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# THE NATURAL RIGHTS-BASED JUSTIFICATION FOR JUDICIAL REVIEW

James E. Fleming\*

## INTRODUCTION

On this panel, we are to consider questions such as “What form should constitutional interpretation by courts take in light of our aspirations to a good society?” For example, should courts engage in “moral readings” of the Constitution by elaborating abstract moral principles of liberty and equality or by making moral arguments about fostering human goods or virtues? In his paper, *Justifying the Natural Law Theory of Constitutional Interpretation*,<sup>1</sup> Professor Michael Moore defends a sophisticated and powerful version of a moral realist or natural law answer to these questions.<sup>2</sup> He confesses that, despite

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\*Professor of Law, Fordham University School of Law; Faculty Fellow in Ethics, Harvard University Center for Ethics and the Professions, 1999-2000. I would like to thank Sot Barber, Sandy Levinson, Linda McClain, Frank Michelman, Larry Sager, and Ben Zipursky for helpful conversations concerning this article. Thanks also to Fordham and to Harvard for generous financial support.

1. Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 Fordham L. Rev. 2087 (2001).

2. Moore is arguably the leading proponent of a moral realist or natural law theory of constitutional interpretation among law professors. Sotirios A. Barber is arguably the leading proponent of a theory similar to Moore’s view among political science professors. See, e.g., Sotirios A. Barber, *The Constitution of Judicial Power* (1993); Sotirios A. Barber, *On What the Constitution Means* (1984). Robert P. George has developed a moral realist or natural law theory that is radically different from Moore’s and Barber’s views both in its content and in its implications for a theory of judicial review. See, e.g., Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 Fordham L. Rev. (forthcoming May 2001). In a forthcoming article, I criticize George’s view. See James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 Fordham L. Rev. (May 2001). I should acknowledge and address an evident tension between my critique of Moore’s view here and my critique of George’s view there. Here, I criticize Moore for placing too much emphasis upon judicial enforcement of natural rights to the exclusion of protection of natural rights outside the courts by legislatures, executives, and citizens generally. There, I criticize George for rejecting judicial enforcement of natural rights and leaving the protection of natural rights to legislatures, executives, and citizens generally. I would reconcile my evidently conflicting positions in the two papers by claiming that we need protection of natural rights both in the courts (contra George) and outside the courts (contra Moore). Put another way, my view lies between those of Moore and George: we need more emphasis on protection of natural rights outside the courts than Moore countenances, and more emphasis on protection of natural rights by courts than George contemplates.

numerous criticisms, his views on the desirability of such a theory have not changed at all over the past twenty years; here he seeks "to provide a new reason for judges to adopt such a theory of interpretation with regard to the United States Constitution."<sup>3</sup> Likewise, I might confess that my basic criticisms of moral realist theories of constitutional interpretation have not changed during the same period;<sup>4</sup> here I shall provide criticisms of Moore's new argument. That said, in the grand scheme of things, my disagreement with Moore's theory may appear to be a family quarrel.

Nonetheless, I do want to note one basic criticism that I have always made of moral realist approaches to constitutional theory. John Rawls argues for the independence of moral and political theory from deep philosophical questions like those of metaphysics, ontology, epistemology, and the like.<sup>5</sup> Basically, he contends that debates on these latter questions do not help us resolve questions of moral and political theory and do not affect the content of principles of justice. And he argues for a political constructivism as a third way between conventionalism and moral realism or naturalism.<sup>6</sup> Rawls' political constructivism seeks to construct principles of justice that provide fair terms of social cooperation on the basis of mutual respect and trust among free and equal citizens in a morally pluralistic constitutional democracy such as our own, rather than to discover principles of justice that are true for all times and places. The latter project is that of theories of moral realism. By analogy, I have sought to develop a constitutional constructivism.<sup>7</sup>

I would argue that constitutional theory, even more than moral and political theory, is independent of such deep philosophical questions. On my view, it is irrelevant for constitutional theory whether constitutional rights are natural rights or constructivist rights or indeed conventionalist rights. What matters is the content of the rights.

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3. Moore, *supra* note 1, at 2089.

