Two Kinds of Originalism

Steven F. Hayward

[How] one understands the Constitution will depend utterly upon principles, not stated in the Constitution, that one brings to bear upon its interpretation. And it will be those principles, not the Constitution itself, that determine the nature of the Union.
— Harry Jaffa, 2000

The rule has not yet been formulated that will decide for the judge when he must trust and when he must distrust the majority. For, as a matter of fact, some judges are to be trusted and others not.
— Walter Berns, 1957

Until Donald Trump came along with the novelty of naming specific jurists he might appoint to the Supreme Court, it was a quadrennial ritual for Republican presidential candidates to pledge that if elected they would appoint Supreme Court justices “like Scalia and Thomas.” George W. Bush (in 2000) and Rudy Giuliani (in 2008), to name just two, both invoked the late Antonin Scalia and Clarence Thomas as their beau ideal of jurisprudence. There’s just one difficulty with this pairing, which a knowledgeable reporter (that rarest of beasts) could have pointed out with a simple question: Which one? They’re not the same. While voting together on most of the controversial cases that reach the Supreme Court, Scalia’s and Thomas’s concurring opinions often travel very different paths in their constitutional reasoning.

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Scalia and Thomas represent two different varieties of constitutional originalism that inform a vigorous debate over jurisprudence among conservatives. Thomas thinks the Declaration of Independence and the natural-law teaching it expresses are an authoritative guide for judges, a view that is described as “judicial activism” of the right. Scalia, while agreeing with Thomas about the content of the natural-law tradition, thinks proper judicial restraint comes from confining judging closely to the written text of the Constitution, the known views of the founders, and the operating language of statutes. Anything beyond the text invites the kind of judicial activism that favors liberalism. The argument among conservatives over this point is often more heated than the argument with liberalism’s “living Constitution.”

Both views connect to a wider argument about the principles of constitutionalism and the philosophy of the American founding. This debate represents the maturing of conservative constitutionalism from the Nixon-era emphasis on “strict construction” or the “original intent” arguments of the Reagan Justice Department. Lots of legal thinkers, along with the Federalist Society, deserve credit for this maturation, but the philosophical core of the disputes can best be seen in part of the epic feud between Harry Jaffa and Walter Berns — political philosophers rather than lawyers.

A DISTINCTION WITH A DIFFERENCE

The substantive difference between Jaffa and Berns might be reduced to which single term in the Declaration each man emphasized as the most important. For Jaffa, the key word is equal (“all men are created equal”); for Berns, it is secure (“to secure these rights, governments are instituted among Men”). It is tempting to paraphrase Lincoln’s famous letter to Alexander Stephens about slavery, that “this is the only substantial difference between us.”

Berns’s argument is simple and straightforward: Natural rights aren’t worth a darn without a government to secure them. A strong but decent government transforms natural rights into civil rights by a supreme act of positive law — in our case, the Constitution. This is the voice of Hobbes speaking, as modified and domesticated by Locke. The basic social compact involves individuals surrendering the enforcement of their natural rights (starting especially with the first one — the right of self-preservation) so that, paradoxically, they will be more secure.
George Washington stated the theory succinctly in his letter of transmittal for the draft Constitution on the last day of the Philadelphia convention in 1787:

Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved.

This difference of emphasis might seem slight, but for Berns and many others it affects our understanding the original intent of the Constitution, and therefore our jurisprudence. Berns and other eminent thinkers—Robert Bork was the most prominent—believe it to be a mistake to try to apply natural-rights and natural-law ideas in jurisprudence, while Jaffa and several of his allies think it is essential.

Whereas Jaffa, following Lincoln, sees the Declaration as the solid center of gravity in American political thought, Berns and others think the Constitution, while informed by the Declaration, is a sturdier center of gravity for American political thought. As Thomas West summarizes the difference, Jaffa and his followers think America has a “Declarational” soul, while Berns and especially Harvey Mansfield, Jr., think America has a “constitutional” soul. (In fact, the title of one of Mansfield’s books is America’s Constitutional Soul.)

Berns, Mansfield, and other constitutionalists do not join Willmoore Kendall in rejecting the Declaration, Locke, or the principle of equality, but they think the Declaration has severe limits as a practical guide to political life, when it isn’t in fact susceptible to misinterpretation by radical egalitarians. Berns and Mansfield worry that appeals to equality and natural rights can do more to harm than help the cause of limited constitutional government.

As Mansfield wrote in 1993, “A regime based on the self-evident half-truth that all men are created equal will eventually founder because of its disregard of the many ways in which men are created unequal.” Jaffa was not pleased with this formulation, and naturally picked a fight with Mansfield over it.
Is this a distinction without a difference? No; there is a case for each side of this argument. But to try to referee this quarrel would be to miss the larger point behind it: The battleground of this feud changed conservatism, and may yet save the country. Intellectual arguments like this tend never to be settled fully, and working the scorecard overlooks that this entire line of argument brought a new richness to conservative engagement with the Constitution, filling in some serious gaps in conservative constitutionalism.

**The Missing Dissent**

Berns took a circuitous route to his mature views about the Constitution. His very first scholarly publication, in the *Western Political Quarterly* in 1953, was about the notorious 1927 Supreme Court decision in *Buck v. Bell*, which upheld a Virginia statute that authorized involuntary sterilizations of the “feeble-minded.” This is the case in which Justice Oliver Wendell Holmes, writing for the majority, asserted that “three generations of imbeciles are enough,” and afterwards boasted to friends that the decision gave him real pleasure and pride. He wrote to Harold Laski that he felt he “was getting near the first principle of real reform.”

*Buck v. Bell* was an odd case in that it had no dissenting opinion, although one justice, Pierce Butler, voted against the majority. Berns’s article, based on his master’s thesis at the University of Chicago, could be thought of as the “missing dissent.” There is nothing cautious or detached about Berns’s treatment of the case and its wider implication for due process of law. His moral indignation bristles from every page, and he does not hedge his contempt for Holmes. “[T]here are some things which decent government simply should not do,” Berns wrote; “One of these is to perform compulsory surgical operations in order to satisfy the racial theories of a few benighted persons. To reduce the due process clause to a guarantee of prescribed procedures is to permit more than the public control of grain elevators.”

After demolishing Holmes’s shoddy legal reasoning, Berns reviewed the still strong and disgusting ideology and practice of eugenics even after World War II: “The present writer believes it important to reveal just what it was these men wanted.” In a footnote, Berns tallied up the thousands of forced sterilizations still taking place in the U.S. in the early 1950s, and pointed out that several of the leading American eugenicists expressed their sympathy for Nazi eugenic theory as late as the middle of World War II.
Berns concluded by quoting a leading constitutional-law figure of the period, A. T. Mason, who approved of the Supreme Court’s jettisoning “the dogmas of eighteenth century individualism, faithfully performing what it conceived to be its historical function of protecting the individual against arbitrary action of legislative majorities.” To which Berns responded, “But Buck v. Bell illustrates the need for some body to perform precisely this function…. In the end, procedural due process is a substantive right which is denied everyone to whom injustice is done.”

One would not have expected Berns to elaborate on this closing challenge in the scope of a short journal article, but it opens the door to one of the largest questions that divides conservative constitutionalism today: how to understand — and apply — the idea of the original intent of the founders in jurisprudence. Part of the controversy is about just what the original intent of the founders actually was. Jaffa’s school of originalist thought argues that the philosophy of natural law and natural right as expressed in the Declaration ought to have authoritative status in jurisprudence. Libertarian legal thinkers, like Richard Epstein and Randy Barnett, share a version of this view. The contrary school of original-intent jurisprudence holds a narrower text-based view: Courts should strike down laws only where there is a clear clause in the Constitution to provide a basis for rejecting the legislative act of a duly constituted majority. Advocates of this view have included Robert Bork, William Rehnquist, Antonin Scalia — and the later Berns.

Berns’s 1953 article seems to tilt in favor of the first school of thought, which could be called “conservative substantive due process.” But to invoke this term shows the difficulty: “Substantive due process” was the orientation of the liberal rights revolution starting with the Warren Court, and ever since liberal jurists have been discovering unenumerated “rights” in the “emanations and penumbras” of the Constitution, most of which conveniently intersect with a modern egalitarian agenda, such as “welfare rights.” Berns’s article on Buck v. Bell appeared before the Warren Court began its rampage in earnest, and when asked later about his flirtation with “substantive due process” in that early article, Berns said, “I changed my mind.”

VIRTUE AND LAW

How did Berns come to change his mind? This issue is, to borrow Lincoln’s phrase, “piled high with difficulty.” Before sorting it out,
it is worth digressing briefly to point out why it is such a significant controversy regardless of which side you find more compelling. The work of Berns and colleagues starting in the 1950s represented something new and significant. While Jaffa was working on the importance of Lincoln and the Civil War, several of his contemporaries, including Berns, turned their constitutional gaze directly at jurisprudence and the Supreme Court.

Berns’s first book, published in 1957, critiqued the Supreme Court’s modern First Amendment jurisprudence. But from the title itself you can see something new and startling; the book is called *Freedom, Virtue and the First Amendment*. Virtue? Here is an unheard-of word both in political science and jurisprudence. The premise of the book is that freedom is not simply the absence of restraint, and cannot be disconnected from a substantive understanding of individual virtue. Its special target is ACLU-style “libertarianism,” as he calls it, which can find no restraining principle against obscenity, for example.

Berns argued powerfully that the “clear and present danger” tests and other improvisations of the Court were inadequate, incoherent, and beside the point. Given that the worst examples of First Amendment permissiveness lay in the future, the book is a remarkable exercise in foreseeing the consequent logic of free-speech absolutism. Absolutist free-speech jurisprudence, he argued, “foreclosed from permitting the exercise of the political virtue, practical wisdom or prudence, by the Supreme Court justice....[W]hether by design or oversight, liberalism ignores the problem of virtue.”

You might even interpret this as the case for “judicial statesmanship,” though Berns did not use that term. Berns rests his case on the ground that “the formation of character is the principal duty of government,” but it begs the question of just where he derives the authority for this conclusion. Virtue is not mentioned in the Constitution; the document is silent on education of any kind. It might be observed that, strictly speaking, education and morals are understood as state responsibilities, as can be seen in the language of the Northwest Ordinance of 1787, for example. And then there’s the public language of the founders, such as that from George Washington previously mentioned, to buttress Berns’s case.

Still, notwithstanding these clear currents, under Berns’s early view, virtue has to be imported into constitutional law, or the judiciary has
to be understood as more of a political branch than a narrowly legal branch that merely “applies” the law in morally neutral ways. Of course that is exactly what many of its critics today think the judiciary has become—“politicians in robes,” with the balance of political power favoring the left for several decades now.

My theory of Berns’s change of mind is simple: As the judicial predations of the Warren Court era accelerated in the 1960s and 1970s, Berns tilted more and more in the direction of the Lockean legislative supremacy toward which he had tentatively nodded in several places in *Freedom, Virtue and the First Amendment*. By the 1980s, Berns was arguing against natural-law jurisprudence and aligning himself with the strict textual originalists like Bork. His embrace of textual originalism can be understood or defended as a prudential judgment—as the only means of preventing the Supreme Court from getting worse. In other words, it was an entirely understandable attempt to keep the “living Constitution” from becoming so alive that it could be a Frankenstein’s monster serving the cause of liberal social engineers.

Berns’s subsequent detailed inquiries about the Hobbesian and Lockean roots of the founding led him to a much more confined view of judicial review. He wrote in 1983: “This doctrine of natural rights has no room for judicial review. In fact, judicial review is likely to prove a threat to the civil society built on natural rights…. There is no room for judicial review in Locke’s system.” This led to the further conclusion that a natural-rights jurisprudence would open a “bottomless well” or “Pandora’s box.” Berns, Bork, and other critics of natural-law jurisprudence have in mind the gross abuses of the 14th Amendment in particular.

A regard for textual originalism is not entirely absent from Berns’s early work, but he is less than clear on the matter. There is this admonition in *Freedom, Virtue and the First Amendment*:

> It deserves mention that fidelity to the original text would have avoided the era of “substantive due process” and its progeny, “substantive equal protection.”… It would have spared us a generation of constitutional lawyers who feel obligated to spin out elegant (but obviously absurd) theories in the vain attempt to provide some valid textual basis for the Court’s Fourteenth Amendment jurisprudence. Best of all, it would have made it easier to preserve the public’s esteem for the Constitution as fundamental law.
By the 1980s, however, the ambiguities in Berns’s early position were gone: “Anyone who argues that the Founders intended the courts to exercise a natural law-natural rights jurisdiction must come to terms with the fact that the original and unamended Constitution contains precious few provisions for such courts to work with.” By the mid-1990s Berns would write an essay bearing the unambiguous title, “The Illegitimacy of Appeals to Natural Law in Constitutional Interpretation.”

**Majorities and Morality**

But if jurisprudence is to be guided by a strict textual originalism that emphasizes legislative supremacy, it leaves the door ajar once again to unqualified majoritarianism, or at least to a serious confusion about constitutional principles. At the root of the problem is that a strict textual originalism is indistinguishable from positivism. That’s the prospect that launched Jaffa into near-earth orbit.

The trouble is that for a long time legal education has neglected to teach the role of the natural-law tradition in the evolution of the Anglo-American legal world. With few exceptions such as Catholic law schools (Ave Maria University comes to mind) or the rare conservative law professor here and there, law students are taught only the positivist basis of law.

Indeed, constitutional law in most law schools is shockingly narrow, as it is overwhelmingly taught from a practitioner’s viewpoint—that is, how the case law has unfolded and how to deploy the precedents and doctrines to argue constitutional cases today. While this is obviously necessary for the practice of law in the courtroom, it has created several generations of lawyers who are mere constitutional technicians rather than constitutionalists. While a law student will learn constitutional law, he won’t learn constitutionalism.

As such, even conservative-minded law students will not have much exposure to the full range of constitutional philosophy, and this can be seen in the surprising if not shocking things some conservative judicial heroes have said. In 1976 future Chief Justice William Rehnquist gave a major lecture aimed at the worthy goal of turning back the worst abuses of the “living Constitution,” rightly seeing it as a doctrine that unleashes judges to implement their own political and social views. Rehnquist observed:

> A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment,
should not change the meaning of the Constitution. A merely temporary majoritarian groundswell should not abrogate some individual liberty truly protected by the Constitution.

So far, so good. But then there’s this:

The third difficulty with the...notion of the living Constitution is that it seems to ignore totally the nature of political value judgments in a democratic society. If such a society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards indeed do take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone’s idea of natural justice but instead simply because they have been incorporated in a constitution by the people.... The laws that emerge after a typical political struggle in which various individual value judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law. It is the fact of their enactment that gives them whatever moral claim they have upon us as a society, however, and not any independent virtue they may have in any particular citizen’s own scale of values.

Immediately after this passage, Rehnquist cites approvingly Holmes’s famous attack on natural law.

This is no good. It is pure positivism. And with regard to it, Jaffa is entirely correct in arguing that “No one can at one and the same time be a legal positivist and an adherent to the original intentions of the Framers.” The principles of the Declaration of Independence, and hence the Constitution, are not conceived as “value judgments.” Would Rehnquist actually rewrite the Declaration, “We hold these value judgments to be what we hold, because a majority has declared it so...”? As Jaffa pointed out, the majority in 1787 included safeguards for the owners of slave property. Did these “safeguards” also “take on a generalized moral rightness” because “they have been incorporated into a constitution by the people”?

To be fair, the balance of Rehnquist’s argument is on the side of legislative supremacy and against a “living Constitution” that would provide
“an end run around popular government.” A good deal of Rehnquist’s jurisprudence on the Supreme Court rested on deferring to the popular branches of government, which as a practical matter is defensible—up to a point. But along the way in his lecture he mangles the due-process question in the *Dred Scott* case and gets the *Lochner* case completely wrong, and so we shouldn’t be surprised to see his protégé, Chief Justice John Roberts, base much of his dissent in the *Obergefell* case that legalized gay marriage on the argument that the decision represents a return to *Lochner*-style jurisprudence. (I’ll mention in passing that more than 20 years ago I had a vigorous argument about Rehnquist’s disputable originalism with one of his very smart law clerks; his name was Ted Cruz.)

Justice Antonin Scalia, whose textual originalism was consistent and powerfully argued both in Court opinions and in his books (especially *A Matter of Interpretation*), voiced a similar bent toward unqualified majoritarianism in a 1996 speech:

The whole theory of democracy…is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines that there are certain minority positions that deserve protection…[Y]ou either agree with democratic theory or you do not. But you cannot have democratic theory and then say, but what about the minority? The minority loses, except to the extent that the majority, in its document of government, has agreed to accord the minority rights.

In Scalia’s defense it must be recognized that he faced a regular onslaught of cases that, as he pointed out in many passionate dissents, seemed to have as their object “a major, undemocratic restructuring of our national institutions and mores,” and undoubtedly sought the most effective way to counterbalance the feeblemindedness especially of fellow Republican-appointed justices such as Harry Blackmun, John Paul Stevens, David Souter, and Anthony Kennedy. And he was absolutely on target with his criticisms against using legislative histories in construing statutes. He also said separately that “A Bill of Rights that means what the majority wants it to mean is worthless.”

On the other hand, in casual conversation Scalia, despite his devout Catholic faith, would express scorn for the place of natural law (or common law for that matter) in jurisprudence. In *A Matter of Interpretation*,...
Scalia all but joins the arguments advanced by Willmoore Kendall and Martin Diamond that the Declaration had little or no connection with the Constitution:

If you want aspirations, you can read the Declaration of Independence, with its pronouncements that “all men are created equal” with “unalienable Rights” that include “Life, Liberty, and the Pursuit of Happiness.” Or you can read the French Declaration of the Rights of Man. [T]here is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government.

It is one thing to say that, strictly speaking, there is no philosophizing in the Constitution’s text, but can or should the Constitution be understood as a philosophically empty or neutral vessel? And if we are not satisfied with the “glittering generalities” of the Declaration (as they are often dismissed), we might inquire about what more extensive legal philosophy the founders did read. Immediately you come to Blackstone, who was fully suffused with the necessity of natural law as the cornerstone for legal reasoning.

If you want to find a Supreme Court justice who holds to the view that the Declaration and its philosophy of natural law and natural right should be an authoritative source for interpreting the Constitution, you have to look to Clarence Thomas. It was not a surprise that at the time of Thomas’s nomination to the Supreme Court in 1991 the left would attack Thomas for his previous public speeches embracing the natural-rights philosophy of the founding. Among other things, it led to the comical Joe Biden, then chair of the Senate Judiciary Committee, lecturing Thomas on the distinction between “good” natural rights and “bad” natural rights—“good” ones being the welfare rights beloved of the left, and “bad” ones being those that protect property and economic liberty. Biden opened Thomas’s confirmation hearing by holding aloft Richard Epstein’s fine book on property rights, Takings, and essentially demanding of Thomas, “Are you now or have you ever been a reader of this book?”

It was a great surprise, however, to see Thomas attacked from the right at the time of his nomination. Human Events ran a full-page editorial on Thomas’s “unsettling” view of natural rights:
What has sent up caution flags is Thomas’s embrace, in some of his writings and speeches, of a controversial position promoted by the disciples of the late political theorist Leo Strauss—including Prof. Allan Bloom of the University of Chicago and perhaps most notably Prof. Harry Jaffa of Claremont College in California—which asserts that the Constitution includes protections for “natural rights,” abstract moral principles not specifically set out in the document or its amendments.…

Not surprisingly, the revelations of Thomas’s natural-rights approach have aroused considerable discomfort among conservative legal scholars. One of them, Bruce Fein, told the Washington Post: “If he got up there [at confirmation hearings] and said he believes in the natural-rights theory, I would write a column that says he should not be confirmed.”

The article completely mangled Jaffa’s (and Thomas’s) actual views. Regarding one gross mischaracterization of his viewpoint, Jaffa wrote to the editors: “I find it incomprehensible that anyone, not functionally illiterate, could have discovered this ‘thesis’ in anything I have written.” But the failure to properly describe Jaffa’s argument is not the key point to notice about this dispute. The key point is that this issue divides the right quite profoundly—though surely those who doubted Thomas ought today to admit at least to some embarrassment given his sterling record on the Court. They might even inquire further as to why his record has been so sterling, noting especially how he has cited the Declaration of Independence as an authoritative source for legal reasoning in numerous opinions from the bench.

What divides the right is not exactly the question of natural law as such but the question of its relation to constitutional interpretation. Neither Scalia nor Robert Bork denied or opposed the ideas of natural law or natural rights (although I have heard several second-hand reports of Scalia’s dismissing the founders’ views on natural rights). But they thought that it was a bad idea for the judiciary to protect unenumerated rights or for judges to employ natural law as a jural tool. In principle, Rehnquist argued, doing so opens the door to imposing one’s own moral views in the cloak of judicial review. In practice, he thought it was a game that favors the left.
Bork, meanwhile, thought the origin of the “judicial activism” that modern conservatives deplore was much older than the New Deal or Progressive Era. He identified the appeal to natural law that appeared in one of the earliest Supreme Court decisions, *Calder v. Bull* in 1798, as the “poisoned apple” of judicial activism. In *Calder*, Justice Samuel Chase appealed to “the great first principles of the social compact” — meaning the Declaration of Independence — as ground for limiting legislative power. Bork’s imagery stands in stark contrast to Lincoln’s famous description of the Constitution as the “frame of silver” for the “apple of gold” — the Declaration of Independence.

**Disputed Questions**

Judicial modesty is a worthy position and a prudent policy for many cases and controversies that come before the courts. Rehnquist, Scalia, and their many allies are surely correct that many controversial issues such as abortion and gay marriage would be better left to the popular branches of government to resolve. They are likewise correct that the left can invent new rights endlessly, and that turning back these claims in the current intellectual environment is the judicial equivalent of the Dutch boy running out of fingers to put in the leaky dike. My favorite example at the time of this writing is the federal lawsuit arguing that action against climate change is required under the Constitution’s guarantees of “life, liberty, and property.” One wonders what a federal judge can do by injunction that the EPA isn’t already attempting on its own contestable authority.

At the same time, however, it should be acknowledged that understanding the Constitution as simply an act of majoritarian will, and the concession to positivism that view involves, turns us into moral mutes, and therefore ill-equipped to argue against the assertive and unending demands of the left couched in the language of “rights.” Jaffa’s robust view of the character of the founding, and the essential connection between the Constitution and the reasoning of the Declaration of Independence, is unquestionably subtle and hard to grasp, and this brief survey of the intellectual battlefield barely scratches the surface of the arguments on both sides. (Readers should see Jaffa’s complete treatment of the issue in *Original Intent and the Framers of the Constitution: A Disputed Question*, which includes lengthy responses from three of Jaffa’s critics, plus his rebuttals.)
And if Jaffa’s perspective about the high moral character of the founding, which took him years to work out, is forbidding or inaccessible, it should be noted that Berns’s attempt to maintain the connection between the Declaration and the Constitution by confining the concepts of natural right within a strictly Hobbesian interpretation is not less subtle or challenging to understand and apply.

To closely examine this dispute is not to resolve it, therefore. Maybe we can do no better than to make a plea for a restoration of Lincoln’s style of constitutional sensibility, which will by no means resolve the arguments outlined here either. One of the defects of our age is the tendency, frequently reinforced by the Supreme Court and the legal guild, to regard the Constitution as the near-exclusive property of lawyers rather than the general property of all American citizens, as the preamble should remind us. Citizens should contest for the meaning of the Constitution just as much as lawyers do. Constitutional government cannot be restored by legal action alone. It requires us to follow the model of great teachers and thinkers and to ask ourselves hard questions about the roots of law and justice.