

Boston University School of Law

## Scholarly Commons at Boston University School of Law

---

Faculty Scholarship

---

4-2001

### Fidelity to Natural Law and Natural Rights in Constitutional Interpretation

James E. Fleming

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#)

---

#### Recommended Citation

James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, in 69 *Fordham Law Review* 2285 (2001).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/2846](https://scholarship.law.bu.edu/faculty_scholarship/2846)

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



# FIDELITY TO NATURAL LAW AND NATURAL RIGHTS IN CONSTITUTIONAL INTERPRETATION

James E. Fleming\*

## INTRODUCTION

It is an honor and a pleasure to comment on Professor Robert P. George's elegant and provocative paper.<sup>1</sup> For one thing, he is a leading proponent of reviving the natural law tradition in political, legal, and constitutional theory.<sup>2</sup> For another, he was a reader of my Ph.D. dissertation in constitutional theory at Princeton University over a decade ago. I am happy to have the chance to reciprocate by reading a work of his and providing a critique of it. Fortunately, I learned at Princeton that vigorous criticism and disagreement are fully compatible with friendship and respect.

I want to begin by observing a striking anomaly in George's analysis. While reading his paper, I had to do a double take. I had to ask myself, is George, a sophisticated proponent of a natural law constitutional theory, actually embracing Justice Black's legal positivist harangue against natural law in dissent in *Griswold v.*

---

\* Professor of Law, Fordham University School of Law. I wish to thank Sot Barber, Charles Kelbey, Linda McClain, and Ben Zipursky for helpful comments concerning this essay. I also am grateful to Russ Pearce, Ben Zipursky, and Gene Harper for inviting me to be an inaugural commentator on Professor Robert P. George's inaugural lecture in the Natural Law Colloquium at Fordham. I conceive my role in this essay to be to comment on George's arguments about natural law, *Griswold v. Connecticut*, and judicial review, not to offer my own justification of *Griswold* or my own account of judicial enforcement of principles of natural law or natural rights in constitutional interpretation.

1. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *Fordham L. Rev.* 2269 (2001).

2. George has written or edited a number of books advocating reviving the natural law tradition. See, e.g., Robert P. George, *In Defense of Natural Law* (1999); Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (1993); *Natural Law and Moral Inquiry* (Robert P. George ed., 1998); *Natural Law, Liberalism, and Morality* (Robert P. George ed., 1996); *Natural Law Theory: Contemporary Essays* (Robert P. George ed., 1992). I recently also had the opportunity to respond to another, fundamentally different, leading proponent of a moral realist or natural law theory of constitutional interpretation, Michael Moore. See James E. Fleming, *The Natural Rights-Based Justification for Judicial Review*, 69 *Fordham L. Rev.* 2119 (2001).

*Connecticut*?<sup>3</sup> I can certainly understand why a positivist like Robert Bork would revel in Black's trashing of natural law.<sup>4</sup> I never thought, however, I would see the day when an able defender of natural law would embrace Black's dissent which, along with Justice Iredell's opinion in *Calder v. Bull*,<sup>5</sup> is usually understood as a legal positivist argument against the idea that the Constitution incorporates principles of natural law or natural rights.<sup>6</sup>

George contends that "our Constitution embodies . . . natural law and natural rights,"<sup>7</sup> but tries to claim that it "places primary authority for giving effect to natural law and protecting natural rights to the institutions of democratic self-government, not to the Courts."<sup>8</sup> This anomaly provides a clue as to what is going on in his essay. George calls his position a determination of prudence.<sup>9</sup> I would call it by a different name, which, like prudence, also begins with "p"—politics.<sup>10</sup> But I am getting ahead of myself.

My comment, like George's paper, has three parts. The first part will point out some problems with George's analysis of what he calls "the *Griswold* problem." The second part discusses his critique of Edward S. Corwin's argument concerning how American constitutional law is indebted to the natural law tradition. Finally, and most importantly, the third part assesses George's claim that the Constitution embodies natural law and natural rights but leaves their enforcement to legislatures, not courts.

