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Constitutional Authority in an Age of Moral Indeterminacy

Ralph F. Gaebler*

Graham Walker, *Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects* (Princeton: Princeton University Press, 1990), 173 pp.; $25.00.

Thomas A. Spragens, Jr., *Reason and Democracy* (Durham & London: Duke University Press, 1990), xi + 275 pp.; $39.50. Paperback text ed. (Durham & London: Duke University Press, 1990), $17.95.

In a memorable passage from his book, *The Tempting of America, The Political Seduction of the Law*, former Judge Robert Bork describes the "rising flood" of constitutional theory as a "puzzling" phenomenon that reflects a "deep-seated malaise, and quite possibly, a state of approaching decadence."[1] He goes on to praise the "older constitutional commentators, secure in their commonsense lawyers' view of the Constitution,"[2] and to criticize "modern theorists," whose concepts are "abstruse," sources "philosophical," and arguments "convoluted."[3] In Bork's view, all such philosophizing is a thinly veiled attempt to politicize law in order to advance one agenda or another in what he calls "the war for control of our legal culture."[4]

Bork's puzzlement is attributable to the law school's traditional isolation from political philosophy.[5] This isolation is unfortunate, for all approaches

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1. Robert H. Bork, The Tempting of America, The Political Seduction of the Law 133-34 (1990).

2. *Id.* at 134.

3. *Id.*

4. *Id.* at 2.

5. In his full-length treatment of the history of American law schools, Robert Stevens concludes that law schools have always given priority to training lawyers and have therefore been somewhat isolated intellectually from all other disciplines within the larger university community. He states, "the American law school was founded and developed as a professional school stressing the knowledge needed to pass the bar examination and to succeed in practice . . . . Legal education's heritage was one of an inherent conflict between the professional and the scholarly." Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s 266 (1983). He continues, "it was [always] difficult to fit a scholarly orientation into an institution designed primarily for teaching purposes," and the "academic lawyer" has remained "primarily a generalist teacher committed to producing generalist lawyers." *Id.* at 270.

to constitutional interpretation, including that which former Judge Bork endorses, rest on logically prior assumptions about what legitimizes the Constitution as a source of law. And it is just this concern for describing the foundations of political obligation that characterizes normative political philosophy.

Two recent books exemplify the good work that contemporary political philosophy has to offer. As its title suggests, *Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects*, by Graham Walker, explicitly attempts to establish the normative legitimacy of the Constitution.[6] In contrast, *Reason and Democracy*, by Thomas A. Spragens, Jr., deals only in general with the legitimacy of democratic liberalism, yet the argument it presents is readily adaptable for use in understanding the normative foundation of the Constitution.[7]

These two books create an interesting comparison because they are diametrically opposed in some respects, yet quite sympathetic in others. Walker and Spragens unite in their rejection of both moral certainty and moral relativism, seeking instead to base their theories of political obligation on a middle ground that is genuinely normative, yet acknowledges the existence of moral indeterminacy. Moreover, both writers do so by claiming that the good can serve as a normative end of political life even though it is beyond human reason to grasp it perfectly.

Yet Walker and Spragens converge on this position from opposite ends of the philosophical spectrum. For Walker, the good remains indeterminate in human affairs because humankind is naturally disinclined to follow it. However, he does not deny the independent existence of goodness. Therefore, his argument remains within the tradition of moral absolutism, or as he prefers to call it, "moral realism."[8] Conversely, for Spragens, the good is normative because decisions about what is to be done have a rational basis. But he does not deny that what counts as good is ultimately a matter of preference. Therefore, he remains within the tradition of moral relativism. Together, these two writers inadvertently demonstrate that there is significant room for reconciliation between two traditions that, up to now, have been viewed as logically inconsistent. This is good news for the Constitution, despite former Judge Bork's misguided grumpiness about the insidious influence of political philosophy in law.

