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A Reply to Professor McConnell

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WHITHER MORAL REALISM IN CONSTITUTIONAL THEORY? A REPLY TO PROFESSOR McCONNELL

SOTIRIOS A. BARBER

In trying to explicate the meaning of the ninth amendment and its current political relevance, I have criticized Robert Bork's inkblot theory of the amendment and concluded, in the main, that the Constitution would have all of our officials strive for justice as they perform their several lawful functions. By "justice" I mean justice, the real thing, not this or that historical version of the real thing. My ninth amendment paper cites and joins some of my other writings in contending that it is the American constitutional document, in light of the American constitutional tradition and the moral intuitions of ordinary men and women throughout our history, that requires this striving for justice itself, and requires it of all constitutional functionaries, including judges. Professor McConnell seems eager to label my views "pure" or "radical anticonstitutionalism."1

I cannot be happy that Professor McConnell employs such a harsh name, especially since I think he proceeds to his judgments more through self-assertion and distortion than through responsible scholarly argumentation. But Professor McConnell has his point of view, and he does give me an opportunity to raise a question of general theoretical interest concerning the relationship between our approaches to constitutional interpretation. On the one hand, he and I seem to agree that moral skeptics have nothing to offer the field of normative constitutional theory. We both consider moral skepticism philosophically bankrupt despite its current status as entrenched academic orthodoxy. Each of us claims to embrace some form of moral realism. We disagree, however, on what the basic realist position in constitutional theory ought to be.

I shall try to show here that our disagreement centers on the role of reason or reasoning in constitutional thought and adjudication. My approach emphasizes an attitude and a set of practices he derides as "the ratiocination of . . . judge[s]." He in turn emphasizes what I regard as a degrading and potentially tyrannical faith in "sources" which he assumes to be clear and powerful enough to settle the most important questions of constitutional principle, thus eliminating the need for ratiocination in ef-

forts to find the meaning of the law. The question posed by this disagree-
ment is, therefore: Whither the new realism in constitutional theory?—
What should a belief in simple justice mean for approaching the institu-
tional and substantive issues of constitutional interpretation?

As indicated, I see certain problems of scholarship in Professor Mc-
Connell's treatment of my article. Problems of this sort normally have
little theoretical significance. Yet I believe that the scholarly defects of
Professor McConnell's article reflect his basic answer to the question,
whither moral realism. Discussing these defects is therefore one way of
testing Professor McConnell's constitutional jurisprudence. I shall di-
vide the following comment into four parts. Faithful to a principle of
interpretive charity, though not without doubts about its content and ap-
plication here, I shall first bring what limited order I can bring to what
Professor McConnell seems to say about the ninth amendment. I shall
then discuss Professor McConnell's apparent view of the source of con-
stitutional meaning in hard cases, relating that view, next, to Professor
McConnell's argumentative methods and tone. I believe this will be
enough to dissuade most readers from Professor McConnell's approach.
Yet I may have to concede in conclusion that I am unable fully to refute
what I take to be Professor McConnell's most basic position. He may
end up right notwithstanding his problems—perhaps even because of
them.

I. McConnell on the Ninth Amendment

A. Rights Galore: Old, New, and Unenumerated

Though he defers a full theoretical statement of his views to a future
work, Professor McConnell sketches an affirmative theory of the ninth
amendment in the course of criticizing my position. That theory is not
what one might have expected from an active defender of Robert Bork.
To begin with, Professor McConnell quietly declines to view the ninth
amendment as either an inkblot or a restatement of the tenth amend-
ment. Equally noteworthy is his description of himself as a moral realist
who rejects the moral skepticism of most lawyers and others among what
he calls the country's professional elite. What Professor McConnell
neglects to mention is that his beliefs in a moral reality and a meaningful
ninth amendment leave only a contingent and derivative link between his
constitutionalism and Bork's. McConnell and Bork differ on the level of
philosophic fundamentals.

2. Id. at 105.
McConnell the moral realist may join Bork's opposition to judicial power, but he can hardly accept Bork's underlying reasons. No realist can accept an argument whose premises include Bork's well-known view regarding the equality of "gratifications." Professor McConnell must justify his opposition to judicial activism on different grounds. He therefore argues from empirical premises regarding the moral capacities of officials and the educative capacities of institutions. He enters a negative assessment of the morality of the legal profession and the country's professional elite as a whole. And he talks not about an equality of gratifications, but about a constitutional arrangement he believes most likely to approximate justice in the long run while enhancing the political morality of the people of the nation and their elected institutions. Standing alone, this argument leaves Professor McConnell with no principled opposition to judicial power. If lawyers and judges had or could acquire the requisite virtues, and if a strong judiciary should prove essential to justice and the nation's moral growth, Professor McConnell might disagree in all respects with Bork's opposition to judicial power.