### I. THE *GRISWOLD* PROBLEM

Again, it is remarkable that George seems to embrace Justice Black's critique in dissent in *Griswold* of "the natural law due process philosophy."<sup>11</sup> According to Justice Black, it is specious to maintain that the Constitution incorporates natural law. For Black, to call a decision or doctrine the product of natural law reasoning is to condemn and discredit it as beyond the pale. Indeed, in Black's constitutional lexicon, there is no more contemptible epithet to hurl at

3. See George, *supra* note 1, at Part I. (analyzing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

4. See Robert H. Bork, *The Tempting of America* 95-100 (1990) (criticizing *Griswold* but praising the dissent of Justice Black).

5. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398-99 (1798) (Iredell, J., dissenting).

6. See, e.g., Edward B. Foley, *The Bicentennial of Calder v. Bull: In Defense of a Democratic Middle Ground*, 59 Ohio St. L.J. 1599 (1998).

7. George, *supra* note 1, at 2282.

8. *Id.*

9. *Id.* at 2279-80.

10. I do not mean politics in a crude or pejorative sense, but in the sense that his position reflects political judgments about what institutions are most likely to realize his particular conservative conception of natural law.

11. *Id.* at Part I.

a position than “natural law”—except perhaps “*Lochner*” and in Black’s mind, the two are one and the same.<sup>12</sup>

It is also notable that George evidently endorses Black’s characterization of *Lochner* as a product of natural law reasoning.<sup>13</sup> It is notable because, in doing so, he acquiesces in Black’s tarring of natural law with the brush of *Lochner*, that dreaded, infamous case. Notwithstanding George, one might expect most natural lawyers to defend the dignity and honor of natural law against Black’s critique. I shall mention three possible avenues of defense. One way would be to argue that Black’s understanding of natural law and natural rights is embarrassingly crude, and that *Lochner*, rightly understood, does not embody reasoning from natural law or natural rights at all. On this view, *Lochner* may well read a problematic economic or political theory into the Constitution, but not as a matter of natural law or natural rights. Another move would be to argue that, even if *Lochner* does reflect natural law or natural rights reasoning, its reasoning is erroneous. Contra *Lochner*, natural law or natural rights, properly understood, do not embody an anti-paternalistic theory of laissez faire capitalism or Social Darwinism. Still another way to defend the honor and dignity of natural law or natural rights against Black’s critique would be to argue that *Lochner* does indeed reflect natural law or natural rights reasoning, and that the majority in *Lochner* got the content of natural law or natural rights right.<sup>14</sup> On this view, natural law or natural rights, rightly understood, indeed do embody a vigorous conception of liberty of contract and do impose anti-paternalistic limitations upon the police power of the states and the powers of Congress. On all three views, Black is fundamentally wrong in his critique of natural law reasoning in constitutional interpretation.

In contrast, George reports Black’s critique of natural law and natural rights and defends a variation on Black’s position! To be fair, George refines Black’s position. He claims that it is possible to believe that the Constitution does embody natural law or natural rights, and still agree with Black that judges have no authority to enforce natural law or natural rights against legislative encroachment. One may well be able to hold this position, but not without throwing out much of Black’s skeptical critique of the very idea that the Constitution embodies natural law or natural rights.<sup>15</sup> Why would

12. See *Griswold v. Connecticut*, 381 U.S. 479, 522-24 (1965) (Black, J., dissenting) (criticizing the “natural law due process philosophy” of *Lochner v. New York*, 198 U.S. 45 (1905)).

13. See George, *supra* note 1, at 2271-72.

14. See, e.g., Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (1994).

15. That is, Black criticized the majority opinion in *Griswold*, not because he believed the Constitution embodied natural law but because he opposed judicial enforcement of it. He criticized the very idea that the Constitution embodied natural law. See *Griswold*, 381 U.S. at 522 (Black, J., dissenting).