In *Moral Foundations of Constitutional Thought*, Walker takes the position that constitutional theory *must* be normative because the Constitution itself is "normative by definition"; it prescribes "the authoritative architec-

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6. GRAHAM WALKER, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT: CURRENT PROBLEMS, AUGUSTINIAN PROSPECTS (1990).

7. THOMAS A. SPRAGENS, JR., REASON AND DEMOCRACY (1990).

8. WALKER, *supra* note 6, at 13.

ture for American public life."[9] Its text makes explicit what is implicit in the very nature of constitutionalism. The Preamble, he notes, is replete with moral objectives: "to form a more perfect union, establish Justice, . . . promote the general Welfare, and secure the Blessings of Liberty . . . ."[10] In addition, specific provisions speak of "cruel" punishment,[11] "just compensation,"[12] "equal protection,"[13] and "due process."[14] In Walker's view, these phrases inevitably point beyond the Constitution as a legal document to an authoritative foundation of values. Those values must exist to vindicate the very enterprise of constitutionally ordered public life, as well as any specific understanding of our Constitution and how it should be interpreted.

From this basic orientation, Walker proceeds to assess the deficiencies of what he describes as *moral nihilism* or *conventionalism*.[15] According to Walker, conventionalists believe that "the good cannot, in the final analysis, be treated as anything more than a contingent human artifact."[16] This school includes skeptics such as Bork,[17] whose moral relativism leads them to endorse simple majoritarianism as the sole legitimator of binding political acts.[18] John Hart Ely also qualifies as a conventionalist because he too derives his process norms from the principle of democracy,[19] the authority of which is taken simply as an historical datum. Other historicists whom Walker places in this category include Michael Perry[20] and Alexander

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9. *Id.* at 10.
10. U.S. CONST. pmbl.
11. *Id.* at amend. VIII.
12. *Id.* at amend. V.
13. *Id.* at amend. XIV, § 1.
14. *Id.* at amends. V, XIV, § 1.
15. WALKER, *supra* note 6, at 12-13.
16. *Id.* at 25.
17. *See* ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).
18. As espoused by Bork and other constitutional conservatives, majoritarianism is not, strictly speaking, a theory of political obligation at all. Majoritarianism simply holds that since the good is a matter of preference, majority vote is the only fair method to decide which ends political society should pursue *under* the Constitution. The consent theory of constitutional legitimacy might be viewed as an application of this principle to the question of whether a constitution should be adopted at all. However, consent theory can also be viewed as a conceptually distinct claim that each individual must voluntarily consent to citizenship before the state can legitimately bind him. Since Walker's argument addresses majoritarianism as a theory of political obligation, he must also regard it as incorporating the first sense of consent theory.
19. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 43-72 (1980); John H. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978).
20. *See* MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 9-36 (1982); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 121-79 (1988); Michael J. Perry, *A Critique of the "Liberal" Political-Philosophical Project*, 28 WM. & MARY L. REV. 205 (1987); Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995 (1986).

Bickel.[21] Each of these theorists anchors morality in tradition, which is historically contingent. Thus morality has no intrinsic content. It is merely the product of culturally molded human will. Walker completes his catalog of conventionalists with Walter Berns,[22] whose work he regards as singular. He concedes that Berns views the Constitution as the embodiment of fundamental, moral ends. However, these ends are derived from Hobbes' "fundamentally nonmoral theory of the good."[23] In Berns' theory,

> [o]pinions of good and bad acquire a semblance of normative force when a human reasoner calculates their conduciveness to domestic peace . . . . [But s]ince natural rights values thus rest upon an instrumental calculation whose outcome is not given in the nature of reality but stipulated . . . by a calculator, their normative status turns out to be at base a matter of convention.[24]