I mention this possibility because I am not sure it is completely hypothetical. Professor McConnell may be in the process of developing a theory that calls for a most powerful judiciary. When he quietly agrees to lift the inkblot and distinguish the message of the ninth amendment from that of the tenth amendment, Professor McConnell accepts the invitation of the ninth amendment to embrace a doctrine of judicially enforced unenumerated rights. Indeed, he proposes a formidable list of such rights. A potent example is what he refers to as "protection for autonomous institutions potentially in conflict with the central government." We can wonder whether Professor McConnell will ever manage to defend this associational right in a manner consistent with his opposition to the jurisprudence of *Roe v. Wade*, for this "protection for autono-

3. *Id.* at 105-06.

4. Beyond the philosophic and stylistic matters which I emphasize in this reply, Professor McConnell ignores key empirical questions associated with his view. First, there is the challenge to constitutional conservatives to produce evidence in behalf of their view that a stronger tradition of judicial deference would probably have made for a more principled politics in America. See *id.* at 29-30; cf. R. DWORKIN, *A MATTER OF PRINCIPLE*, 69-71 (1985). Second, in rejecting what he calls the "Meese-Barber position" (he might have said the Jefferson-Lincoln position) on a plurality of constitutional interpreters, Professor McConnell assumes, inter alia, that under all or most social conditions judges will probably be impervious to the constitutional opinions of other institutions, regardless of their quality. See McConnell, *supra* note 1, at 102-03. This assumption may reflect Professor McConnell's negative assessment of the legal profession generally. For further comment on his assessment, see *infra* text pp. 127-29.

5. For the distinction between principled and merely prudential opposition to judicial activism, and criticism of other ostensibly nonskeptical arguments against judicial activism, see Barber, *Epistemological Skepticism, Hobbesian Natural Right, and Judicial Restraint*, 48 Rev. Pol. 374 (1986).
mous institutions” turns out to be a very pregnant guarantee. As Professor McConnell conceives it, the right includes protection for (1) “churches and synagogues,” (2) “colleges and universities,” (3) “the press,” (4) “voluntary associations,” (5) “families,” and even (6) “neighborhoods.” The reader should note how this herd of associational rights begins modestly with those that overlap enumerated and established first amendment rights, (1) - (3), multiplies into penumbras of enumerated rights, (4) - (5), and finally expands to something one would have thought a New Right theorist would be the first to call a “new right,” the protection of (6) “neighborhoods.”

Professor McConnell’s list of unenumerated rights also includes a family of property rights. He would protect things ambiguously referred to as “decentralized economic power through private property” and a “guarantee of economic opportunity through free enterprise.” Lest there be any mistaking the historical significance of these economic rights, whatever they may precisely be, readers should note Professor McConnell’s observation that they have “been challenged by intelligent people who take a different view of natural right and simple justice,” especially elements of the New Deal who believed “a more powerful central government . . . necessary to the public weal,” and those who “think that socialism is preferable to free enterprise.” Here, then, we may have judges reading the Constitution as protecting not only private property but “decentralized economic power,” as opposed to centralized representative institutions, and “free enterprise” as opposed to New Deal “socialism.”

For all his talk about my radical anticonstitutionalism, Professor McConnell even lists a few judicial warrants for the continuing discovery of unenumerated rights and an open-ended guarantee of substantive justice for all on a case-by-case basis. I mean substantive protection above and beyond the rights he lists or could list. Thus, he refers to a guarantee of “legislative generality.” This right seems to have substantive import for Professor McConnell because he separates it from a guarantee of “procedural regularity.” He also lists, as either one or two rights, “equality before the law and freedom from invidious distinctions”—not just invidious distinctions on specific grounds like race or even sex, but invidious distinctions, period. There is more than enough room in these

7. Id.
8. Id. at 108.
9. Id. at 107.
10. Id.
formulations for what Professor McConnell calls the "notorious" doctrine of substantive due process, along with substantive equal protection—doctrines he decries as warrants for open-ended judicial review. Surely we are entitled to wonder how Professor McConnell can say elsewhere in his article that "[o]pen-ended judicial review does not give greater protection to natural rights—it simply substitutes the judge's understanding of natural rights for the Constitution's."12

B. Moral Realism and Legal Positivism? A Troubled Union

An explanation could lie in a course that Professor McConnell flirts with but may already have abandoned. The course in question would derive unenumerated rights from purely conventional sources. Professor McConnell says at one point that the ninth amendment means "precisely what it says, and no more." He then quotes the text of the ninth amendment and adds the following remarkable paraphrase of what the amendment "precisely . . . says":

In other words: the Bill of Rights, indeed the entire Constitution, is not the only source of individual rights. Common law, state statutes, federal statutes, state constitutions, administrative regulations, municipal ordinances, contracts, familial relationships and other sources all are legitimate bases for positive law rights under our system. The framers thought it useful to express in no uncertain terms that the adoption of a Bill of Rights would not, by negative implication, abolish these rights. Nothing in the language or history of the ninth amendment suggests that the ratiocination of the judge is one of the sources of rights recognizable by positive law. Nor has such a reading ever been the basis of the holding of a majority opinion in the Supreme Court.14