George adopt this argument? It appears he has made the prudential, that is, political judgment that it is worth doing in order to damn *Griswold*, *Roe v. Wade*,<sup>16</sup> and *Planned Parenthood v. Casey*<sup>17</sup> as illegitimate instances of *Lochner*-style natural law judging.<sup>18</sup>

I want to make four points about George's analysis of *Griswold* itself. First, George obstinately and proudly goes against the grain of our constitutional practice by continuing to criticize *Griswold* as wrongly decided. Elsewhere, I have argued that *Griswold*, like *Brown v. Board of Education*,<sup>19</sup> has become a "fixed star in our constitutional constellation."<sup>20</sup> *Brown* in the 1950s, and *Griswold* in the 1960s, provoked methodological crises in constitutional law. Yet like *Brown*, *Griswold* today is a case that any nominee to the Supreme Court must say was rightly decided in order to stand a chance of being confirmed. Thus, after the Senate's rejection of Robert Bork, Justices Kennedy, Souter, and Thomas in their confirmation hearings were as scrupulous about saying that they recognized a constitutional right of privacy and accepted *Griswold* as they were about declining to say whether they recognized a right to abortion and accepted *Roe*.<sup>21</sup> More generally, as with *Brown*, so with *Griswold*, any constitutional theory, to be publicly acceptable, has to entail that it was rightly decided. So one might just as well rail against *Brown* as against *Griswold*.

Second, George states, "[i]n the end, Douglas' opinion [in *Griswold*] rests on the essentially undefended assertion that the availability of contraceptives is good for the institution of marriage."<sup>22</sup> This is erroneous. Douglas' opinion instead rests on two fundamental propositions concerning the institution of marriage. First, it would be destructive to the marriage relationship if we allowed "the police to

16. 410 U.S. 113 (1973).

17. 505 U.S. 833 (1992).

18. It is common for conservatives to blast *Roe* and *Casey* as illegitimate instances of "Lochnering." See, e.g., *Casey*, 505 U.S. at 998 (Scalia, J., concurring in the judgment in part, and dissenting in part); *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting). Some scholars have defended *Griswold*, *Roe*, and *Casey* (as distinguished from *Lochner*) on the basis of natural law or natural rights arguments. See, e.g., Charles A. Kelbey, *Natural Law and the Supreme Court* (unpublished manuscript on file with author).

19. 347 U.S. 483 (1954).

20. James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1, 13 (1995) (drawing an analogy to *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

21. See 1 *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 225, 364 (1991); *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 172-76 (1990); *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 135-36, 164-65 (1987). Even Scalia strains to say that *Griswold* was rightly decided according to his conception of the due process inquiry. See *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989) (plurality opinion).

22. George, *supra* note 1, at 2273 n.20.

search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives.”<sup>23</sup> As Douglas added, “[t]he very idea is repulsive to the notions of privacy surrounding the marriage relationship.”<sup>24</sup> Second, the marriage relationship or association deserves special protection because it is “intimate to the degree of being sacred” and “it is an association for as noble a purpose as any involved in our prior decisions” such as those protecting freedom of association for political, social, legal, and economic purposes.<sup>25</sup> Neither of these propositions, contra George, rests on the truth or falsehood, as an empirical or moral matter, of the assertion that the availability of contraceptives is good for the institution of marriage. Together, though, the two propositions lead to another proposition: it is good that the partners of the marital association have the privacy and the freedom to make important decisions about whether or when to have children.<sup>26</sup>

I happen to think, as an empirical and moral matter, that the right of privacy, including the right to use contraceptives, is good for the institution of marriage. I do not believe that marriage would be an institution worth preserving in its present form if no such rights existed. Indeed, in a toast at my own wedding ceremony, I read from the stirring final passages from Douglas’ opinion in *Griswold* that I just quoted. In fact, I believe that marriage is such a good thing that it ought to be made available to all, heterosexuals and homosexuals alike.<sup>27</sup>

Third, George also characterizes as a “remarkable proposition” the argument in Douglas’ first draft of the *Griswold* opinion, which would have invalidated the Connecticut statute on the ground that it violated the right to freedom of association.<sup>28</sup> This proposition not only is not remarkable, it also is eminently sound. In fact, the Supreme Court subsequently adopted that ground for the right at issue in *Griswold*.<sup>29</sup> Kenneth Karst, elaborating upon the language from Douglas’s opinion concerning freedom of association, put forward a famous justification for the right recognized in *Griswold* in terms of “The Freedom of Intimate Association.”<sup>30</sup> (An article whose title nicely encapsulates its argument.) The Supreme Court essentially adopted Karst’s analysis in an important case regarding freedom of association,

23. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

24. *Id.* at 485-86.

25. *Id.* at 486.