Walker finds much to admire in conventionalism. Most important, it accounts for *moral indeterminacy*, that is, our subjective experience of moral ambiguity. Consequently, conventionalism tends to endorse judicial self-criticism and prudence, although its proponents are by no means unanimous in calling for judicial self-restraint. Walker himself supports prudent self-restraint, yet in the end he completely rejects all conventionalist theories on the ground that they are logically "incoherent." They are illogical, he claims, because they deny the existence of that which must exist to justify their own normative claims. For example, Walker asks how Bork can argue that majoritarianism is the legitimating principle of the Constitution if he also argues that there is no real moral standard legitimating majoritarianism.[25] We are left with a theory suspended in midair. Even historicist theories that lean for support on the shoulders of tradition beg the question of why we should honor tradition. By their own admission, according to Walker, conventionalists ultimately place judges in the position they most abhor, that of making decisions by imposing their own arbitrary view of what the Constitution requires.

Thus we can summarize one of the basic propositions that Walker puts forth in *Moral Foundations*. Constitutions, he asserts, must be normatively grounded. Normativity, in turn, must be based on moral reality, not mere convention. Therefore, constitutional government presupposes the existence

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21. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 23-30 (1975).

22. Walter Berns, *Taking Rights Frivolously*, *in* LIBERALISM RECONSIDERED 51 (Douglas MacLean & Claudia Mills eds., 1983); Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49; Walter Berns, *The New Pursuit of Happiness*, 86 PUB. INTEREST 65 (1987).

23. WALKER, *supra* note 6, at 31.

24. *Id.* at 32.

25. And, one might add, if one were to stipulate majoritarianism's exclusive legitimacy, how could Bork argue that there are any constitutional restraints on what a current majority might want to do in derogation of the Constitution?

of a morally real universe, "a reality whose existence is independent of human artifice."[26] Walker concludes that the failure of conventionalists properly to ground their normative theories in this reality leads them to an impasse that dooms their projects to incoherence.

When Walker turns from conventionalism to *moral realism*, a different set of problems arises. Of course, although he finds the conventionalists fundamentally misdirected, Walker finds the moral realists fundamentally sound. Yet he recognizes in their work certain ontological and epistemological problems that leave their theories incomplete. He turns to the political ethics of Saint Augustine both to clarify and to rectify those problems in a manner that will leave constitutional philosophy, and therefore constitutional law, on a surer footing.

To analyze moral realism, Walker delves into the work of Michael S. Moore,[27] Sotirios Barber,[28] and John Courtney Murray.[29] However, it is primarily through his treatment of Moore that Walker probes the epistemological and ontological shortcomings of contemporary moral realism. Moore, like Barber and Murray, is committed to moral realism, or the idea that moral truth exists independent of human perception. Moore argues that the existence of such independent order need not be proved; it is enough that "our practices with regard to thinking about and describing the world [whether scientifically or morally] are realist in their metaphysical presuppositions."[30] Nevertheless, to account for the moral indeterminacy we experience, Moore also argues that we can never get an unmediated glimpse of the independent order of goodness. In this respect, he is more fervently committed to subjectivism than even the conventionalists, who must claim to have such a glimpse of the order of things to know that there is no moral reality. He also differs from Murray, who, as a Thomist,[31] believes that natural law is fully intelligible to humankind. Moore and Walker reject this *correspondence epistemology* because it fails to account for moral indeterminacy. In its place, Moore espouses *coherence episte-*

26. WALKER, *supra* note 6, at 24.

27. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985) [hereinafter *Natural Law Theory*]; Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453 (1987) (reviewing RONALD M. DWORKIN, A MATTER OF PRINCIPLE (1985)).

28. *See* SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984).

29. *See* JOHN C. MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960).

30. *Natural Law Theory*, *supra* note 27, at 311, *quoted in* WALKER, *supra* note 6, at 48.