Professor McConnell should forget this statement, if he has not already done so. Readers with enough interest and training to follow this debate will surely adjudge each of Professor McConnell's claims virtually self-refuting. No literate reader needs any commentary on Professor McConnell's proposition that the ninth amendment embodies "in no uncertain terms" the framers' intent to protect only "positive law rights," as opposed, presumably, to natural rights, whose meaning can lie only in "the ratiocination of the judge." Nor need anyone bother to criticize Professor McConnell's faith that repairing to the "positive law" and the "sources" he enumerates avoids or even mitigates the ratiocination of

11. Id. at 101, 103, 104
12. Id. at 100-01.
13. Id. at 94.
14. Id. at 94-95
judges.\textsuperscript{15} Also undeserving of formal refutation is the suggestion that federal judges can void congressional enactments for violating rights derived solely from state statutes, state constitutional provisions, common law precedents, and even federal statutes. What can he have had in mind when proposing such sources of ninth amendment rights? Should Professor McConnell ever try to clarify these suggestions, he will surely withdraw them.

It comes as no surprise, therefore, that elements of Professor McConnell's thought combine to suggest a different course. He ventures beyond positive law sources at one or two points when referring, approvingly, to the Constitution's purposes. "Traditional constitutionalism," he says, "is not hostile to judicial enforcement of aspirational principles—if they can fairly be discovered in the text, structure, and purposes of the Constitution."\textsuperscript{16} He may not have decided whether by the Constitution's purposes he refers merely to posited ends or also to something real—whether, in other words, the framers thought they wanted justice when they advanced their conception of justice, or whether they wanted merely to assert themselves. He at least has some doubts.

Immediately following the statement just quoted he contrasts a judicial concern for constitutional purposes with "[o]pen-ended" judicial protection for "natural rights."\textsuperscript{17} Here constitutional purposes and simple justice seem somehow opposed. But an earlier part of his discussion connects the Constitution's purposes with rights beyond the positive law. In distinguishing "natural right" from "positive law," Professor McConnell says:

Positive law is the law of the legal system; it is the law the judges are bound to enforce. Natural right is a standard of judgment against which we can determine whether positive law is good or bad, just or unjust. The founders of the United States were believers in natural right; this much is unmistakable from their Declaration: "We hold these truths to be self-evident . . . ." The Constitution was framed in accordance with the people's understanding of natural right; we know this from the preamble's statement of intentions. But the Constitution is not merely a proclamation of natural right. It is positive law. It is persuasive to the extent it accords with natural right, and that is much of its appeal, but it is authoritative because it was ratified by the people.\textsuperscript{18}

\textsuperscript{15} For now familiar arguments against assumptions like Professor McConnell's, see R. DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985); J. ELY, DEMOCRACY AND DISTRUST 43-72 (1980).
\textsuperscript{16} McConnell, supra note 1, at 100.
\textsuperscript{17} Id. at 100-01
\textsuperscript{18} Id. at 99 (footnote omitted).
This passage struggles to affirm the exclusively positive status of the Constitution. But it is less than a complete success, for in the end it connects both the law of the Constitution and the framers’ purposes with simple justice. When Professor McConnell says the Constitution is not merely a proclamation of natural right, he at least suggests that the Constitution is partly an expression of the desire for justice. To this extent he keeps faith with the claims of the Constitution, the framers, the tradition, and what reflective men and women have typically required in order to respect their institutions, that is, in any sense of “respect” closer to admiration than fear.

I note at this point that Professor McConnell steers relatively clear of my argument that, given our ordinary moral intuitions, one would calumniate democracy, the Constitution, the framers, the tradition, the law, the public, and other normative authorities by separating them altogether from a concern for justice itself—the real thing. He cannot challenge that argument without compromising his own view that the Constitution “was framed in accordance with the people’s understanding of natural right” and “is persuasive to the extent it accords with natural right.” Yet he insists that the Constitution “is positive law” and “authoritative because it was ratified by the people.” Putting these statements together Professor McConnell might easily have emerged with the plausible and traditional view that the Constitution is a positive law that envisions the protection of natural rights. This would have avoided the problem of separating what Professor McConnell sees as the reason for the Constitution’s authority from the reason for its persuasiveness.