26. I have defended such an interpretation of *Griswold* in terms of a theme of “deliberative autonomy.” See Fleming, *supra* note 20, at 10-14.

27. See, e.g., *Baker v. State*, 744 A.2d 864 (Vt. 1999).

28. George, *supra* note 1, at 2273-74 n. 21.

29. *Griswold*, 381 U.S. at 484.

30. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

*Roberts v. Jaycees*.<sup>31</sup> There the Court characterized *Griswold* and related cases protecting personal liberty under the Fourteenth Amendment in terms of "freedom of intimate association,"<sup>32</sup> just as it characterized *NAACP v. Alabama* and related cases under the First Amendment in terms of "freedom of expressive association."<sup>33</sup>

Fourth and finally, I want to point out the irony in George siding with Justice Iredell and against Justice Chase in the *Calder* debate. That exchange is conventionally framed as a debate between the natural law jurisprudence of Chase and the legal positivism of Iredell.<sup>34</sup> Beyond that, it is striking that George says that "the questions at issue [in the *Calder* debate] involved nothing like the *Griswold* problem."<sup>35</sup> He states that *Calder v. Bull* concerned "whether courts could overrule legislative acts which plainly violated 'vital principles' that, though not expressly stated, were presupposed by the very institutions of 'free republican government.'"<sup>36</sup> This is striking for several reasons. First, in *Griswold*, Justice Black and Justice Harlan thought that the debate in *Calder* between Iredell and Chase concerning the vital principles of free republican government was clearly on point—Black played Iredell to Harlan's Chase. Black relied on the words of Iredell to argue that the Constitution does not protect the right of privacy because it is not expressly mentioned in the text,<sup>37</sup> and Harlan quoted from Chase to argue that the right of privacy is a constitutional right even though it is not specifically enumerated in the text.<sup>38</sup> Furthermore, many scholars, including myself, have argued that the right to privacy, conceived as a right to autonomy, is, in Chase's formulation, a vital principle of free republican government.<sup>39</sup>

## II. CORWIN ON NATURAL LAW AND AMERICAN CONSTITUTIONALISM

George's particular critique of Corwin—that both common law and legislation depend not only on authority but also on reason—is sound.<sup>40</sup> But Corwin's larger argument is sound and withstands George's critique. In our constitutional tradition, judicial review is

31. 468 U.S. 609 (1984).

32. *Id.* at 617-19.

33. *Id.* at 618.

34. *See, e.g.,* Foley, *supra* note 6; Kelbey, *supra* note 18.

35. George, *supra* note 1, at 2279.

36. *Id.* (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.)).

37. *Griswold v. Connecticut*, 381 U.S. 479, 524-25 (1965) (Black, J., dissenting) (quoting *Calder*, 3 U.S. at 399 (Iredell, J., dissenting.)).

38. *Id.* at 500 (Harlan, J., concurring) (incorporating by reference his dissent in *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting *Calder*, 3 U.S. at 388 (Chase, J.)).

39. *See, e.g.,* Fleming, *supra* note 20, at 25-26.

40. *See* George, *supra* note 1, at Part II.

not limited to interpretation and enforcement of textual provisions understood as if they were sections of a detailed code.<sup>41</sup>

I would press a different, more fundamental argument concerning Corwin's analysis. I am dubious about any argument that treats our historical practices—whether the common law, statutory law, or even constitutional law—as the deposit of natural law or natural rights. I would argue that natural law or natural rights inherently provide a normative standard for criticizing our historical practices, including the common law, statutory law, and constitutional law of our country. The best evidence for the appropriateness of this critical attitude is the course of human history, including that of American history, which is strewn with both atrocities committed against, and appalling neglect for, basic human rights, dignity, and needs. And so, we should be skeptical about any theory that treats our historical practices or laws themselves as the repository of natural law or natural rights.

For this reason, we should also be wary of any attempt—like that of Scalia—to reduce the liberties fundamental to our constitutional traditions to whatever specific rights have long been recognized in our historical practices as expressed in the common law and the statute books.<sup>42</sup> Our historical practices surely have failed to realize and vindicate the fundamental liberties of our constitutional traditions. We should understand our traditions, not as historical practices, but as aspirational principles that are deeply critical of our historical practices.<sup>43</sup> Aspirational principles are principles to which we as a people aspire—and for which we as a people stand—even though we have failed to realize them in our historical practices. Our aspirational principles are more akin to principles of natural law or natural rights than are our historical practices, including our statutory law, common law, and constitutional law.