31. St. Thomas Aquinas held that an intellectual quality called *synderesis* enabled anyone to intuit the first principle of reason, namely the proposition that "'[g]ood should be done and sought after; evil is to be avoided.'" Vernon J. Bourke, *Thomas Aquinas, St.*, *in* 8 THE ENCYCLOPEDIA OF PHILOSOPHY 105, 112 (Paul Edwards ed., 1967) (quoting THOMAS AQUINAS, SUMMA THEOLOGIAE (c. 1265-73)). From this proposition, he thought one could derive "sufficient knowledge of what is morally right . . . to be able to regulate [one's] own actions." *Id.*

mology, in which moral precepts are evaluated according to how well they cohere with everything else one believes. Since there is no method by which humankind can directly glimpse moral reality, this form of evaluation is all that remains.

Walker's critique of Moore focuses on the theory of coherence epistemology, which, in his view, suffers from irreconcilable tensions. First, he notes Moore's confident assertion that coherence checking can lead to ever better moral theory. This assertion implies that we can somehow know that moral theory and moral reality are converging, which in turn implies a direct knowledge of moral reality, which Moore denies we can have. As a corollary, Walker argues that such confidence in coherence checking leads Moore to endorse a degree of judicial activism that is troubling both on prudential grounds and in light of Moore's own fundamental skepticism about our ability to glimpse the good directly.[32] Untroubled moral confidence can lead judges into several types of error, notably the tendency to collapse morality and law and the tendency to ignore historical revelations of moral reality. To Walker, the importance of history is not its embodiment of cultural convention or tradition, but its potential for bequeathing to us past accomplishments in moral reasoning, derived from glimpses of moral reality, that we can apply to our own problems. Walker notes in his own defense that in turning to St. Augustine, he uses history in this way.

In addition, Walker criticizes Moore's epistemology for reintroducing conventionalism into constitutional theory. After all, coherence checking amounts to no more than consulting our moral practices to determine what is morally good. Walker wonders how we can be sure that coherence checking will lead us to converge on the truly good rather than the truly evil if the coherence we seek is purely cultural. As a moral realist, Walker is concerned that coherence checking will be distorted by the influence of evil desires and thus lead to a moral system that does not correspond to moral reality. In short, Moore equates moral knowledge with other types of knowledge by showing that neither is epistemologically secure. Walker's reply is that Moore's argument succeeds in undermining the "real" basis of all knowledge, but fails to secure the "real" basis of moral knowledge.

32. WALKER, *supra* note 6, at 48-54. Walker's criticism focuses on the fact that Moore's theory is vulnerable in practice because it fails to account for the possibility of egregious judicial error. However, I believe there is another problem here as well. Since judges have no special moral insight, their authority to interpret the Constitution derives from the Constitution itself. But what if some nonjudge has better moral insight? Are we not obligated to follow the dictates of that person rather than those of the judge, even if they conflict? Although the judge is authorized by the Constitution to render binding decisions, the Constitution is binding only as a means to bring us closer to convergence with moral reality. If the moral insights of a particularly sensitive nonjudge will get us there faster, they are still more authoritative than the judge's decisions. The problem here is that Moore's theory inevitably reduces the authority of the Constitution to a purely instrumental level.

This follows from focusing on how we know rather than on the question of what is to be known.

Thus we can summarize Walker's second major proposition, namely, that a moral realist theory must account for moral indeterminacy in ontological, rather than in epistemological, terms. To put this another way, it must account for our subjective experience of moral ambiguity in terms of the nature of moral reality itself, rather than in terms of our perception of it. Only with an ontologically grounded theory, he says, can we avoid the impasse of contemporary moral realist theory, which either ignores moral indeterminacy (Murray) or lapses into conventionalism and judicial hubris (Moore).

Having thus assessed the character and shortcomings of contemporary conventionalism and moral realism, Walker undertakes an explication of Augustinian ethics in the hope that it will provide the key to "detaching 'moral realism's' assets from its liabilities."[33] Walker's description of Augustinian ethics can be briefly summarized as follows. God is the sole, immutable good. His power pervades all things in nature, animate and inanimate, directing each to its proper end. Knowledge of this goodness is open to the mind without mediation through "intellectual sight," a kind of knowledge just as empirical as sense impressions, but which differs in that its objects are immutable and eternal rather than physical and finite. Human nature stands at the apex of creation and is uniquely excellent in that it can recognize and voluntarily adhere to the immutable good itself. Thus human nature, in its pristine form, has perfect knowledge of and inclination toward the good.