Professor McConnell prefers to hint that the Constitution’s authority and the reason for its persuasiveness are opposed to each other. But this suggestion is untenable. If, as he says, ratification is responsible for the Constitution’s authority and the Constitution’s persuasiveness is responsible for its ratification, and if, as he suggests, the Constitution’s perceived relationship to justice is responsible for its persuasiveness, then the Constitution’s authority is connected to its perceived relationship to justice. I need not repeat here an argument I have attempted elsewhere about the precise links between justice and the Constitution’s authority as law. For present purposes I need only show that a link of some sort between justice and authority is present, if precariously, in Professor McConnell’s own thought. To see further that this is the case we might ask

19. Id.
20. Id.
why Professor McConnell emphasizes a devotion to natural right as responsible for ratification. Why not rather some combination of less noble motives like the desire to protect slavery, secure a windfall for speculators in government bonds, advance the cause of oligarchic power, and wipe out the Indians? When Professor McConnell identifies natural right as the cause, he assumes that he must look beyond possibly unjust historical motives and account for positive authority partly by attending to the rhetorical claim typical of all such authority, viz., that it seeks justice.

Yet Professor McConnell mentions slavery, and suggests that Lincoln adopted a dutifully positivist attitude against abolition through judicial fiat.22 He also suggests that John Marshall and the authors of The Federalist had a purely positivist view of legal authority. But Lincoln at least appears to have followed Publius in defending constitutional protection for slavery only as a necessary evil.23 And Lincoln seems to have looked to justice, not to the concrete purposes of slaveholding framers, when he called upon the Court to reverse Dred Scott and hold that Congress could outlaw slavery in the territories.24

The upshot of Lincoln’s position on judicial power has to be gauged in light of considerations beyond those Professor McConnell takes up. First, there is Lincoln’s “house divided” belief that the nation as a whole had eventually to become either all slave or all free.25 There is also his view that the Constitution had put slavery “in the course of ultimate extinction.”26 In the context marked by these beliefs, asking the Court to overrule Dred Scott can be construed as asking the Court to play its part in achieving a constitutional aspiration to rise above conditions responsible for the initial protection of slavery. Secondly, there is Lincoln’s own conduct during the war. When justifying his suspension of the writ of habeas corpus, he all but claimed power under the “take care” clause to disregard sections of the Constitution that stood in the way of securing the system’s essential objectives.27 And he later rationalized the Emancipation Proclamation as a necessary means to the successful prosecution of the war.28 Lincoln’s approach thus turns out to be a poor model for what Professor McConnell has in mind for the judiciary.

Without pretending to settle the historical question of Lincoln’s

22. McConnell, supra note 1, at 99-100.
25. Id. at 372-73.
26. Id. at 360-61, 373.
27. Id. at 600-01.
28. Id. at 690.
views on the Court, let us take Lincoln's beliefs about presidential power and consider what those beliefs ought to mean for Professor McConnell. Professor McConnell seems to think that the president's position vis-a-vis the law is similar in an important respect to that of the judiciary. I infer this from his statement that "[w]ithin the scope of authority defined by the Constitution, the decisions of representative institutions must be enforced by executive officers and judges, whether or not they agree with the substance of the decisions."29 If Lincoln's actions represent Professor McConnell's view of fidelity to the law, and if we agree with Professor McConnell that the President and the Court have similar obligations to follow the law, then, for courts as with presidents and all other officials, the meaning of the laws—i.e., the real meaning of laws that live up to the public claim of all laws—is to be found as Lincoln found it, not in historical texts and purposes construed separately from a desire for simple justice. As Harry Jaffa has shown, Lincoln's construction of the Declaration of Independence was oriented to a conception of equality as an end of government that was different from the Lockean conception that was shared by the signers of the Declaration.30 Professor McConnell is therefore far from success in enlisting either Lincoln or the original constitutional document to the cause of New Right legal positivism.

Professor McConnell also tries to enlist John Marshall and *The Federalist* to the cause. He describes Marshall and Publius as strict legal positivists on the strength of isolated statements which he construes in a manner that ignores the broader philosophies of which the statements are but parts. My ninth amendment article outlines an argument about Publius's constitutional philosophy and footnotes another article in which I discuss both Marshall and Publius in greater detail. These articles defend a number of contentions that I should have expected Professor McConnell to try to refute. I argue, for example, that *The Federalist* No. 78 envisions judges "'mitigating the severity'" of "'unjust and partial laws'" even when these laws are beyond the Court's reach on positive constitutional grounds.31 I argue that conceding such power to unelected judges is in keeping with Publius's repeated view that there is a difference between the public's objective interests and its transient inclinations, and that the duties of constitutional officials are defined in terms

31. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI-KENT L. REV. 67, 78-79 (quoting *The Federalist* No. 78, at 528 (A. Hamilton)).
of the former. 32 I also cite a leading student of Marshall's jurisprudence who offers a considerable body of evidence for the view that Marshall accepted a Lockean commercialism (and decided cases accordingly, where feasible) not just as an inheritance, but because he considered it a true political teaching. As Robert Faulkner puts it, and as I quoted him, Marshall looked upon Locke's teaching "as the private law, and the public law, dictated by nature itself." 33

I cannot confront Professor McConnell's arguments against these arguments, for instead of arguments he offers little beyond mere counter-assertion. It therefore remains to be seen how he can turn Marshall's judicially active concern for national power and vested rights into emblems of New Right majoritarianism. 34 It also remains to be seen what Professor McConnell can do with Publius's belief that the legitimacy of popular government depends on its reconciliation to higher standards of political morality, 35 that "Justice" has been and will remain "the end of government," 36 and that where constitutional forms permit majorities to unite and oppress the weak, there is no real law, for "anarchy may as truly be said to reign, as in a state of nature." 37 Whatever the future may bring, Professor McConnell is still a long way from showing that Publius and Marshall held historical consent, necessary though it be, as the sole foundation for legitimacy. 38

C. McConnell as Natural Lawyer? Faith of Our Fathers

But Professor McConnell may want to develop his argument in a different direction, for, as I have pointed out, he strays from the legal-positivist course when he characterizes the purposes of the Constitution

32. Id. at 78-79 (citing THE FEDERALIST No. 71, at 482); see also THE FEDERALIST No. 63, at 422-25. For a more extensive treatment of this subject, see Barber, Judicial Review and The Federalist, 54 U. CHI. L. REV. 837 (1988).
35. See THE FEDERALIST No. 9, at 50-51; id. No. 10, at 57-58, 60-61.
36. Id. No. 51, at 352.
37. Id.
38. This is McConnell's suggestion in McConnell, supra note 1, at 97-98, and in his rather arbitrary and purely formal definition of "constitutionalism," id. at 89. Since Publius and Marshall linked legitimacy and constitutionalism with a substantive notion of justice, they could not have seen consent as both a necessary and sufficient condition for either constitutionalism or legitimacy. For a discussion of the ambiguous status of consent in classical liberalism, see R. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 41-45 (1985).
as natural rights and allows that judges can look to those purposes when deciding hard cases. If, as he says, the purposes of the Constitution can serve as sources for judicially unenumerated rights,\(^{39}\) and if, as he also says, the purposes of the Constitution include the protection of natural rights,\(^{40}\) then it would seem to follow that natural rights can serve as sources for judicially enforced unenumerated rights.

To Professor McConnell’s previous list of positive-law sources of unenumerated ninth amendment rights, we may therefore add what he calls “natural rights.” All that would prevent us from doing so is Professor McConnell’s hostility to an open-ended judicial protection of natural rights. That hostility is not a consistent feature of Professor McConnell’s thought, as I have pointed out. But it does seem to predominate. What we would need, therefore, is a theory of natural rights as a closed body of norms. What seems to trouble Professor McConnell most is not the openness of the positive law to higher standards of justice; what he cannot accept is openness or “ratiocination” at the level of ultimate constitutional standards. Hence his statement that the only hope for controlling unavoidable judicial judgment and discretion “is that judges will be steeped in the philosophy of the Constitution, and will interpret it in a way that is true to the vision of the framers and ratifiers.”\(^{41}\) We must press a little further toward the bottom of Professor McConnell’s thinking.

I remind the reader again that Professor McConnell does not challenge my argument that one calumniates the framers and other political authorities by imputing to them any purpose less than justice itself. No one can be faithful to the framers and their project by holding that they did not intend their rhetoric to be taken seriously, or that they did not really believe in simple justice, or that we who are more enlightened ought to disregard their naive talk about justice, or that they simply delighted in asserting their parochial conception of justice regardless of its proximity to the real thing.

So (continuing to develop the nonpositivist option for interpreting his thought) if we assume that Professor McConnell opposes open-ended judicial review under general constitutional standards, both as a moral realist and as one who fully accepts the authority of the framers, he probably believes: (1) that the framers had one basically coherent and unambiguous philosophy of constitutional government; (2) that this phi-

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40. Id. at 99.
41. Id. at 91; see also id. at 100.
losophy can be exhaustively described, at least in principle, by an enumeration of particular norms, including a closed body of rights; and (3) that it is impossible to be faithful to the more authoritative intentions of the framers by improving on their historical understanding of justice and other values, because those conceptions are simply right, or as right as they can be in an imperfect world. These beliefs would explain Professor McConnell's suggestions that the Constitution seeks nothing higher than a particular conception of justice, and that constitutionalism excludes a right to revolution. They can also explain his ridiculing my views regarding the defeasibility of all historical conceptions of justice and the consequent need for dialogical practices and attitudes as essential for approximating the real wants and intentions of those who are objectively worthy of political authority.

For what I call "self-critical striving" toward a moral reality whose elusiveness renders our conceptions defeasible, Professor McConnell substitutes total immersion in what he sees as the one true historical teaching, the philosophy of the framers. Once possessed of the spirit of that vision, we apparently can dispense with "the ratiocination of ... judge[s]." Presumably, the spirit itself will simply reveal the unenumerated rights, as needed, and "in no uncertain terms." For judges, and all other subjects of the Constitution, constitutional meaning is not the object of some exercise in ratiocination or philosophic quest. Constitutional truth is just given, revealed somehow to those completely immersed in the right source.