### III. NATURAL LAW AND THE “GRISWOLD PROBLEM”

George contends that “natural law itself does not settle the question of whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conforms to natural law and respects natural rights.”<sup>44</sup> His contention is correct. As I would put it, we should distinguish between the following two fundamental interrogatives of constitutional interpretation: *What* is the Constitution? and *Who* may authoritatively interpret it?<sup>45</sup> To

41. Edward S. Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 Notre Dame Law. 258 (1949-50).

42. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 123-27, 127 n.6 (1989) (plurality opinion).

43. I have developed this distinction elsewhere. James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211, 268-73 (1993).

44. George, *supra* note 1, at 2279.

45. For a work that conceives the enterprise of constitutional interpretation on the



elaborate the distinction: The answer to the question, *What* does the Constitution include?—for example, text expressing specific rules only or text embodying abstract principles of natural law or natural rights—does not determine the answer to the question *Who*, as between legislatures and courts, may authoritatively interpret and enforce the Constitution, whatever it includes.

The classical, interpretive justification for judicial review, put forward in *The Federalist No. 78*<sup>46</sup> and *Marbury v. Madison*,<sup>47</sup> is a famous answer to the *Who* question. Courts are obligated to interpret the higher law of the Constitution and to preserve and enforce it against encroachments by the ordinary law of legislation. This justification is agnostic as between the following two competing answers to the *What* question. The first is a legal positivist conception advanced by Bork, Scalia, and Black.<sup>48</sup> On this view, the Constitution is basically a code of detailed rules. It excludes abstract moral principles, including abstract principles of natural law or natural rights. The second answer is a moral realist or natural rights conception put forward by Michael Moore and Sotirios A. Barber;<sup>49</sup> I will lump their conception in with Ronald Dworkin's idea of a "moral reading of the Constitution."<sup>50</sup> These theorists believe the Constitution embodies a scheme of abstract moral principles, which, with some simplification, we can say are principles of natural rights.<sup>51</sup> Thus, the important question becomes *What* is the Constitution?, as well as *What* does it include? In particular, which of the two foregoing general answers is superior?

basis of these two fundamental interrogatives – along with a third, *How* should the Constitution be interpreted? – see Walter F. Murphy, James E. Fleming & Sotirios A. Barber, *American Constitutional Interpretation* (2d ed. 1995).

46. *The Federalist No. 78*, at 467, 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

48. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting); Hugo LaFayette Black, *A Constitutional Faith* (1969); Bork, *supra* note 4; Antonin Scalia, *A Matter of Interpretation* (1997) [hereinafter *A Matter of Interpretation*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) [hereinafter *Originalism*].

49. See, e.g., Sotirios A. Barber, *The Constitution of Judicial Power* (1993) [hereinafter *Judicial Power*]; Sotirios A. Barber, *On What the Constitution Means* (1984); Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *Fordham L. Rev.* 2087 (2001); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 279 (1985); Michael S. Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151 (1981).

50. See, e.g., Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) [hereinafter *Freedom's Law*]; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *Fordham L. Rev.* 1249 (1997) [hereinafter *Arduous Virtue*].

51. I say "with some simplification" because Dworkin speaks of the Constitution as embodying abstract moral principles rather than natural rights as such.

Narrow originalists like Bork and Scalia have asserted a monopoly on the classical, interpretive justification of judicial review and on concern for fidelity in constitutional interpretation.<sup>52</sup> Again, they offer the foregoing legal positivist answer to the question *What* does the Constitution include. They side with Black in *Griswold* and Iredell in *Calder*. The Constitution consists of the text only, which should be understood as a code of detailed rules, and it excludes natural law or natural rights (and, more generally, any conception of a scheme of abstract principles). For them, the classical, interpretive justification of judicial review requires judges to interpret and enforce the Constitution so understood. And for them, fidelity to the Constitution so understood forbids judicial interpretation and enforcement of principles of natural law or natural rights.<sup>53</sup>