Yet humankind voluntarily turned away from the good in the vain hope of becoming more autonomous. This turning away, of course, was embodied in the Fall, which according to St. Augustine led to the Protagorean misconception that man is the measure of all things. With the Fall, human nature was *vitiated* and there occurred a *contraction of nature*. That is, the connection between human nature and immutable goodness was attenuated, but not broken. In ethical terms, St. Augustine argues that humankind can still glimpse the immutably good but is disinclined to follow it.

Augustinian ethics places moral indeterminacy on an ontological footing by claiming that it derives not from humankind's inability to see the good directly, but from its vitiated disinclination to behave in accordance with it.[34] This insight has several consequences. First, it leads to greater skepticism

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33. *Id.* at 22.

34. Walker argues that Barber's work is incipiently Augustinian because it, too, makes much of humankind's disinclination to follow the law. Thus he finds Barber's unapologetic endorsement of judicial activism inconsistent with the implications of his theory.

about judicial activism, which poses the danger of unchecked judicial tyranny. Second, it restores the usefulness of historical insights into moral reality and checks the impulse to reconstruct moral goodness in each judicial mind.[35] Perhaps most important, it emphasizes the distance between law and morality. I say distance, rather than separation, because Walker's St. Augustine does not deny that law and morality are related. He claims only that politics and, therefore, law have the "daunting," "unromantic," and "unenviable" task of "managing a fundamentally mixed multitude" of people whose very nature precludes them from being completely moral in this world.[36] Thus the rule of law remains at base an instrument of political order rather than a guide to true virtue.[37]

Walker presents a St. Augustine who is a moral realist, but also a tough pragmatist. Does this version of skeptical moral realism resolve the theoretical impasses which led Walker to undertake this project in the first place? On the one hand, Walker's argument does graft the normative force of moral realism to the perception of moral indeterminacy that underlies conventionalism. On the other hand, he provides no convincing reason why one should necessarily buy into St. Augustine's belief system. Walker emphasizes that St. Augustine made no leap of faith, but arrived at his beliefs as the best explanation for the reality he knew. He suggests we follow the same path when he remarks that "[q]uite apart from theological considerations, the need to make sense as coherently as possible of human experience ought to make us receptive to an ontological outlook with this kind of basic logic."[38] However, there is a problem here as to where St. Augustine's theology leaves off and his philosophy begins; to what extent must one accept the former to utilize the latter? Even if St. Augustine made no leap of faith, he did experience life in a particular way. For example, he took the prophets to be divine revelation, something which, for the modern mind, should not be a precondition to understanding the Constitution's authority aright.

Another problem relates to the usefulness of Walker's insights as a source of interpretive theory. Of course, Walker claims that his form of moral realism allows the interpreter to take seriously the Constitution's explicit moral aspirations as such. It does not "arbitrarily privileg[e] the conventional prejudices, wants, and fears of [the framers'] particular moment in history," nor treat the Constitution's moral provisions as "a malleable rationale for the indeterminately evolving values of later generations."[39] On

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35. In comparison, Moore argues that if a judge's moral conclusions conflict with conventional morals, the judge should follow his own inclination. *Id.* at 53.

36. *Id.* at 108.

37. In contrast, Moore "regards the attainment of justice as the paramount function of all civil law," and considers the Constitution as a "blueprint" of the just society. *Id.* at 54.

38. *Id.* at 141.

39. *Id.* at 154.

the other hand, Augustinian ethics views politics, and therefore law, as fundamentally "coerci[ve],"[40] designed to maintain peace in a world of vitiated nature that can never achieve genuine goodness. This point is crucial to Walker's critique of contemporary moral realism's urge to conflate law and morals. Yet the question remains, how do the duty to act prudently and the robust invocation of moral reality relate to each other? The problem here is that Walker's conception of moral reality provides no principled basis upon which to exercise prudence.