Professor McConnell's approach is thus reminiscent of a model of reality which grounds the world and our knowledge of it ultimately in some willful act. Bork seems to operate from a humanistic version of this basic model when he grounds all moral truth and reasoning in the ethical systems of different societies, systems which, he says, have "no objective or intrinsic validity of [their] own." This model can also explain Bork's belief that our most important freedom is the freedom to enact our moral preferences into law. True freedom apparently means participation in a power mighty enough to dictate the very meaning of right and wrong, along with other values—true freedom included, perhaps. At bottom,
for Bork, the source is force, and convention is both. As a self-styled moral realist, Professor McConnell cannot accept Bork's brand of moral skepticism. He is therefore left with a version of the willfulness model that posits a will higher than that of the different societies, a will that can function as the source of real truth. Professor McConnell suggests something like this when he assumes that a secular philosophical orientation precludes a concern for moral truth. I would argue, by contrast, that at least some aspects of a secular outlook are essential to an authentic or unequivocal moral realism. We associate this-worldly rationalism with such an outlook, and no one can deny ratiocination a powerful role because no one can realistically deny either our presuppositions of a moral reality or our capacity to challenge, or at least wonder about, any proposition regarding moral truth. I would therefore be prepared to question matters of faith and commitment in this context, and I would support democracy or a conception thereof only provisionally, and only as the latest of a continuing stream of arguments might favor. Bork supports what he supports basically because it's there. And if I am right about Professor McConnell, he would move as faith in a certain vision moves him.

II. ON MCCONNELL'S ARGUMENTATIVE METHOD AND TONE

Now let us see if his jurisprudence can explain the scholarship style of Professor McConnell's commentary on my article. The reader should bear in mind that I am assuming that Professor McConnell has or will eventually resolve the tensions in his thinking in the only way he can, against his positivist inclinations and in favor of his realist inclinations.

Because Professor McConnell seems to consider the framers' historical understanding of constitutional language (something I would distinguish from the real meaning of the language itself) as unerring truth revealed only to those who abandon argument for complete immersion in the right vision, he may think he is excused from reasoning with those who are not completely immersed. The unimmersed either do or do not

49. See McConnell, supra note 1, at 105.
50. This is not to reject all forms of reliance on faith, commitment, community sentiment, and tradition, for these sources of authority can include a reliance on ratiocination or, as I prefer, self-critical striving to realize the implicit claims of all rationally defensible authority. For works in constitutional theory that combine a reliance on reason with various of these other forms of authority, see M. BALL, THE PROMISE OF AMERICAN LAW (1981); R. DWORKIN, LAW'S EMPIRE (1987); M. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY (1988); S. Macedo, Liberal Virtues: A Liberal Theory of Citizenship, Virtue, and Community (forthcoming 1988); G. Walker, The Deep Structure of Contemporary Constitutional Controversy: Morality, Skepticism, and Augustine (forthcoming 1989).
want justice. If they do not want justice, reasoning with them would perhaps be futile. If they do want justice, then they must want what Professor McConnell is certain the framers wanted, whether they realize it or not, since all who claim to want justice really want the same thing, and the framers’ conception of justice is that thing. Reasoning or argument fails to bring the unimmersed to justice not because they are unimmersed, but because argument cannot bring anyone to justice, only immersion can do that. Exchanging arguments about something implies a critical distance that enables one to weigh the pros and cons, and one cannot be totally immersed at a critical distance. So forget the quest for better arguments. Just do what you can to immerse others; all will thank you eventually.

Such a belief can explain (though, I venture, never justify) the way Professor McConnell neglects such conventional rules of argumentation as those against begging questions, distorting historical facts and distorting the arguments of one’s critics. I limit myself to the most serious examples.

Professor McConnell calls me a radical anticonstitutionalist because I disagree with his conception of constitutional democracy. With Bork and most other New Right constitutionalists, Professor McConnell views the Constitution as an act of majoritarian empowerment; he adopts what I call a model of majoritarian willfulness. I read constitutional logic, language and tradition differently. I see the Constitution as an expression of an aspiration to achieve an intrinsically admirable condition. I have defended my reading at some length in a work that Professor McConnell cites. Moreover, the literature of contemporary constitutional theory contains conceptions of constitutional democracy that differ both from Professor McConnell’s conception and mine. These different answers to the questions of what constitutionalism and the Constitution are, are linked to different theories of constitutional interpretation, constitutional obligation, constitutional rights, the duties of constitutional officials, and so forth. Yet, like Alexander at the Gordian knot, Professor McConnell simply pretends that these difficulties do not exist. In a breathtaking act of question begging, his very first paragraph sweeps aside the central difficulties of constitutional theory and just declares what constitutional democracy is. At no point does he offer a supporting argument. He does not even bother to identify his definition as his defini-

51. See McConnell, supra note 1, at 92 n.15; see also S. Barber, supra note 21, at 39-62, 113-15.
52. See generally W. Murphy, J. Fleming, & W. Harris II, American Constitutional Interpretation 81-180 (1986); W. Murphy, What Is The Constitution? (forthcoming).
tion. He simply asserts it categorically as a straight read-off from reality. So: constitutional democracy is X (never mind the controversy about whether it might be Y or Z); Barber deviates from X (don't mention his reasons, or even that he has reasons); therefore, Barber is a radical anticonstitutionalist.

Professor McConnell does me and the rest of his readers another and related injustice by trying to isolate me as a noninterpretivist who proposes something the Court has never accepted and who displays no respect for constitutional text, tradition, and authorities, either classical or contemporary, on or off the bench. I am not sure what the principle of interpretive charity requires of me at this point, but if I continue to assume that Professor McConnell has read the works on which he comments, then he must know that my theory of the ninth amendment overlaps with a substantive approach to the due process and equal protection clauses, such that the latter clauses can do the work of the ninth amendment, precisely as they have done for the greater part of our constitutional history. There is hardly anything new about the practice of open-ended judicial review, as Professor McConnell himself indicates when he treats substantive due process as such a practice. And if my way of justifying that practice departs from that of most major contemporary theorists (who, incidentally, would not be separately identifiable or known as significant theorists if they agreed with each other in all of the most important respects) Professor McConnell neglects to mention the theorists with whom I do agree on matters of relevance here, theorists cited in my article.

Most regretful is Professor McConnell's account of my theory as one which licenses judges and others to disregard the institutional and substantive limits of the so-called positive law. Yet I hardly appeal from law to justice in any matter of constitutional meaning, whether involving rights, powers, or questions of institutional competence. The closest I have ever come to rationalizing usurpations is a theory of constitutional action in emergencies or circumstances that officials cannot control in constitutional ways. I have argued that as a matter of constitutional logic, institutional boundaries can be crossed only when events have caused actual institutional collapse. Professor McConnell

53. S. Barber, supra note 21, at 105-47, especially 119-30, 145-47; Barber, supra note 31, at 80-83.
54. McConnell, supra note 1, at 101, 103, 104.
55. Barber, supra note 31, at 70 n.12, 72 n.25, 73 n.26, 77 nn.29 & 32, 79 n.40, 85 n.52, 87 n.54.
57. S. Barber, supra note 21, at 190-95; cf. 199-204.
may well find something in this argument to support his charge of "radical anticonstitutionalism," as he conceives it. If he does, however, he will no longer be able to treat Lincoln and Publius as model constitutionalists. I can engage Professor McConnell on this aspect of the question when he reaches it.

In the meantime, I have tried to develop a set of interpretivist proposals. In works that Professor McConnell cites, I claim that the Constitution requires multiple interpreters, a weak rule of precedent in constitutional cases, and a mode of interpretation that proceeds partly through a self-critical striving for better theories of justice.\(^{58}\) My claim to be an interpretivist may prove false, of course. But it is a claim that is backed with arguments. Should Professor McConnell ever deal with those arguments as arguments, he will have to confront the contention that no interpretivist can responsibly avoid the burdens of what Professor McConnell calls ratiocination. To refute this claim Professor McConnell need only show that his version of the source of constitutional meaning is sound and that immersion in it succeeds where ratiocination fails.

I have already commented on Professor McConnell's suggestion that Publius, Marshall, and Lincoln were positivists in the Borkean mold, or vice versa. That suggestion, in my view, is enough to vitiate Professor McConnell's own claim to be an interpretivist—that is, one who acknowledges that there are limits on the interpretations that laws and other texts can legitimately bear. If the reader needs more, consider Professor McConnell's treatment of the Dred Scott case. In brief, he finds the controlling error of that decision to be a natural law conception of property rights that Taney deployed to deny Congress power to exclude slavery from the territories.\(^{59}\) But as we assess this view of the case, we should recall Professor McConnell's agreement with the position that the Constitution protects unenumerated property rights.\(^{60}\) In light of this position, Professor McConnell cannot be altogether opposed to the abstract proposition that Congress should respect the property rights of persons who move from one place to another. What is regrettable in Dred Scott is the additional proposition that Congress has a duty fully to respect property in human beings. That Congress should respect property is one proposition; that the law either has or can legitimately make human beings ordinary pieces of property is quite another. Everything in Dred Scott turns on Taney's affirmative answer to the latter, an

\(^{58}\) S. Barber, supra note 21, at 13-62, 116-20, 145-47; Barber, supra note 31, at 70-71, 72-73, 77-78, 80-83, 84, 86.

\(^{59}\) McConnell, supra note 1, at 101.

\(^{60}\) Id. at 107.
answer he pretended to believe was a clear mandate of the American founding.

Taney tried to give the impression that law and justice were separable and that the applicable texts and traditions pointed clearly in one direction. On the pivotal question—the constitutional status of blacks as persons—Taney affected "pure positivism," if I may borrow a term, precisely the affectation we find in Bork. In treating Dred Scott as an emblem of legal positivism, I emphasize that I am not saying that Taney actually acted in a purely positivist manner, for he did not. I deny that anyone can act in a purely positivist manner. I even deny that anyone can really want to act in a purely positivist manner, except perhaps the fictional constructs of some other-worldly jurisprudence or social science that would move their subjects about by forces fully beyond human capacities. I would support my contention by defending a conception of human action that is linked to notions of reasoned choice and a capacity for reflective criticism. So I am not talking about what Taney actually did; I am talking about his attempt to escape moral responsibility for what he did. That attempt furthered the degradation of both the law and the community by denying that the Constitution is what it says it is: an instrument of justice. Yet Professor McConnell would have us identify Dred Scott as representative of a natural law approach, an approach that denies both the possibility and desirability of excluding moral choice from legal decision. Surely Professor McConnell owes us an explanation.

III. CONCLUSION: CAN "ERROR" SAVE MCCONNELL?

Am I engaging in oppressive acts of name calling and question begging of my own? Perhaps. My theory of Professor McConnell's theory results from an attempt to reconcile his professed moral realism with what he says about immersion and ratiocination. If my construction of his theory sounds like name calling, then there is either something wrong with my argument about the upshot of his views, or there is something wrong with Professor McConnell's views. If my argument is flawed, I know of no conventionally respectable or naturally just cure other than further argumentation from the other side.

61. See id. at 98.
63. For a summary of Taney's political objectives in Dred Scott, see G. White, The American Judicial Tradition, 68-69, 74-83 (1976).
64. See S. Barber, supra note 21, at 224 n.43; Barber, supra note 33, at 290-92.
Yet I concede that in calling for arguments as opposed to assertions and professions of faith, I seem unable to escape presuppositions and conventions associated with the practice of reasoning about controversial matters—a practice whose very status seems the central issue between Professor McConnell and me. So, by my own account of the contest, it is really I who may be begging the question-in-chief. I could point defensively to Professor McConnell's own praise of Professor Suzanna Sherry for "quot[ing] substantial evidence against her own position," praise that attests his respect for the conventions he flaunts in dealing with my arguments. But such a move would only deepen my immersion in rationalist assumptions, for it would apply the same rationalist norm of "integrity" that Professor McConnell applies favorably to Professor Sherry. Perhaps I could try to deny that rationalist assumptions are really controversial since one cannot really engage in political or academic controversy without acting from rationalist assumptions. I could then skewer Professor McConnell for the incoherent act of entering this debate with an article that suggests immersion in something he treats as opposed to ratiocination. But that would prove nothing beyond my determination to sink deeper into the presuppositions whose status is at issue. For even if we cannot question reason and its conventions in a coherent way, we can surely doubt their claims. Since reasoning itself can lead to perplexity about reason and the value of reasoning, we cannot simply excommunicate antirationalist messages like Professor McConnell's, notwithstanding their apparent incoherence. Apparent incoherence may be essential in any attempt to capture doubts about reason and reasoning, doubts real enough to demand philosophic attention and respect despite the possible limitations of language. So my survey of his "errors" may do no real damage to Professor McConnell's basic position.

In fact, an additional consideration forces me to concede that Professor McConnell's criticism of my position may actually be right. Although I can make sense of the Constitution only by reading it a certain way, my reading may be most unrealistic. For it supposes that a properly "constitutional attitude" can obtain among the nation's political and professional leadership, or enough of it to make a difference. I need not devote additional space to the tensions in Professor McConnell's thinking, so I leave aside his own reliance on virtue in the form of judges immersed in the philosophy of the framers. I focus instead on his view that the nation cannot entrust the legal profession with a role in

65. McConnell, supra note 1, at 94 n.32.
67. McConnell, supra note 1, at 91.
pursuing the Constitution’s claim to justice. For, he suggests, members of this subculture are more likely to act from the “prejudices of their class” than a self-critical and public-spirited concern for truth and justice. Professor McConnell may actually hold this negative view of his profession. I say this because he could not fully have intended to address his criticism of my article to any other than the audience he describes. I doubt that his description fits the legal profession. To show that it does not, I would explore Professor McConnell’s assumptions about group identity and reflect on the tension between the prejudice he alleges and the capacities that he presupposes in self and others in the very act of publishing the allegation. But in the end I may be forced to acknowledge that Professor McConnell is both a true and truthful representative of his class. He may be closer than I am to the facts that count.

68. See id. at 105.