

32. See generally MICHAEL MOORE, OBJECTIVITY IN ETHICS AND LAW (2004).

juvenile defendants. In making this kind of judgment, the job of the judge is to try to determine whether this proposition is true or false. Of course, if I am the judge, I have to use my first-person judgment, just as I have to use my first-person judgment about anything I decide. I have to judge whether the sun is going to come up tomorrow. That is my judgment. I cannot get out of using my judgment. But the *truth* of what I am judging is nonetheless something independent of me; in this case, the fact of the sun rising. The same is true of first-person moral judgments: of course I have to rely on my judgment, but that practical reality does not make all moral facts subjective. There is a fact of the matter as to whether there is a right under the Eighth Amendment to be free of cruel and unusual punishment, and whether this right specifically precludes the imposition of the death penalty on juveniles. That is the first-person judgment of the second sort that is rightly demanded of our judges in constitutional cases.

The other type of first-person moral judgment—the view that something is right merely because a judge deems it so—is far less legitimate because licensing this sort of judgment would be to give judges the power to make decisions on no better grounds than their own preferences. As a matter of *power*, of course, this is true of Supreme Court Justices: the Court has the final word, so the Constitution is in some sense exactly what the Supreme Court says it is. As a matter of *obligation*, however, this would lead to the radical view that the only job of a Justice is to *decide*, rather than to decide one way or another. Such a view would imply that the Supreme Court could not be wrong because its view would be the only criterion of correctness.

If one is a skeptic about morality, then this last possibility is all that first-person judgments can ever look like. If one does not think that there is a mind-independent moral reality to which true moral propositions correspond, then all judges' first-person judgments will be assertions of subjective preferences and nothing else. A famous moral skeptic on the bench was Justice Oliver Wendell Holmes. My own unsympathetic take on Justice Holmes is that his view of his own first-person judgments was precisely that of the moral skeptic: "Oh, there is no answer to moral questions, but isn't it great to be on the Court. Someone's values have to go in; thank God they're

mine.”³³ It is difficult to justify such unrestrained imposition of one person’s values on others who may not share them. On the other hand, if one is a moral realist—as Madison, Hamilton, and Locke were³⁴—it follows that when judges are enjoined to make moral judgments, they judge something that is not of their own creation. Whether a particular punishment is cruel or unusual is true or false independent of what such judges think about the matter. Although judges have limited normative powers to make something legally right by their decisions, their obligation is to use such normative powers in accordance with what is objectively right prior to their decision. This approach is available only to moral realists, not to moral skeptics like Holmes.

I turn now to the third-person moral judgments relied on by some judges in their interpretation of the Constitution. There is a rich variety of approaches, due largely to the highly charged rhetoric used by the Supreme Court in its occasional flight from responsibility. One example is Chief Justice Earl Warren’s “evolving standards of decency that mark the progress of a maturing society.”³⁵ Before that were Justice Felix Frankfurter’s “canons of decency and fairness which express the notions of justice of the English-speaking peoples.”³⁶ Justice Benjamin Cardozo identified “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³⁷ A more recent example is Justice Scalia’s attention to “the most specific level at which a relevant tradition . . . can be identified.”³⁸ This diversity in approaches reveals an unseemly variety of elements invoked in the name of popular morality.

The following taxonomic scheme is a useful tool with which to order this tangle of judicial rhetoric. Categorize the moral beliefs of others on which the Court relies by (1) the time at which the beliefs are held, (2) the makeup of the population that has to hold the moral beliefs in question, and (3) the de-

33. See generally Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

34. See Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 136–37 (1989).

35. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

36. *Rochin v. California*, 342 U.S. 165, 169 (1952).

37. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

38. *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 n.6 (1989).

gree of reconstruction that the Justice is willing to engage in as he or she decides what the majority believes.

With respect to the time dimension, one could ask: (a) either what the original audience of the text believed or what the authors of the relevant text believed. Both of these can be called originalist moral beliefs. For example, what did Americans believe about the death penalty in 1791 when the Bill of Rights was ratified? One could also ask some variant of Justice Scalia's question: (b) what are the longest-held beliefs on the matter at issue, framed in the narrowest language? The answer to this question need not take us all the way back to the beliefs of the Framers or of their original audience, although it could. Third, one could ask: (c) what do people right now think? When Earl Warren spoke of the evolving standards of decency, he seemed to have in mind some contemporary consensus. Justices Brennan and Marshall relied in part on some such consensus in their concurring opinions in *Furman* in 1972, suggesting that America had matured to the point that its citizens were morally opposed to the death penalty.³⁹ (In this they were surprised, as the states and Congress passed much death penalty legislation.⁴⁰) Finally, one might ask: (d) what will people think on these matters in the future? One interpretation of Alexander Bickel was that the Court should predict what popular consensus will be in the future.⁴¹ (This is a problematic inquiry for judges because the very decisions made by the Supreme Court will play a role in shaping any future consensus.)

If the first taxonomic principle is the time dimension, the second might be called the "who-holds-the-belief" dimension. The possibilities on this dimension include: (a) everyone in the world. Here one would attempt to find cultural universals. Or, one might count the beliefs of: (b) only English-speaking peoples, on the assumption that the culture of the United States is exclusively Anglo-American. (This is an assumption of Justice Frankfurter's that his contemporary, Justice Hugo Black, immediately questioned.⁴²) One could also count: (c) only the be-

39. *Furman v. Georgia*, 408 U.S. 238, 277-79, 295-300 (1972) (Brennan, J., concurring); *id.* at 329, 360-63 (Marshall, J., concurring).

40. See *Gregg v. Georgia*, 428 U.S. 153, 179-81 (1976).

41. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 99 (1978).

42. *Rochin v. California*, 342 U.S. 165, 175-76 (1952) (Black, J., concurring).

liefs of citizens of the United States. Alternatively, one could restrict the analysis further and look to: (d) only some subset of the United States population. Judge Frank, for example, once asserted that judges should inquire about the beliefs of our “ethical leaders” in resolving questions of law and morality.⁴³ This was in contrast to Frank’s fellow judge, Learned Hand, who had urged that in such cases judicial decisions should reflect consensus moral opinions.⁴⁴ Judge Frank would instead determine who the ethical leaders were and ask what they, rather than the general public, thought about particular questions, such as whether performing euthanasia evinced bad moral character.⁴⁵

The third organizing principle involves the degree of reconstruction of popular belief a judge is willing to perform. One possibility is: (a) take totally unreconstructed popular beliefs at face value by reflecting such beliefs just as their holders state them. For example, a judge determining what most people think about abortion would accept whatever they say in a Gallup Poll as what they think. Or a judge could: (b) take a more activist role and reconstruct popular belief according to ideally informed preferences. When Thurgood Marshall found in the capital punishment cases that most people actually favored capital punishment, he nonetheless clung to his faith that most people *would* find the death penalty unacceptable if they were fully educated about it.⁴⁶ This could be called the “hypothetical belief view.” (I find this view highly suspect: did Justice Marshall’s judgment of what most people *would* think differ even slightly from what Thurgood Marshall himself actually *did* think? Of course not.) Equally manipulable is a third possibility: (c) identify the fundamental moral commitments that underlie various popular preferences. Thus, Ronald Dworkin urges judges to synthesize a “community morality” so as to distill the deep principles that best cohere and explain the mass of particular moral judgments made by that community.⁴⁷ Not surprisingly, the principles Dworkin distills differ not a whit from what Dworkin himself happens to think on every con-

43. *Repouille v. United States*, 165 F.2d 152, 154 (2d Cir. 1947) (Frank, J., dissenting).

44. *Id.* at 153.

45. *Id.* at 154 (Frank, J., dissenting).

46. See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

47. DWORKIN, *supra* note 6, at 126–30.

ceivable issue.⁴⁸ This could be deemed the “reconstructed morality approach.”

Although one could explore particular problems with each of these variations of conventional morality, such particular problems are moot in that all forms of conventional moral judgment should be rejected. Instead, judges should use their own first-person, committed judgments about the moral issues that arise in constitutional adjudication.

III. THE DESIRABILITY OF COMMITTED, FIRST-PERSON MORAL JUDGMENTS BY JUDGES INTERPRETING THE CONSTITUTION

There are four reasons why judges should make their own moral judgments in the first person in Eighth Amendment and other cases. The first is a limited argument, albeit a popular one: even if a judge decides to defer to consensus opinion, he or she must at least make a first-person value judgment that such deference is appropriate.⁴⁹ Judges typically defer to popular consensus because they value democracy and fear the unequal treatment that results from judicial capriciousness. Of course, judges who defer in this way are making moral judgments about democracy and equality in order *not* to make other moral judgments on the merits. Judges cannot avoid morality completely inasmuch as they must make that much of a moral judgment.⁵⁰

At a Federalist Society National Symposium nearly twenty years ago, I discussed a second reason.⁵¹ It is what John Harrison, then a law student in attendance, now calls the “Mark II originalism” argument.⁵² The argument is originalist in that the meaning of the text of the Constitution is in part a function of the beliefs of the Framers of 1791 and 1868. Such Framers had three sorts of beliefs of particular relevance here: ontological,

48. I explore why supposed deference to reconstructed moral convention turns out to be such a sham in Moore, *Four Reflections on Law and Morality*, *supra* note 30, at 1541–49.

49. I call this a “regress” form of arguing for the infusion of morality into law. *See id.* at 1528–29.

50. *Id.*

51. *See* Michael S. Moore, *The Written Constitution and Interpretivism*, 12 HARV. J.L. & PUB. POL’Y 3 (1989), expanded in Moore, *Do We Have an Unwritten Constitution?*, *supra* note 34.

52. John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83, 92–93 (2003).

epistemological, and semantic. The first was an ontological belief in natural rights. Madison, Hamilton, and the Abolitionists of 1868 all believed in the moral metaphysics of John Locke.⁵³ That metaphysics holds that all persons have certain natural rights, rights that exist independently of any laws or beliefs validating their existence.⁵⁴

Such Framers also shared Locke's epistemological beliefs. Locke wrote that one can know the truths of morality as easily, and demonstrate them with as much certainty, as one can know and demonstrate the truths of mathematics.⁵⁵ If one shares such Lockean metaphysical and epistemological beliefs, then one might well think that the clauses in the Bill of Rights and in the Civil War Amendments name, but do not create, rights that courts should enforce. Whether this conclusion follows depends upon a third belief.

The final belief is a semantic thesis in the sense that it is a thesis about the meaning of words used in the Constitution, including the words used in its rights-conferring clauses. When speakers of a natural language like English speak, what they mean by their words is a function of the semantic intentions with which they speak. Broadly, there are two kinds of such semantic intentions, what I once called "sparse" versus "rich" intentions.⁵⁶ Most current philosophers would call these "referential" versus "attributive" intentions, respectively.⁵⁷

For example, if I send someone out to get some *gold*, my intention typically is referential: with the word "gold," I am referring to a substance whose nature guides its meaning. In that situation, one should not fix my meaning by reference to examples of particular yellow stuff, even if I am the one who is the source of such examples; nor should one fix my meaning by a list of properties that some definition of "gold" would employ,

53. Regarding Madison and Hamilton's beliefs, see MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* (1987).

54. See, e.g., 5 FREDERICK COPLESTON, *Hobbes to Hume*, in *A HISTORY OF PHILOSOPHY* 128–29 (1959).

55. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 295 (Kenneth P. Winkler ed., 1996) (1689).

56. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 340 (1985); see also Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, *supra* note 25, at 2093–96.

57. See, e.g., Keith S. Donnellan, *Reference and Definite Descriptions*, 75 PHIL. REV. 281 (1966).

even if I am the one who gave such a definition. Nor should one look to some consensus about what is or is not gold; I do not want any fool's gold, no matter how popular it may be to call it "gold." I want the real stuff. One should figure out what gold is using his or her judgment and then get me some.⁵⁸

Similarly, when a statute allows organs to be transferred only on the *death* of a person, do not decide when someone is dead by the conventional beliefs then prevailing about when someone is dead. Do not even recite legal definitions attributing properties to events that are to be called "deaths." Rather, find out, by the best science available, when someone is really dead. It might turn out that although her heart and lungs have ceased spontaneous functioning, she has lost consciousness, and she popularly might be regarded as "dead," she is not really dead but is actually revivable (because, for example, she has been immersed in sufficiently cold water). Do not start cutting out organs of people who would be considered dead by conventional standards but are actually still alive. The organ-donation statute's direction to a judge is to figure out what death is.⁵⁹

Or consider best interest litigation in custody disputes. A statute may direct judges to award custody such that the *best interest* of the child is maximized. Again, judges are not asked by such statutes to determine what most people think is in the best interest of the child. In a once celebrated Iowa case, a judge had to determine whether a child should live with his father, a hippie living on a houseboat in Sausalito, California, or with his more conventional, conservative, maternal grandparents living in rural Iowa.⁶⁰ The Iowa social conventions no doubt differed somewhat from the social conventions prevailing in California, but that social fact is irrelevant; judges should ignore both sets of conventions. Judges, whether in California or Iowa, are directed by law to decide what is really in the best interest of that child, not what their communities might think about it.

58. This is the example used in 2 HILARY PUTNAM, *The Meaning of 'Meaning,'* in MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS 215, 227–28 (1975).

59. I explore this example at length in Moore, *A Natural Law Theory of Interpretation*, *supra* note 56, at 293–300, 322–28.

60. See *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966).

The same obligation to ignore convention (whether contemporary or original) and make a moral judgment applies with respect to constitutional clauses, such as the Eighth Amendment prohibition of cruel and unusual punishment. Proper application of this standard depends preliminarily upon the answer to the historical question: what were the semantic intentions of the Framers? Asking the question in this way confirms John Harrison's classification of this as a kind of originalist argument.⁶¹ It differs from more typical originalist arguments in that it relies on the spare semantic intentions of the Framers as the basis for *not* relying on their exemplars or concepts of the clauses they wrote.

Over time I have become less rigid in my view of the dominance of spare over rich semantic intentions. Sometimes people do speak with rich ("attributive") rather than spare ("referential") intentions. For example, suppose somebody says to you, "Go meet the man in the Brooks Brothers suit." Usually, people saying such things would have referential, or spare, semantic intentions: they intend to refer to a particular person whom you are to meet, irrespective of whether he is really wearing a Brooks Brothers suit. Thus, the property used to pick out that person, "wearing a Brooks Brothers suit," does not fix the reference. The nature of the thing referred to does. However, if *my* wife were to say to me, "Go see the man in the Brooks Brothers suit," it is likely that she speaks with an attributive, or rich, semantic intention. Her thought is, "I do not care who you see, just go see what a well-dressed man looks like; that is, look at someone who is actually wearing a Brooks Brothers suit." For me to follow that direction, I need to find anyone who has that property.⁶²

People therefore can, and on different occasions do, speak with different kinds of semantic intentions. The semantic thesis I attribute to Madison and Hamilton is that their semantic intentions were spare, or referential. This is the thesis that natural rights exist, and the Framers were referring to them by the rights-conferring clauses they wrote.⁶³ This is what Mark II originalism amounts to: we have a constitutional scheme based

61. See *supra* note 52 and accompanying text.

62. The example is from LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 85 (1987).

63. See *supra* notes 53–54 and accompanying text.

on the belief that people have real human rights that are outside of politics; we have created an institution, judicial review, that protects those rights; and judges, in exercising the great power of judicial review, will have to find the meaning of the rights-conferring clauses in the nature of the rights referred to, and not in anything else, be it social convention or the preferred constitutional interpretation of the Framers.⁶⁴ Such an originalism commits judges to engaging in some first-person, committed moral reasoning about the nature of the rights protected by the Constitution.

If such a scheme is to be successful, it matters a lot who the judges are that engage in the task of articulating the nature of our natural rights. Hamilton and Madison dealt with this in the *Federalist Papers*.⁶⁵ Given the power we are giving judges, of course we only want persons of virtue who have strong powers of moral discernment.⁶⁶ Not everyone should be entrusted with such responsibility. This second argument in favor of judges making their own moral judgments in constitutional interpretation is thus a bit hostage to which individuals we put on the bench.

The third argument in favor of first-person moral reasoning by judges is what I shall call the “backdoor” argument. Suppose the Supreme Court is right that, generally speaking, there are only two possibilities as to the source of values. The possibilities are either first-person judgments of the judges themselves or third-person sociological judgments about what other people believe. If you eliminate the sociological determinations (which is the strategy of the backdoor argument), that leaves first-person judgments as necessary (assuming that morality-free constitutional interpretation is simply not possible). The strategy of the backdoor argument to eliminate reliance on sociology is based on two decisive objections against judges relying on other people’s moral beliefs.

One is the late John Hart Ely’s objection, which he eloquently voiced some thirty years ago.⁶⁷ Between a court and a legislature,

64. See *supra* notes 53–55 and accompanying text.

65. See THE FEDERALIST NO. 78, at 471–72 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (1787).

66. See *id.*

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

how could anyone think that courts better reflect community conventions than institutions composed of freely elected representatives?⁶⁸ If the purpose of judicial review were truly to protect some conventional consensus about the rights we have, why would anyone think that appointed judges are better at reflecting that consensus than the institution we set up to be representative, the legislature? Ely was a moral skeptic, so this argument led him to believe that there should be no substantive judicial review. For those who are not skeptics, the argument should lead them to believe that judges should apply their own independent moral judgments in exercising judicial review.

The second objection to the application of conventional moral views by the judiciary is based in part on the fear of the tyranny of the majority that led to the Madisonian compromise.⁶⁹ Despite a democratic scheme of governance, we enshrined the rights of a minority as beyond the reach of ordinary politics. Suppose, however, that the rights of the minority are interpreted by what the majority believes them to be. What is the worth of a right good against the majority when that same majority interprets that right? Would the Nazis have marched in Skokie if the First Amendment had been governed by the majority's interpretation of free speech? It is highly unlikely.

The rights enshrined in the Madisonian compromise are supposed to be good against the majority. It does not make sense to give a majoritarian interpretation of minority rights against the majority.⁷⁰ Thus, at some point, a judge has to say what rights people really have, not what rights a contemporary majority or any other consensus believes that they have. To do this, a judge must engage in first-person, committed moral judgment.

The fourth and final argument in favor of allowing judges to resort to their own moral beliefs in interpreting the Constitution is that judges do better in their constitutional adjudication if they make committed, first-person, emotion-laden judgments, rather than being guided by the dry recitation of moral shibboleths accepted by others.⁷¹ When individuals make their own decisions, they must seek their own commitments, rely on their own most cherished beliefs, and engage their emotions.

68. *See id.* at 102.

69. *See id.* at 80–81.

70. *See id.*

71. *See Moore, A Natural Law Theory of Interpretation, supra* note 56, at 392–93.

When people have to stand behind their decisions and take responsibility for them, they take the task much more seriously than they would if they were simply deferring to the supposed authority of other people's moral beliefs. Judges should thus do what Justice Kennedy did in *Roper*, and what Justice Stewart did before him in *Gregg*; they should decide what *they* think constitutes cruel and unusual punishment.⁷² The committed question is not: what do other people think about this? The better question for a judge is: what do I think?

The need for judges to consider what they think right is illustrated in the immigration cases of a generation or more ago.⁷³ Because Judge Learned Hand was a moral skeptic, he regularly deferred to popular judgment instead of relying on his own first-person moral judgments.⁷⁴ For example, when a statute required a finding of good moral character for citizenship, Judge Hand deferred to what he took to be a consensus on that issue, despite some sympathetic fact patterns.⁷⁵ One case Judge Hand heard involved an Italian immigrant who had killed his fourth child (out of five children) because he could not put the rest through school.⁷⁶ The father regrettably euthanized his hopelessly retarded fourth child in order to help his other children.⁷⁷ Did that act evince a lack of good moral character requiring that his petition for citizenship be denied? Judge Hand dryly recited the conventional moral shibboleth that one should not kill people, particularly one's own children, and left it at that.⁷⁸ But the moral issue is actually much more interesting than any general moral conventions can capture. Judge Hand would have done a better job if he were seriously in session with himself in trying to determine whether the father really had good moral character.⁷⁹ Then Judge Hand's emotions would have been engaged, and then his judgment would have had to penetrate the easy generalities and grapple with the

72. See *supra* text accompanying notes 10–11.

73. LEARNED HAND, THE ART AND CRAFT OF JUDGING 45–64 (Hershel Shanks ed., 1968). I am grateful to the late Gerald Gunther for drawing my attention to these cases.

74. *Id.* at 17, 24–25.

75. See, e.g., *Repouille v. United States*, 165 F.2d 152, 152–53 (2d Cir. 1947).

76. *Id.*

77. *Id.*

78. *Id.*

79. See generally Edmond N. Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838 (1951).

compelling particularities of the case. Judge Hand's own moral judgment might well have been considerably more nuanced and responsive to the facts of the case had he thrown off his deference to the moral views of others.

These last four arguments urge judges to resort to their own first-person, committed moral judgments as they interpret the Constitution. To put this conclusion pithily: surely first, foremost, and always, the job of a judge is to *judge*.⁸⁰

80. A truism relied upon by Herbert Hart for a very different point. See H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROC. ARISTOTELIAN SOC'Y 171, 182 (1949).