Walker argues that his form of moral realism does entail conclusions about the sources, if not the method, of interpretation. This argument proceeds from the observation that historical experience provides partial and occasional glimpses of moral reality. Hence, the gleanings of this experience, in the form of judicial precedent, accepted standards of decency, and the framers' intent, furnish the proper sources of interpretive judgment. But without some indication of how "intellectual sight" assists in separating the morally real from the merely conventional of historical experience, Walker's catalog of sources remains indistinguishable from those that any purely conventionalist judge would consult.

One of Walker's primary contentions, as already mentioned, is that conventionalist theories cannot be normative. This brings his argument into conflict with that of Thomas Spragens, whose *Reason and Democracy*[41] is an extended effort to repair precisely those aspects of conventionalism that Walker finds fatal.

In *Reason and Democracy*, Spragens attempts to derive a theory of political obligation from the idea that public life must be governed by a characteristic pattern of procedures and institutions in order to reach the end of human flourishing. Spragens defines "the good" in Aristotelian terms as "the felicitous exercise of human capabilities and the satisfaction of legitimate human wants."[42] To Spragens, it is this good which generates a normative standard for the conduct of political life.

Why ought we to be motivated to pursue the good in political life at all? Put another way, is the good sufficiently related to politics to be able to serve as the source of a theory of political obligation? This is a threshold question for any theory such as the one Spragens espouses. Spragens' response is, first, that the good for each individual consists partly in the practice of public life. No individual can live a solitary life, nor would he be happy if he could. Second, since we are bound to live in communities, some agreement on what is good is necessary, at least in certain areas. The mechanism of political life need not be normative to the extent that a

40. *Id.* at 106.
41. SPRAGENS, *supra* note 7.
42. *Id.* at 117.

religious covenant is normative for those who voluntarily subscribe to it. Rather, it is normative only in that it binds us to a particular process of finding answers to the pressing problems of social existence.

The goal of Spragens' argument is to lay out the main features of the process which constitutes the norm of political life. However, before taking up the main thread of his argument, Spragens finds it necessary to address a more fundamental question concerning the nature of reason and the ontological status of the good.

The good, according to Spragens, is the final end of political life. However, all members of a given political community will not agree on the nature of goodness. This is because goodness is not something that can be known through logical deduction, through measurement or calculation, but rather is something we know only through experience. We can never know it completely since we can neither experience everything nor remain in all aspects the same throughout our lives. Moreover, even those who do share the same experiences may have different conceptions of the good, since those experiences must be filtered through different personalities before acquiring a particular value. As Spragens puts it, "[o]nly in the rear view mirror . . . do we begin to understand the shape and dimensions of the positive human good."[43] Our knowledge of the good is always "partial," "imperfect," and "piecemeal." The good, then, is something toward which we orient ourselves, knowing that it can never be fully and permanently manifest.

Because of the good's unstable ontological status, Spragens does not argue that it is directly normative, in the sense that it would be if it were morally real. He argues only that it is indirectly normative in that it entails a particular communal practice, a practice that is demonstrably necessary for bringing political life into line with the best available specific conceptions of what is good. Spragens calls this practice "the politics of reason."[44]

Spragens derives the concept of practical reason from what Aristotle termed "*phronesis.*" *Phronesis* refers to practical wisdom, or the virtue of reasoning well for the "'attainment of truth in things that are humanly good and bad.'"[45]

Applied to the polis, *phronesis* conceives of politics as a practice, a form of social, cooperative activity, with a good internal to that activity and standards of excellence in performance.[46] The crux of *phronesis* is that it

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43. *Id.* at 118.

44. *Id.* at 113. *See generally id.* at 112-145.

45. *Id.* at 23 (footnote omitted) (quoting ARISTOTLE, NICOMACHEAN ETHICS bk. 6, at 5 (J.A.K. Thomson trans., Penguin Books 1955)).

46. *Id.* at 182 (quoting ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 175 (2d ed. 1984).

asks us to accept the truth value of ideas about the good that are derived from this practice, despite the good's ontologically unstable status.

Spragens believes that the conception of practical reason was alive in the Enlightenment intuition that the life of reason is somehow linked to the achievement of a good society. However, Spragens also claims that this intuition was hazy at best because of the seventeenth century revolution in metaphysics which replaced classical teleology with the belief that reality consists purely of matter in motion. As a result of this shift, science and philosophy became committed to a truncated conception of reason as pure logic, according to which reason is capable of calculating, weighing, and measuring. Anything that cannot be deduced by one of these means cannot be said to be right or true according to reason.

With this conception of reason, modern political philosophy inevitably rejected the idea that the good can be normative even if distilled from a rational process. It argues instead that the good is a matter of irrational preference. The ascendancy of "technical rationality" led to the conception of politics as purely instrumental, "a means to an end outside of itself that is established prerationally."[47] Hobbes, whom Spragens portrays as the key figure in this development, reformulated the end of human flourishing simply as the end of self-preservation. Since he perceived no other compelling final end, but only irrational desire, he understood the good in purely negative terms as the avoidance of death. According to Spragens, "practical reason within the modern empiricist tradition remains to this day essentially what, in outline at least, it was for Hobbes, namely "a theoretical science of cause and effect that can become technically efficacious when conjoined with stipulated purposes."[48] In the course of its development, the theoretical foundation of democratic liberalism has retained this instrumentalism. Thus, both utilitarianism (greatest good for the greatest number) and liberal skepticism (mutual toleration because all values are relative) fail to provide a normative basis for political obligation because they are committed to a distinction between fact and value that renders value arbitrary.

Having described the manner in which he believes modern political philosophy got off the track, Spragens dedicates the bulk of his argument to the proposition that the classical view of politics is demonstrably correct, and that the normative standard for the conduct of political life is reasonably specifiable. To do so, he draws analogies from the polis of scientific practice and the polis of linguistic communication.[49] In each he finds a "physiology of rational practice" which manifests "the intrinsic 'politics' of practical reason."[50] Having thus uncovered "[a]t the heart of reason" a "character-

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47. *Id.*
48. *Id.* at 31.
49. *Id.* at 102.
50. *Id.* at 90.

istic pattern of procedures and institutions,"[51] he asks whether the norms of conduct essential to effective cognitive activity in science and language are also applicable to political activity. He answers with a "qualified affirmative," stating that "[t]he type of politics warranted by this philosophically recast version of rationalism turns out to be a particular conception of democratic liberalism."[52]

According to Spragens, the "epistemic bedrock of science"[53] throughout most of modern history was "'direct appeal to facts.'"[54] Drawn from the seventeenth century revolution that also directed the development of political philosophy, this epistemology assumed that the facts were universal, unchanging, and objective, and that observation is a matter of passively receiving sense impressions. Scientific progress was characterized as a continuous accretion of knowledge about facts, accomplished through a rigorously explicated logic of observation.

In contrast to this characterization, Spragens identifies a new conception of scientific rationality which portrays science as a group enterprise in which communities, institutions, and processes are conjoined to interpret what is scientifically true. Underlying this radically different view of science is a view of truth as "our apprehension of the structure of our world"[55] rather than universal and unchanging essence. This science is rational because it must be carried out according to certain principles, and progressive because it yields ever greater understanding to our minds. Yet it is subject to change as structures are developed and then discarded, in a never-ending quest to understand better.