4. In the 1980s, I wrote a Ph.D. doctoral dissertation developing a constitutional constructivism as a third way between legal positivist and natural law theories of constitutional interpretation. See James E. Fleming, *Constitutional Constructivism* (1988) (unpublished Ph.D. dissertation, Princeton University) (on file with author) [hereinafter Fleming, *Constitutional Constructivism*].

5. John Rawls, *The Independence of Moral Theory*, in John Rawls: *Collected Papers* 286, 286-87 (Samuel Freeman ed., 1999).

6. See John Rawls, *Political Liberalism* 90-99 (1993) [hereinafter Rawls, *Political Liberalism*] (distinguishing his project of political constructivism from that of theories of moral realism or natural law); John Rawls, *A Theory of Justice* 263 (1971) (characterizing his theory as attempting to find an "Archimedean point" outside existing circumstances that does not "appeal to a priori or perfectionist principles").

7. See James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211, 217 (1993) [hereinafter Fleming, *Constructing the Substantive Constitution*]; Fleming, *Constitutional Constructivism*, *supra* note 4.

This argument is relevant to Moore's paper in the following sense. He advances what he calls "the rights-based justification for judicial review,"<sup>8</sup> a label that might seem to be agnostic on the question of whether rights are natural rights. But then he summarizes the argument as follows: "judges' regarding a written constitution as authoritative (so that they use it to overturn ordinary legislation) is justified by the likelihood that such judges will give greater protection of natural rights than would the legislature."<sup>9</sup> He proceeds to compare the characteristics of rights, on the one hand, with those of courts and legislatures, on the other, arguing that "courts generally will protect natural rights better than do legislatures if one rather than the other is given the last word on what those rights are or when they are violated."<sup>10</sup> It seems to me that, whatever the merits of his argument, they are independent of the status of the rights in question as natural rights. That is, Moore's arguments, to the extent they are successful, would apply even if he did not claim that constitutional rights are natural rights—even if he were agnostic on the question of whether rights are natural or constructivist or even conventionalist.

#### I. MOORE'S RIGHTS-BASED ARGUMENT FOR JUDICIAL REVIEW

Strikingly, Moore characterizes his rights-based argument for judicial review enforcing natural rights as "a consequentialist argument."<sup>11</sup> The argument "builds on the good consequences thought to follow" from it, namely, "the enhanced protection of natural rights caused by judges exercising the power of judicial review."<sup>12</sup> He concedes that the argument "crucially depends on constitutions having a certain content," specifically, "a bill of rights (and one whose clauses refer to a relatively complete list of basic human rights)."<sup>13</sup>

Because Moore frames his argument as a consequentialist argument, he would seem to invite testing of the argument on the basis of the real world consequences of judicial review, and thus an inquiry into whether courts in fact are more effective at protecting natural rights than are legislatures. For example, he might need to engage with arguments like those which Mark Tushnet made in his recent book, *Taking the Constitution Away from the Courts*.<sup>14</sup> Tushnet offers powerful arguments against judicial supremacy in constitutional interpretation, and provides an assessment of judicial review—specifically in terms of how well it has protected the natural rights

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8. Moore, *supra* note 1, at 2099.

9. *Id.*

10. *Id.* at 2102.

11. *Id.* at 2100.

12. *Id.* at 2100-01.

13. *Id.* at 2101

14. Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

proclaimed in the Declaration of Independence, and how well it has furthered the moral purposes stated in the Preamble—that should sober even the most committed, court-loving constitutionalists, including moral realists.<sup>15</sup> He argues that the Constitution should be treated as self-enforcing through the political processes rather than judicial review.<sup>16</sup> Indeed, as I have stated in a review: “one measure of the success of Tushnet’s book is that I—an unabashed Dworkinian and a propounder of what might appear to be one of the grandest court-centered constitutional theories of them all—am persuaded by his arguments . . . to the extent that I am.”<sup>17</sup>

To take another example, Moore might have to engage with Jeremy Waldron’s “rights-based critique of constitutional rights” and of judicial review enforcing them.<sup>18</sup> He might have to, as he puts it, “take a position on the content of natural rights in order to ascertain how well the United States Supreme Court has done in protecting them.”<sup>19</sup> Unfortunately, Moore does not address such arguments. Instead, he tries to deflect them by arguing that they are better addressed to a parochial version of the rights-based argument for judicial review based on the American experience, whereas he is making a universalist version of the argument. The parochial version “make[s] an empirical observation: judicial review in America, particularly as exercised by the United States Supreme Court, has on the whole been a good thing because natural rights have been protected.”<sup>20</sup> The universal version analyzes “more universal features that explain why we should, in general, expect greater protection of natural rights from courts applying a written constitution with a bill of rights than we would expect from legislatures with or without such a constitution in front of them.”<sup>21</sup> By his own admission, “the aim of the universalist version of the argument, however, is to sidestep” objections like Waldron’s<sup>22</sup> (and, I might add, Tushnet’s). He continues: “The question I ask is this: whatever the content there may be to natural rights, might courts better protect them than democratic legislatures?”<sup>23</sup>

And so, Moore puts his argument in the following strange posture. He says that his argument is a “content-dependent, consequentialist

15. *See id.* at 129-53.

16. *Id.* at 165-72.

17. James E. Fleming, *The Constitution Outside the Courts*, 86 *Cornell L. Rev.* 215, 218 (2000) [hereinafter Fleming *The Constitution Outside the Courts*] (reviewing Tushnet, *supra* note 14) (footnote omitted).

18. Moore, *supra* note 1, at 2103 (referring to Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 *Ox. J. Legal Stud.* 18 (1993)).

19. *Id.*

20. *Id.* at 2101.

21. *Id.* at 2102.

22. *Id.* at 2103.

23. *Id.*

argument.”<sup>24</sup> But he also says (1) that his argument is independent of the content of natural rights, and (2) that he need not defend his argument on the basis of assessments of its real world consequences.<sup>25</sup> Granted, one can distinguish between a parochial version and a universalist version of the consequentialist argument. But it seems that ultimately, even the universalist argument needs to be assessed in terms of its real world consequences. At any rate, Moore’s argument, especially because he offers it as a consequentialist argument, would be more persuasive if he were to defend it in terms of its real world consequences for the protection of natural rights. Accordingly, it would be more persuasive if he were to defend his theory against sobering assessments of the practice of judicial review like that offered by Tushnet.

## II. MOORE’S COMPARISON OF COURTS AND LEGISLATURES IN THEIR RIGHTS-PROTECTING CAPACITIES

Moore states that “[t]he basic idea of the universalist version of the argument is to make a three-way comparison between rights, courts, and legislatures.”<sup>26</sup> He elaborates: “More exactly, the comparison is between certain general features we may plausibly suppose natural rights to possess and certain features distinctive of courts versus those features distinctive of legislatures.”<sup>27</sup> In a very clear-headed and elegant fashion, he boils down the comparison into a chart summarizing “six reasons courts may plausibly be thought better at the business of natural rights protection than democratic legislatures.”<sup>28</sup> I am not going to take issue with his particular formulations of characteristics of natural rights, courts, and legislatures. My observations here will be more general and fundamental.

My first observation concerns the force or power of reason in human affairs, including constitutional theory. I think it is fair to say that, among constitutional theorists, moral realists typically have as much or more confidence in the power and force of reason in human affairs, including constitutional interpretation, than do almost any other variety of thinkers. For example, they are not typically afflicted by skepticism about reason—whether that of post-modernists, utilitarians, or economists—or by worries about the indeterminacy of moral and constitutional principles. Consequently, I am surprised that Moore expects so little of legislatures as far as the capacity for reasoning and conscientious constitutional interpretation is concerned. Indeed, he basically cedes legislatures to majoritarians,

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24. *Id.* at 2101.

25. *Id.* at 2102.

26. *Id.*

27. *Id.*

28. *Id.* at 2104.

utilitarians, interest group pluralists, and public choice theorists, and expects little of them with respect to conscientious constitutional interpretation and the protection of constitutional rights. By contrast, many other firm believers in the possibility of reasoning—for example, Rawls,<sup>29</sup> Frank Michelman,<sup>30</sup> Cass Sunstein,<sup>31</sup> and myself<sup>32</sup>—advance conceptions of liberal republicanism or deliberative democracy that expect more of legislatures as far as the capacities for reasoning are concerned, particularly in protecting rights and deliberating about constitutional obligations.

Now, I am not suggesting that Moore has to agree with us, or more generally that he has to be a civic republican, liberal republican, or deliberative democrat. But is it too much to ask of a moral realist that he or she bring reason to bear on legislation as well as adjudication? More precisely, is it too much to ask that Moore reckon with the calls to take the Constitution seriously outside the courts—as the foregoing scholars have done or begun to do?

My second observation is that if we aim to “maximize” the protection of natural rights, as Moore does,<sup>33</sup> we should not ask whether courts *or* legislatures are likely to be better at protecting natural rights. Instead, we should ask how can we pursue the goal of getting legislatures *as well as* courts to do a better job of protecting natural rights? Along these lines, we should address the calls for taking the Constitution seriously outside the courts, by legislatures, executives, and citizens generally.<sup>34</sup> Elsewhere, I have pondered the question why, despite these repeated calls, has constitutional theory remained so court-centered?<sup>35</sup> I mentioned six reasons, most of which rested upon law professors’ overly laudatory conceptions of the capacities of courts and overly disparaging conceptions of the capacities of legislatures.<sup>36</sup> Moore’s comparison of the characteristics of courts and legislatures could have served as Exhibit A in my analysis. Most of the reasons that I gave for why constitutional theory has remained so court-centered are reflected in Moore’s comparative

29. See John Rawls, *The Idea of Public Reason Revisited*, in John Rawls: Collected Papers, *supra* note 5, at 573, 579-81; Rawls, *Political Liberalism*, *supra* note 6, at 4-5, 240, 299.

30. See, e.g., Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988).

31. See, e.g., Cass R. Sunstein, *The Partial Constitution* (1993).

32. See Fleming, *Constructing the Substantive Constitution*, *supra* note 7, at 252-55, 292-96.

33. Moore, *supra* note 1, at 2115-17.

34. See, e.g., Sunstein, *supra* note 31, at 9-10; Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978) [hereinafter Sager, *Fair Measure*]; Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993) [hereinafter Sager, *Thinness*].

35. Fleming, *The Constitution Outside the Courts*, *supra* note 17, at 225-28.

36. *Id.*

argument for why courts are likely to be better than legislatures at protecting natural rights.

Again, Tushnet has provided a sobering assessment of courts as vindicators of rights and a sanguine assessment of the capacities of legislatures both as conscientious interpreters of the Constitution and as vindicators of rights.<sup>37</sup> We should bear Tushnet's assessment in mind in considering Moore's arguments. Ultimately, I don't accept Tushnet's arguments for "taking the Constitution *away from* courts." But I believe that his work helps establish the groundwork for taking the Constitution seriously outside the courts by taking it *to* legislatures, executives, and citizens generally, in order that these bodies might better frame and guide their reflections, deliberations, and decisions by constitutional principles, aspirations, and ends.<sup>38</sup> Obviously, much work remains to be done in developing—to use Paul Brest's formulation—"a conscientious legislator's guide to constitutional interpretation."<sup>39</sup> Such a guide need not be utopian. We could build upon the work of Tushnet, Sanford Levinson,<sup>40</sup> Lawrence Sager,<sup>41</sup> and Mary Becker,<sup>42</sup> as well as that of several other scholars I might mention: Louis Fisher & Neal Devins,<sup>43</sup> Wayne Moore,<sup>44</sup> Keith Whittington,<sup>45</sup> and Jeremy Waldron.<sup>46</sup> The work of all of these scholars taken together suggests that Congress' practice of engaging in conscientious constitutional interpretation—and protecting constitutional rights—has not been as dismal compared with that of courts as most law professors, including Moore, evidently assume.

37. See Tushnet, *supra* note 14, at 14-26, 57-65, 95-128.

38. See Fleming, *The Constitution Outside the Courts*, *supra* note 17, at 217, 246-49.

39. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *Stan. L. Rev.* 585, 585 (1975).

40. Sanford Levinson, *Constitutional Faith* (1988).

41. Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 *Fordham L. Rev.* 1989 (2001); Sager, *Fair Measure*, *supra* note 34; Sager, *Thinness*, *supra* note 34.

42. Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 *U. Colo. L. Rev.* 975 (1993); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 *U. Chi. L. Rev.* 453 (1992); Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *Fordham L. Rev.* 2007 (2001).

43. See, e.g., Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (1988); Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* (2d ed. 1996); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 *N.C. L. Rev.* 707 (1985).

44. Wayne D. Moore, *Constitutional Rights and Powers of the People* (1996).

45. Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999).

46. Jeremy Waldron, *The Dignity of Legislation* (1999).



## III. MOORE'S MORAL READING OF THE CONSTITUTION

In our prior Fordham conference on "Fidelity in Constitutional Theory," Ronald Dworkin defended his conception of fidelity in constitutional interpretation, which entails what he calls a "moral reading of the Constitution."<sup>47</sup> In general, a moral reading of the Constitution conceives the Constitution as embodying abstract moral principles, and conceives interpretation and application of those principles as requiring fresh judgments of political theory about how they are best understood. Moore's moral realist theory is a form of moral reading of the Constitution: it conceives the Constitution as including natural rights, and it conceives constitutional language such as "equal protection" to refer to natural rights.<sup>48</sup>

I think it would be illuminating to compare Moore's moral reading with Dworkin's. Here I will merely note one important difference and one important similarity between their views. First, the difference. Dworkin, like Moore, argues for judicial review enforcing a moral reading of the Constitution on the basis of a content-dependent reason: the goodness of the consequences thought to follow from it, namely, the protection of fundamental rights.<sup>49</sup> But Dworkin, unlike Moore, also advances a content-independent reason: namely, that the quest for fidelity in constitutional interpretation—the quest for the interpretation that best fits and justifies the Constitution—requires it.<sup>50</sup> At any rate, in his paper, Moore eschews making any such argument.<sup>51</sup>

This is a significant omission, for it weakens the appeal of his argument for judicial review enforcing his moral reading of the Constitution. Moore seems at a disadvantage as compared with Dworkin in that Moore can argue only from the good consequences that follow from his theory, whereas Dworkin can also argue that his account better fits and justifies our constitutional text, history, and structure, to say nothing of our tradition, practice, and culture. At the Fidelity conference, Dworkin was bemused by the fact that several participants thought that his moral reading was too constrained by

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47. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *Fordham L. Rev.* 1249, 1251-56 (1997); see also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) [hereinafter Dworkin, *Freedom's Law*].

48. Moore, *supra* note 1, at 2092. In his paper for the conference, Moore does not indicate whether he believes that aspects of moral reality in addition to natural rights (for example, aspirations to a good society besides natural rights) are incorporated in the Constitution and, if so, whether they are judicially enforceable.

49. Dworkin, *Freedom's Law*, *supra* note 47, at 34-35.

50. *Id.* at 10-12.

51. Moore, *supra* note 1, at 2093-98.

concerns for fit with the Constitution: those critics would like to have seen him defend an aspirational Constitution with more normative kick to it!<sup>52</sup> At the same time, other participants thought that his theory was not constrained enough by concerns for fit.<sup>53</sup> In retrospect, I wish Moore had been there to present a defense of his moral reading of the Constitution. For one thing, his doing so would have shown, in bold relief, how constrained by fit Dworkin's theory is (at least in theory).<sup>54</sup> For another, to those critics who objected that his theory was not constrained enough by fit, Dworkin could have retorted, "You've got the wrong theorist; your criticisms are more aptly aimed at Moore."

Now, the similarity between Moore's theory and Dworkin's. Moore's theory, like Dworkin's, fails sufficiently to account for what Larry Sager has called the evident "thinness" or "moral shortfall" of constitutional law, as compared with our thicker commitments to political justice (and, in Moore's case, to natural rights).<sup>55</sup> To account for this thinness or moral shortfall, Sager advances a well-known view that certain constitutional principles required by political justice are judicially underenforced, yet nonetheless may impose affirmative obligations outside the courts on legislatures, executives, and citizens generally to realize them more fully.<sup>56</sup> Sager's view is an important component of a full moral reading or justice-seeking account of the Constitution. It helps to make sense of the evident thinness or moral shortfall of constitutional law, while still offering a moral reading or justice-seeking account. It also has the attractive implication that when judicially enforceable constitutional rights are not in play, legislatures and executives still may be under constitutional obligations to take rights seriously and indeed affirmatively to protect them, rather than being free to act in constitutionally gratuitous ways.

In my paper for the prior conference, I credited Dworkin with at least making a nod in the direction of endorsing Sager's powerful and

52. See Colloquy, *Fidelity as Integrity*, 65 Fordham L. Rev. 1357, 1357 (1997) [hereinafter Colloquy, *Fidelity as Integrity*] (quoting Ronald Dworkin's reply to criticism that he was too "wedded to text," advanced by Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 Fordham L. Rev. 1313 (1997)).

53. Colloquy, *Fidelity as Integrity*, *supra* note 52, at 1360-63 (quoting Dworkin's reply to criticism that he was "not sufficiently wedded to text," put forward by Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269 (1997)).

54. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham L. Rev. 1335, 1349 (1997) [hereinafter Fleming, *Imperfect Constitution*] (distinguishing between Dworkin's theory of fidelity as integrity with the moral reading (which in theory is sufficiently constrained by concern for fit with legal materials) and Dworkin's own application of it (for he fails satisfactorily to do the fit work that his own theory calls for), and urging "[d]o as Dworkin says, not as he does").

55. See Sager, *Thinness*, *supra* note 34, at 410, 414-19.

56. *Id.* at 433-35; Sager, *Fair Measure*, *supra* note 34, at 1221, 1263-64.

important idea.<sup>57</sup> I see nothing of the sort in Moore's paper. The consequences of this omission are twofold. First, Moore's moral realist theory fails to account for the evident thinness or moral shortfall of constitutional law (and indeed of the Constitution) vis-a-vis natural rights. Second, his theory is too easy on legislatures in the sense that it evidently fails to impose on them direct obligations to take rights—and moral reality—seriously and to view themselves as being bound directly by them. Moore might well say his theory is not incompatible with such an approach. If so, well and good, he should articulate this idea, especially in a conference where this panel follows a panel on "The Constitution Outside the Courts and the Pursuit of a Good Society."

#### IV. CONSTITUTIONAL CONTAINMENT

In his recent Storrs Lectures, Frank Michelman ponders the phenomenon that he calls constitutional containment, whereby in recent years many constitutional theorists have thinned down their conceptions of the content of the Constitution vis-a-vis the commitments to justice, natural rights, or the like.<sup>58</sup> Many theorists who have engaged in this development have done so because of a belief that the Constitution does or should leave many matters of justice open for deliberation through the political processes; or, in terms of this conference, a belief that the Constitution does or should leave greater room for the pursuit of the good society outside constitutional law and also outside the courts.

Michelman suggests that there are very few constitutional expansionists around these days.<sup>59</sup> Moore may not qualify as a constitutional expansionist (if to do so one must be expanding one's own conception of the moral reach of the Constitution), but he certainly appears to be holding the line against constitutional containment. Again, he demonstrates no concern with the moral shortfall of constitutional rights as compared with natural rights. And he shows no evident concern to leave matters of justice more open to democratic deliberation.

My own view concerning this phenomenon of constitutional containment—which accords with Larry Sager's view—is that we should thin down constitutional law, or the judicially enforceable Constitution, in order to bulk up the Constitution outside the courts.<sup>60</sup>

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57. Fleming, *Imperfect Constitution*, *supra* note 54, at 1343.

58. Frank I. Michelman, *The Essential Constitution*, The Storrs Lectures at Yale Law School (Spring 2000) (on file with author) [hereinafter Michelman, *The Storrs Lectures*]; Frank I. Michelman, *Populist Natural Law (Reflections on Tushnet's "Thin Constitution")*, 34 U. Rich. L. Rev. 461, 462-64 (2000).

59. Michelman, *The Storrs Lectures*, *supra* note 58.

60. On this point, I have benefited from conversations with Frank Michelman and Larry Sager.

To explain: Sager and I propose to thin down constitutional law in the sense of the judicially enforceable Constitution. But we do so in order to make clear that the Constitution is richer, fuller, or thicker than the judicially enforceable Constitution. The point is not to argue that legislatures should be free to engage in democratic deliberation without constraint of constitutional obligations. Rather, the point is to argue that such democratic deliberation is constrained by constitutional norms, including constitutional obligations to protect and realize constitutional rights more fully than courts do. Again, we argue for thinning down the judicially enforceable Constitution in order to bulk up the Constitution outside the courts.

#### CONCLUSION: CONSTITUTIONAL ASPIRATIONS AND THE PURSUIT OF HAPPY ENDINGS

On a panel on constitutional aspirations that includes Sandy Levinson, I cannot resist the temptation to conclude by making some remarks about the presence of imperfections in the Constitution and the pursuit of what he has called “happy endings” in constitutional interpretation.<sup>61</sup> Some scholars have expressed skepticism about constitutional theories like mine (as well as Dworkin’s and Moore’s) on the ground that they seem always to lead to happy endings: that the Constitution, properly interpreted, requires the result that their moral or political theories recommend.<sup>62</sup> I resist the peculiar trend in recent constitutional theory to prove my positivist mettle by making a virtue of all the constitutional imperfections, tragedies and stupidities, and unhappy endings that my theory sanctions.<sup>63</sup> Put another way, I question the wisdom of submitting constitutional theories to an “imperfect Constitution” test, or what Christopher Eisgruber has dubbed a “no pain, no claim” test.<sup>64</sup> Basically, the idea is that a constitutional theory has no serious claim on our attention unless the theorist putting it forward suffers some pain by acknowledging that the Constitution does not secure everything that she or he would protect in a perfect Constitution. Our Constitution is indeed

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61. I believe that the term “happy endings” comes from Sandy Levinson. See Colloquy, *Fidelity as Integrity*, *supra* note 52, at 1358 (question from Professor Levinson). For application of the term, see Dworkin, *Freedom’s Law*, *supra* note 47, at 38; James E. Fleming, *Constitutional Tragedy in Dying: Or Whose Tragedy Is It, Anyway?*, in *Constitutional Stupidities, Constitutional Tragedies* 162, 163, 166-67 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) [hereinafter Fleming, *Constitutional Tragedy*]. In this section, I draw upon my analysis in the work just cited.

62. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 353-60 (1981).

63. See Fleming, *Constitutional Tragedy*, *supra* note 61, at 167.

64. See Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 Duke L.J. 1, 7 (1993).

imperfect in many ways.<sup>65</sup> But we should strive to interpret it so as to mitigate its imperfections and to avoid interpretive tragedies or stupidities. We should aspire to interpret the Constitution so as to make it the best it can be.<sup>66</sup> That is, we should embrace what I have called a Constitution-perfecting theory of interpretation,<sup>67</sup> which proudly aims at happy endings rather than reveling in the Constitution's imperfections or in the tragedies or stupidities that it might be interpreted to permit. Instead of submitting constitutional theories to a "no pain, no claim" test, I argue, we should challenge them with what Eisgruber has called a "no gain, no claim" test.<sup>68</sup> From this standpoint, a constitutional theory has no serious claim on our attention unless it promises some gain, in the sense that adhering to it might exhort us to pursue and realize our highest and noblest constitutional aspirations. That test, I submit, my Constitution-perfecting theory (along with Dworkin's moral reading and Moore's moral realist theory) satisfies in full measure.

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65. See Fleming, *Constitutional Tragedy*, *supra* note 61, at 162.

66. See Ronald Dworkin, *Law's Empire* 365-68 (1986); Ronald Dworkin, *A Matter of Principle* 146-66 (1985).

67. For the idea of a "Constitution-perfecting" theory, as distinguished from a "process-perfecting" theory, see Fleming, *Constructing the Substantive Constitution*, *supra* note 7, at 214-15. I mean "perfecting" in the sense of interpreting the Constitution with integrity so as to render it a coherent whole, not in Monaghan's caricatured sense of "Our Perfect Constitution" as creating a perfect liberal utopia or an "ideal object" of political morality. See Monaghan, *supra* note 62, at 354-60.

68. See Eisgruber, *supra* note 64, at 13.