Dworkin, Moore, and Barber have challenged the narrow originalists' pretensions to a monopoly on the classical, interpretive justification of judicial review and on concern for fidelity in constitutional interpretation. They have sought to reclaim and reconstruct the classical, interpretive justification with their own conceptions of the Constitution and fidelity.<sup>54</sup> They roughly side with Douglas in *Griswold* and Chase in *Calder*. The Constitution includes the text, but they understand the text as embodying a scheme of abstract moral principles including (for the sake of argument) principles of natural rights. And so, for them, the classical, interpretive justification of judicial review entails that judges should interpret and enforce the Constitution so understood. And fidelity to the Constitution so understood requires judicial interpretation and enforcement of abstract moral principles including natural rights.

George's move is different from that of the narrow originalists. First, he argues, contrary to the narrow originalists, that "the fabric and theory of our Constitution embodies our founders' belief in natural law and natural rights."<sup>55</sup> Second, he apparently wants to invoke the classical, interpretive justification of judicial review.<sup>56</sup> Nonetheless, he wants to conclude, like the narrow originalists, that judges interpreting and enforcing the Constitution should not interpret and enforce principles of natural law or natural rights. As he puts it, "I do not draw from this [conception of the Constitution as

52. Bork, *supra* note 4; A Matter of Interpretation, *supra* note 48; *Originalism*, *supra* note 48. Elsewhere, I have criticized the narrow originalists' claim to have a monopoly on concern for fidelity in constitutional interpretation. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham L. Rev. 1335 (1997); James E. Fleming, *Original Meaning Without Originalism*, 85 Geo. L.J. 1849 (1997).

53. Bork, *supra* note 4, at 66, 209-10, 351-55; A Matter of Interpretation, *supra* note 48; *Originalism*, *supra* note 48.

54. See, e.g., Judicial Power, *supra* note 49, at 157-58; Freedom's Law, *supra* note 50, at 72-83.

55. George, *supra* note 1, at 2282.

56. *Id.*

embodying our founders' belief in natural law and natural rights] the conclusion that judges have broad authority to go beyond the text, structure, logic, and original understanding of the Constitution to invalidate legislation that, in the opinion of judges, is contrary to natural justice."<sup>57</sup> He also writes, "Black, Bork, Scalia, and other 'textualists' and 'originalists' are nearer the mark, in my judgment, in calling for judicial restraint in the absence of a clear constitutional warrant for overturning duly enacted legislation."<sup>58</sup>

Yet because of George's conception of *What* the Constitution includes, he cannot embrace the narrow originalist conclusion unless he offers a justification for judicial review besides the classical, interpretive justification. George argues from a conception of *What* is the Constitution like Dworkin's (rather than Bork's)—through a justification of judicial review that is agnostic between a conception of *What* like Dworkin's and a conception of *What* like Bork's—to a conclusion or conception of judicial review like Bork's (as distinguished from Dworkin's). But again, he cannot reach that conclusion without a "noninterpretive" justification of judicial review.<sup>59</sup> For the classical, interpretive justification of judicial review offers no justification for judges' to refrain from enforcing any provision, part, or aspect of the Constitution. Instead, it says, interpret and enforce the Constitution, whatever it is. And so, if the Constitution embodies principles of natural law and natural rights, that justification entails that judges should interpret and enforce those principles.

To be sure, there are alternative "noninterpretive" justifications for judicial review that might support George's conclusion that principles of natural law and natural rights, although incorporated into the Constitution, should not be judicially enforced. But in this paper at least, he has not put forward any such alternative justification. He does say, "[A]s I read the document, [the Constitution] places primary authority for giving effect to natural law and protecting natural rights to the institutions of democratic self-government, not to the Courts."<sup>60</sup> He continues, "[i]t is primarily for the state legislatures, and, where power has been duly delegated under the Constitution, to the Congress to fulfill the task of making law in harmony with the requirements of morality (natural law), including respect for valuable and honorable liberties (natural rights)."<sup>61</sup> He merely reports his conclusion and does not argue for it.

57. *Id.*

58. *Id.*

59. Here I do not mean "noninterpretive" in the common pejorative sense that one thinks another's theory of interpretation is not really a theory of "interpretation" at all. Rather, I mean it in the sense that the argument against judicial review reflects or grows out of concerns that do not simply follow from a theory of interpretation.

60. *Id.*

61. *Id.*

In his closing remarks about fidelity to the rule of law and the Constitution, George suggests that proponents of judicial enforcement of principles of natural law or natural rights have forsaken such fidelity and instead have made a “bargain with the devil.”<sup>62</sup> But it is important to note, as just intimated, that he turns against his own understanding of fidelity to the Constitution in order to argue against judicial enforcement of such principles. To be sure, he can argue that principles of natural law and natural rights embodied in the Constitution should be interpreted and enforced by legislatures rather than courts. But it will take an argument besides fidelity to get to that conclusion.

Moreover, I dare say that several common arguments are not available to George, given his general commitments. For example, he surely would not make skeptical arguments: that even if the Constitution incorporates natural law or natural rights, its content is unknowable or so indeterminate that courts should ignore it or leave it to legislatures to interpret and enforce it. He is hardly such a skeptic. And he presumably would not make democratic arguments: that even if the Constitution incorporates natural law or natural rights, and even if judges can determine its content, courts should ignore it or leave it to legislatures because it is in principle a good thing for our constitutional democracy that legislatures give their own content to natural law or natural rights. I doubt that he is such a democrat. For example, I doubt that he would say that it is a good thing for democracy for New York to decide that women have a natural right to decide whether to terminate a pregnancy through having an abortion.

Finally, George might be able to argue, along the lines suggested by the work of Lawrence G. Sager and Cass R. Sunstein, that the Constitution incorporates principles of natural law or natural rights, but these principles are properly understood as “judicially underenforced norms.”<sup>63</sup> On these views, the fuller protection and enforcement of such principles is secure with legislatures and executives in “the Constitution outside the Courts.”<sup>64</sup> But thus far George has not made such an argument.

Such arguments against judicial interpretation and enforcement of principles of natural law or natural rights might be good arguments, but again, they are not arguments of fidelity that follow from the classical, interpretive justification of judicial review. They are arguments of policy or prudence that compromise, override, or

---

62. *Id.* at 2283.

63. See, e.g., Cass R. Sunstein, *The Partial Constitution* v-vi, 9-10, 138-40, 145-61, 350 (1993); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

64. Sunstein, *supra* note 63, at 9-10.

abandon the quest for fidelity in constitutional interpretation. Ronald Dworkin pointed this out long ago in his book, *Taking Rights Seriously*,<sup>65</sup> and recently reiterated it in his essay in the Fordham symposium on the idea of fidelity in constitutional interpretation.<sup>66</sup> I certainly do not deny that George might be able to make “noninterpretive” or “non-fidelity” arguments for his conclusion that courts should not interpret and enforce principles of natural law or natural rights that he himself believes the Constitution embodies. Rather, I wish to emphasize two points. One, George has not made such arguments. And two, I hope to have punctured the pretensions that manifest themselves in his charge that the theorists with whom he disagrees concerning natural law or natural rights have made a “bargain with the devil” in disregard of fidelity to the rule of law and the Constitution.

In closing, I want to point out that charging that one’s theoretical disputants have made a “bargain with the devil” is a game that both sides can play. I could argue that fidelity to the Constitution imposes on judges a duty in justice to give full meaning to the Constitution’s charter of liberty, rather than giving in to the temptation to abdicate responsibility by recourse to narrow originalism or to deference to state legislatures.<sup>67</sup> I could argue that Bork, Scalia, and George have made a bargain with the devil by succumbing to versions of the latter temptation. My more general point is that no one proposes breaking with fidelity to the Constitution (as they understand it) in order to achieve the results that they desire. Rather, everyone argues that fidelity to the Constitution, rightly understood, requires the results that they believe are constitutionally sound. Thus, we return to the fundamental question, what is the best understanding of *What* is the Constitution?, and what is the best understanding of fidelity in constitutional interpretation.

---

65. Ronald Dworkin, *Taking Rights Seriously* 131-49 (1977).

66. *Arduous Virtue*, *supra* note 50, at 1249-51, 1262-68.

67. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 847-49, 901 (1992); *Freedom’s Law*, *supra* note 50, at 72-83, 119, 124-29.