Spragens identifies in linguistic theory a similar set of divergent characterizations. According to the old linguistics, language is purely representational, and the business of linguistics is to clarify its terms by linking them to their unambiguous referents. This view presupposes the world to be composed of discrete bits and pieces of material things. Language then becomes simply a calculus employed to assert or deny facts. In contrast, the new linguistics asserts that words do not have meanings. Instead, people mean certain things and employ language as an instrument to express them. Therefore, to understand how language means anything, we must look not to syntax but to the pragmatics of usage, the network of practices that inform any successful speech act. As it turns out, these practices are also rational in that they are organized around certain rules for the performance of speech acts. Thus, as in the case of scientific truth, linguistic meaning

51. *Id.* at 113.
52. *Id.* at 115.
53. *Id.* at 59.
54. *Id.* (quoting JOHN HERSCHEL, A PRELIMINARY DISCOURSE OF THE STUDY OF NATURAL PHILOSOPHY 59 (London, Longman's 1831)).
55. *Id.* at 117.

is revealed as a moving object whose basis is found not in any logical relationship to objective universals, but in the adherence to certain rules of practice.

To explicate the rules of the scientific enterprise, Spragens turns to the work of Michael Polanyi[56] and Robert Merton.[57] Polanyi, in particular, was concerned to describe the mode of governance in what he termed "the republic of science."[58] He found that science requires an animating consensus, criteria of citizenship, and attendant modes of participation, as well as criteria and procedures for decision making. The animating consensus consists of a common goal, in this case, the attainment of scientific truth. The basic decision-rule is to accept the force of the better argument. This rule of authority entails certain procedural requirements: impartiality of adjudication (replication of experimentation, peer review); organized skepticism toward accepted truths; protection of dissent (with the expectation of respect for the weight of received truth as also having been distilled through the same rational process); obligation to attend the ideas of others; and the requirement of fairness, or self-restraint, in presenting one's own arguments. Finally, citizenship depends on sharing the animating purpose of the enterprise and recognizing the procedural restraints under which one must operate. Yet admission to citizenship must be nondiscriminatory, and there must be moral equality among citizens. Although there will be a hierarchy of influence, it depends on relative merit assigned by public opinion and is subject to change.

What emerges from this, according to Spragens, is a "pattern of interrelated consensus, authority, liberty, and participation."[59] It is a system in which authority is neutral, based on persuasion rather than power, and sovereignty is dispersed among all citizens of the "republic." Most important, this enterprise is motivated by a common desire to seek the truth, with a dual understanding that there will always be disagreement about its substance and that our common knowledge of it will always be partial and conditional. It is this understanding that entails the particular institutions, values, and procedures characteristic of the republic of science, for these practices produce the truth with the greatest explanatory power. Such truth is not timeless or perfect. Instead, it is merely rational and unarbitrary.

Reviewing the theory of linguistic communication, Spragens finds that it, too, depends upon norms, in this case norms of "communicative competence," which comprise the republic of rational discourse. As in the case of science, these rules follow from the goal of the enterprise and its principle

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56. *See* Michael Polanyi, Science, Faith and Society (1964).

57. *See* Robert K. Merton, *Science and the Social Order*, and *Science and Democratic Social Structure*, *in* Social Theory and Social Structure 537-61 (rev. ed. 1957).

58. Polanyi, *supra* note 56, at 16.

59. Spragens, *supra* note 7, at 108.

of authority, which again disperses sovereignty among all participants.

Spragens claims that the conception of truth that animates science is analogous to that of the good in politics. Each is "open-ended," "antidogmatic," and "experimental."[60] Like scientists seeking the truth, citizens in a rational society do not agree about what is good. The good

> serves not as a substantive a priori answer to the questions politics addresses, but rather as the orienting question for a free and humane political project. It is a question—"what is our common good and how do we achieve it?"—that is capable of functioning in an analogous way to the question "what is true?" in the theoretical disciplines.[61]

Following Polanyi's conclusion that the republic of science must be liberal and democratic, Spragens asserts that conceptions of the good can only have value analogous to that of scientific truth if they are deduced from a process designed to elicit consensus from morally autonomous individuals. In general, this means that politics must be governed by the same principles of authority and citizenship that Polanyi set out for science. