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Introduction

This book critically examines a fundamental ambiguity in the Supreme Court's jurisprudence regarding the reasoning behind its constitutional rights decisions. The confusion concerns whether the opinions rest exclusively on the nation's particular history and context or whether they rest at least in part on a basis that is independent of that history and context. I argue that this ambiguity can be understood as a product of the justices' flawed response to a central tension in American constitutionalism regarding the foundations of individual rights. After describing a parallel source of confusion in contemporary constitutional theory, I propose an alternative approach to constitutional interpretation, which is designed to provide clearer foundations for constitutional rights decisions, while preserving a meaningful but limited role for universal arguments in constitutional law.

My critique of the court's constitutional rights jurisprudence is not focused on doctrine, but on the kinds of arguments that the justices use to justify decisions. The American inclination to translate grievances against the government into the language of rights places a premium on understanding the considerations that carry weight in discerning the meaning of constitutional rights.[1] Apart from the outcomes of specific constitutional disputes, it matters a great deal which kinds of arguments we count as legitimate in the debate.[2] The content of judicial opinions is significant not only because it outlines the reasoning supporting the decision at hand, but also because it sends signals to other legal actors regarding the proper approach to interpretation. Moreover, the kinds of arguments we offer in constitutional debate are interconnected with questions about the authority of the Constitution and the exercise of judicial review.[3]

This book is concerned especially with one of the most significant questions regarding the arguments that are deemed admissible in constitutional discourse. One kind of argument appeals to the nation's particular political and legal context, including its history, enactments, and popular understandings, whether past or present (for brevity, referred to here as "particular arguments"). Another kind of argument appeals to considerations that extend beyond the particular context of the United States (referred to here as "universal arguments"). Reliance on particular arguments is pervasive and taken for granted in the American judicial system, which is not surprising given that judges are institutional actors empowered by, and operating within, a particular community governed by its enacted laws. However, since American constitutionalism has viewed rights both as natural principles and as popularly enacted laws, a crucial question is whether universal arguments may figure in the interpretation of rights. The judiciary's approach to this question is paramount because the courts, for better or worse, have assumed primary responsibility for elaborating the legal effect of constitutional rights.[4] Due to the legal force of precedent, opinions provide cues to litigants, who potentially play an integral role in the shaping of law by crafting arguments that build on the justices' own reasoning. I focus on the Supreme Court because of its unparalleled influence on constitutional jurisprudence.[5]

Constitutional theory often has been framed around dichotomies that fail to capture the vital distinction between universal and particular arguments. Beginning around the mid-1970s, for example, a good deal of scholarship was centered around the distinction between interpretivism and noninterpretivism, with the former referring to the view that constitutional meaning derived exclusively from ideas explicitly or implicitly indicated by the text.[6] Many scholars, though, moved away from this way of framing the debate because they realized that virtually any approach to interpretation could be presented as deriving meaning from the Constitution; the telling disagreements concerned conceptions of the Constitution and how the document connected with outcomes in specific cases. More recently, debate has been framed around the distinction between originalism and nonoriginalism (or "living constitutionalism").[7] Widely varying approaches, however, can be presented as in some sense relating back to the document's original meaning.[8] After all, viewing the Constitution as embodying extremely broad principles, such as freedom or equality, affords wide latitude in treating conclusions as following from principles that are original to the document.[9] Thus, theorists who agree on treating broad concepts embedded in the text as the starting point nevertheless

may rely on fundamentally different kinds of arguments to draw out the meaning of those concepts. The originalism-versus-nonoriginalism paradigm frames debate around the first reference point in discerning constitutional meaning. Regardless of whether we characterize interpretation as traceable to the text or original meaning, though, we must provide reasons explaining why one interpretation is better than another; the distinction between universal and particular arguments captures a crucial fault line regarding the kinds of reasons that are accepted as legitimate in constitutional debate.

Natural Law and Universal Arguments

The subject of universal arguments is vital to the study of constitutional law and theory regardless of one's ideology or research agenda. Unfortunately, however, scholars often neglect the contemporary salience of universal arguments. One reason is the marginalization of natural law in contemporary discourse more generally. Universal principles commonly are associated with the concept of "natural law,"[10] the most familiar term referring to norms with a basis independent of any particular community.[11] While natural law ideas have had tremendous influence historically,[12] explicit reliance on natural law or natural rights has declined since the American Founding, especially during the twentieth century.[13] Moreover, reliance on natural law in constitutional interpretation has been viewed as discredited since the late 1930s.[14] For many, to show that a constitutional argument has relied on natural law is to drive a stake through its heart. One manifestation of the discrediting of natural law in jurisprudence is that contemporary theorists often are quick to reassure readers that their theories do not entail natural law reasoning.[15] Paradoxically, however, natural law ideas continue to play critical roles in the court's jurisprudence and in the work of prominent constitutional theorists.[16] This disconnect between reality and perception with respect to the role of universal arguments is a source of confusion regarding the basis of constitutional rights.

To be sure, John Finnis's *Natural Law and Natural Rights*[17] sparked a revival of interest among some scholars in natural law theory over the last few decades.[18] The reinvigorated discourse on natural law theory, however, did not translate into mainstream interest in the contemporary role of natural law in constitutional adjudication. A contributing factor is that the scholars who are most comfortable speaking the language of

natural law in normative and political theory often are among the more ardent opponents of judicial reliance on natural law. For example, Robert George, who has been one of the most active scholars in the contemporary development of natural law theory,[19] advocates a restrained judiciary that does not decide cases based on its own natural law views. George has stressed that philosophical questions about the content of natural law are distinct from questions about how different institutions should make decisions,[20] writing: "It is a mistake . . . to suppose that believers in natural law will, or necessarily should, embrace expansive judicial review or even 'natural law' jurisprudence."[21]

Another factor limiting mainstream interest in the contemporary role of universal arguments in jurisprudence is the tendency to conflate natural law reasoning with recognition of the Framers' intellectual context. This tendency is illustrated by the Sturm und Drang over Clarence Thomas's natural law beliefs during his confirmation hearings. Joseph Biden Jr. (D-DE), then the chairman of the Senate Judiciary Committee, identified Thomas's references to natural law as the hearings' most urgent concern,[22] and it was a major topic of questioning. In writings and speeches, Thomas had indicated that constitutional interpretation should be guided by the philosophy expressed in the Declaration of Independence. Thomas's emphasis on the Declaration fit with his broader commitment to the classical liberal, Lockean ideas infusing the nation's founding documents.[23] During the hearings, however, Thomas downplayed his natural law beliefs, while stressing the importance of keeping a judge's own ideology separate from the process of adjudication. Natural law was relevant, Thomas suggested, only to the extent that it informed our understanding of the Framers' beliefs about the Constitution's meaning.[24] That is, judges should not introduce their own beliefs on what natural law requires, but simply recognize natural law as part of the Framers' belief system. Scott Gerber, the biographer who has written most extensively on Justice Thomas's jurisprudence, suggests that Thomas distanced himself from natural law during the hearings to maximize the chances of confirmation.[25] Gerber shows that aspects of Thomas's jurisprudence can be understood as applications of his belief in certain natural law principles.[26] Nevertheless, the approach that Justice Thomas has articulated on the bench is one that looks to the Framers' understandings for guidance without using the language of natural law. The agitation surrounding Thomas's natural law beliefs during the hearings and his subsequent avoidance of natural law terminology reflect the anxious confusion that the mere mention of natural law tends to provoke.[27]

The role of universal arguments in jurisprudence is easier to overlook because the court almost never uses natural law terminology. Even in the court's earliest period, when natural law discourse was more prevalent in the society at large, the justices only rarely used the terms "natural law," "natural rights," or "natural justice." Contemporary justices do not use these terms at all (except to discredit an opinion allegedly relying on natural law).[28] Since justices do not use the term "natural law," and natural law jurisprudence widely is perceived as illegitimate, it is tempting to conclude that the study of natural law is only of historical interest and cannot help us to understand disagreements on today's court. In fact, however, we can learn a great deal about the court by focusing on the distinction between particular arguments (those appealing to sources reflecting the nation's unique political and legal context) and universal arguments (those appealing to considerations that extend beyond the specific context of the United States). The definition of universal arguments used here zeroes in on a crucial feature of natural law that proves to be vital in illuminating ongoing jurisprudential debates: the appeal to reasons that do not depend on the context of a specific political community.[29]

I use the term "universal arguments" rather than the more familiar term, "natural law," because it is important to recognize the continuing role of universal arguments in constitutional law and theory even though those arguments frequently diverge from ideas historically associated with natural law. We will miss the contemporary significance of universal arguments if we search only for the term "natural law" and conceptions of natural law that mirror those of the Framers. Contemporary discourse typically shuns terms like "natural law" or "natural rights" because they carry baggage that is unwelcome in the context of adjudication. First, natural law has been associated with religious faith.[30] References to natural law evoke links with spiritual premises, generally, or with the work of specific thinkers, such as Thomas Aquinas, whose theoretical frameworks are deeply theological.[31] This association discourages the use of natural law terminology in the judicial context where religious premises are not accepted as grounds of decision.[32] Even when natural law claims are not associated with explicitly religious premises, they may be seen as entailing outdated positions on metaphysical questions.[33]

In American constitutionalism, natural law also has been associated with the prioritization of property rights. The founding generation believed that property rights were rooted in natural law,[34] and the Constitution reflected an emphasis on property rights.[35] The Supreme Court paid attention principally to property until well into the twentieth

century,[36] often applying natural law reasoning in protecting property rights.[37] In the late 1930s, however, the court abandoned this line of jurisprudence[38] and generally demoted property in its hierarchy of rights.[39] Natural law had been associated with the prioritization of property, and judicial reliance on natural law to strike down legislative acts has been seen as discredited since the court shifted away from property and toward the protection of other categories of rights.[40] Consequently, arguments today that have the ring of natural law carry an association with reactionary substantive propositions of constitutional law.

Many also associate natural law with claims that are ambitiously foundational in character, asserted with greater certainty, and supposed to yield answers in a mechanistic fashion.[41] I adopt an unencumbered definition of universal arguments to avoid the distorting effect of false historical associations. As defined here, there is no reason why universal arguments must imply specific positions on theological or political issues, or why they must be more speculative. Entering constitutional debates brings with it the burden of providing reasons to support positions, and all lines of justification must rely at some point on unproven premises.[42] Universal approaches to rights also need not be presented as operating in a mechanistic fashion. People can be counted on to disagree over the concrete implications of jurisprudential arguments whether they are particular or universal in character. No worthwhile approach to constitutional analysis can operate automatically or eliminate divergence of opinions. What we should demand of interpretive approaches is that they identify which kinds of reasons are doing the work.[43]

Since our focus is on whether universal arguments, broadly understood, may figure in the interpretation of constitutional rights, it is not necessary here to enter the controversy over the relation between natural law (traditionally viewed as moral directives) and natural rights (viewed as limitations on legitimate authority).[44] We will see, though, that the justices' use of universal arguments has been more akin to the concept of natural rights.[45]

Rights Interpretation and Universality: An Overview

Dating to the founding era, the Constitution's authority has been understood as rooted both in popular sovereignty and in prepolitical principles.[46] Thus, from the beginning, the justices faced the question of whether judicial opinions could appeal to universal arguments, or whether judges

only had authority to rely on particular arguments. This book investigates the manner in which the justices have responded to this question, demonstrating an axis of disagreement between two approaches to interpretation.[47] One approach has insisted that judges must rely exclusively on particular arguments (referred to here as an "exclusivist" approach to interpretation). Justices advocating this approach have treated constitutional rights as reflections of popular will, with interpretation guided in the main by constitutional text, the Framers' intentions, and traditional understandings.[48] A competing approach has insisted that judges, at least in some instances, may appeal to the force of universal standards or principles (referred to here as a "universalist" approach to interpretation).[49] Justices have expressed universal arguments in a variety of formulations, including, for example, rights following from the "very idea of a government, republican in form";[50] requirements "implicit in the concept of ordered liberty";[51] and standards for "determin[ing] whether a challenged punishment comports with human dignity."[52]

In practice, however, justices have intermingled universal and particular arguments without explaining the relation, thus calling into question whether the universal arguments are doing any independent work. In *Atkins v. Virginia* (2002), for example, in which the court held that the execution of mentally retarded persons violated the Eighth Amendment, a 5–4 majority asserted its prerogative to conduct an "independent evaluation" of whether a challenged practice comported with the Eighth Amendment, which included considering the requirements of "the dignity of man."[53] Yet Justice John Paul Stevens's opinion for the court also leaned heavily on recent shifts in public attitudes and state practices without making clear how these considerations related to the justices' evaluation of the requirements of dignity. Would the court have reached a different decision if the nation's "evolving standards of decency"[54] did not cut in the same direction as the court's own evaluation, and, if not, in what sense was the justices' evaluation independent? As is typical in contemporary cases relying on universal arguments, the opinion did not address these basic questions regarding the justification for the decision.

Similarly, in *Lawrence v. Texas*,[55] which invalidated a state law that made it illegal for two persons of the same sex to engage in certain intimate acts, the majority's reasoning suggested reliance on universal principles,[56] while also hinting that shifts in predominant public policies or attitudes could sway the meaning of constitutional rights.[57] The opinion, though, did not indicate the relation between these two distinctive kinds of argument. Although the case stoked debate on questions

about constitutional interpretation, including the proper role of foreign law,[58] state practices,[59] and public opinion,[60] and whether the justices may recognize evolution in the meaning of rights,[61] my critique focuses on a more fundamental aspect of Justice Anthony Kennedy's opinion (and the court's jurisprudence generally): a core ambiguity regarding the kinds of reasons that count in constitutional interpretation. This kind of confusion, though not new, has been exacerbated by an increasing tendency in the court's jurisprudence to stress reliance on particular arguments in areas where universal arguments have figured importantly, without clarifying whether universal arguments retained an independent role.[62]

Justices using universal arguments have insisted that they enable constitutional rights to operate as an independent check on majority power. But universal arguments cannot serve this function if opinions appear to turn on trends in state legislation. Hollow incantation of universal arguments undermines them without acknowledgment. The court's jurisprudence is troubling if one accepts the premise, expressed by many justices, that the judiciary needs lines of reasoning that do not reduce to a reading of mass preferences. One approach on the court denounces universal arguments, and another combines them with particular arguments in ways that undercut their independent force.

The justices need universal arguments to justify changes in constitutional meaning that are independent of predominant public attitudes. Due to pervasive concerns about the undemocratic character of judicial review, however, the justices understandably do not want to lead with their chin by highlighting reliance on universal arguments. The upshot is muted universal arguments immersed in citations to traditions and prevalent attitudes. This unexplained melding of sources prevents litigants and others from fully engaging the arguments driving constitutional decisions.

Contemporary constitutional theory suffers from a similar kind of confusion regarding the basis of rights.[63] As on the court, one school advocates exclusive reliance on particular arguments. Legal scholarship has been preoccupied with the question of how to reconcile judicial review and democratic values.[64] The most common exclusivist strategy for addressing this "countermajoritarian difficulty"[65] views constitutional requirements as deriving authority from the process of enactment. On this view, the enforcement of rights to block legislative acts is consistent with democracy because the people express their will through multiple avenues. One set of procedures leads to ordinary legislation, and another enacts constitutional provisions. The judicial invalidation of legislation amounts to enforcement of popular will as expressed in its supreme legal

form. An exclusivist approach can provide justifications for interpretations that are distinct from views on the substantive questions raised by a constitutional dispute. Since disagreement on political questions is inevitable, it is essential that laws be grounded in a source of authority that can be accepted even by citizens who disapprove of specific policy outcomes. Although judicial decisions are not democratic in the same way as legislation, exclusivist interpretation allows judges to maintain that their opinions implement the enactments, customs, and understandings of the American people.

Many theorists, however, reject the notion that rights should be viewed as expressions of popular will. An influential school in constitutional theory, associated most famously with Ronald Dworkin, views interpretation as aiming toward moral progress and making the Constitution the best that it can be. Proponents hold that positive social change can be advanced through a proper approach to constitutional interpretation set within a larger, substantive political theory. Adherents of this school (referred to here as "aspirationalism") emphasize that rights provisions embody "abstract moral principles"[66] and that judging entails moral reasoning. Since an aspirationalist judge participates proactively in the articulation of the nation's highest ends,[67] aspirationalist accounts open into theories of political morality.

I contend that aspirationalist accounts produce confusion regarding the kinds of reasons underlying interpretation by failing to acknowledge the significant role that universal arguments necessarily play in their analysis.[68] Aspirationalists typically deny reliance on appeals to universal principles,[69] stressing that interpretation within their frameworks is constrained by the nation's particular history and political context.[70] Their accounts, however, require a great deal of substantive political theorizing to flesh out the implications of extremely broad principles. The attempt to present these principles as seriously constrained by American history loses plausibility because the principles are conceived at such a high level of abstraction. The aspirationalist approach is imbued at every stage with an orientation toward the exercise of independent normative judgment, which underwrites the recognition of new rights.[71] Aspirationalism is not interested merely in figuring out how to realize the Constitution we have inherited, but in revising the Constitution into one that is worthy of respect. Adherents inescapably rely on universal arguments to distinguish the elements of American history that should be honored from those to be discarded on the way to moral progress. The crucial justificatory work is done by independent normative reasoning through the process

of interpretation, not by the inertial force of history or expressions of popular will.

Confusion regarding the basis of rights results from a fundamental tension in American constitutionalism that complicates the articulation of coherent interpretive frameworks. We want grounds for interpretation that are consistent with democracy but without being tethered to political decisions and predominant attitudes that are morally objectionable. The central preoccupation of constitutional theory is a jigsaw puzzle. Scholars largely agree that constitutional interpretation must be: consistent with democratic values; a meaningful check on political decision making; able to justify certain non-negotiable decisions, such as *Brown v. Board of Education*;[72] and sufficiently determinative to constrain judges. The challenge is to make the pieces fit. Many of the most prominent works in constitutional theory represent valiant attempts finally to solve the puzzle.

Instead of proffering another attempt to conquer the puzzle, I propose recognizing that it cannot be solved (at least not in the form in which it typically is posed).[73] That is, no single approach to interpretation can accommodate all of the pieces. Rather than bringing us closer to reconciling the fundamental tensions in American constitutionalism, the continued pursuit of solutions to the puzzle produces confusion with respect to the most basic question about any interpretive theory: which kinds of reasons are doing the work? The heroic attempt to make all of the pieces fit ends up deforming them beyond recognition.

Two distinct kinds of constitutional argument serve vital roles but work in incompatible ways. Particular arguments provide reasons for people to accept collective decisions that they reject on substantive grounds, and universal arguments provide reasons for ruling out certain policies despite their political enactment and popular support. The two kinds of argument operate in essentially distinct manners. Particular arguments find their justificatory force in the history, enactments, and understandings of the American people, while universal arguments appeal to principles with a validity that is independent of the nation's unique context. The alternative approach that I outline proceeds in two stages ("dual-stage review"). In the first stage, judges use only particular arguments to discern what constitutional provisions require. The crucial role that this kind of reasoning plays is to provide a basis for interpretation that can be accepted even by people who disagree with the substantive outcomes of specific cases. The arguments appeal to principles and understandings that have been endorsed by the American people as manifested by enactments and accepted understandings. In the overwhelming majority

of cases, only this first stage of reasoning should find its way into judicial opinions. The second stage of analysis, where invoked, consists of universal arguments. Judges only would invoke universal arguments on rare occasions to explain why a public action was unacceptable despite its roots in tradition or popular approval. The conventional response has been to deny that judges legitimately may rely on such arguments. I contend, however, that the need for universal arguments is so strong that jurists and theorists end up relying on them more than they are willing to admit. Maintaining that judges may draw on freestanding universal arguments might seem radical, but reliance on universal arguments long has been an integral part of constitutional jurisprudence. Thus, I am not advocating expanded reliance on universal arguments, but, rather, a more candid acknowledgment of their already substantial role in constitutional discourse.

My defense of a limited role for universal arguments draws broadly on Locke's *Second Treatise* for an understanding of the relation between universal and particular arguments. In Locke's framework, universal principles set bounds around an area within which popular will is given free rein. Universal principles limit what people may do even in the absence of positive law and establish the purposes for which people create governments. Actions by the members of a particular political community create government and lend authority to the community's collective decisions. Even after the establishment of a political community, however, universal principles limit what the government legitimately may do, since the people authorize government specifically to protect rights with a prepolitical basis. Thus, the choices of a particular community's members ground the authority of enacted laws, while universal principles limit the scope of public power.

Locke's theory provides a compelling account of the relation between universal and particular bases of rights but gives rise to a difficulty: how can a community's policies be limited by principles with a basis independent of the community when they only can be imposed by members of the community? The remedy in Locke's framework for governmental violation of universal limitations on government is to install a new government. The *Second Treatise* provides no mechanism short of revolution to address instances in which the exercise of public power transgresses the bounds of legitimacy. Judicial reliance on universal arguments in interpreting constitutional rights can be understood as an imperfect but appealing mechanism for setting limits on the community's preferences writ large (that is, as manifested in all its forms, including

even the Constitution itself). Democratic procedures ground the community's decisions, and universal arguments provide a language for describing limitations on government that do not reduce to measurements of power. In the hands of judges, universal arguments function as an institutional backstop that provides a potential remedy when democratic procedures fail to respect bounds on the legitimate scope of government.

Reliance on universal arguments raises concerns about the scope of judicial power. These concerns are mitigated in part by conceiving of universal rights as serving only the limited role of setting bare minima for the acceptability of public policies. Aspirationalism aims to make the Constitution and the nation the best they can be. As a result, the tendency to constitutionalize political issues and the need for universal arguments are built into its DNA. By contrast, the approach proposed here views only the people as empowered to determine the community's highest ideals. When invoked, universal arguments are admissible only to set outer bounds around the policies that the community may adopt in pursuing those ideals.

Moreover, insisting on the candid articulation of universal arguments would buttress an important check on the judiciary. Judges potentially are constrained by an institutional context that affords other participants a role in shaping law. Litigants make arguments developing the kinds of reasoning used by judges in earlier cases. Opinions that obscure the grounds of decision undermine the ability of other legal actors to press for decisions in accordance with principles articulated in previous opinions. Justices would address concerns over undisciplined judging best not by using universal arguments in an opaque manner, but by more openly developing the universal analysis on which some of their decisions depend.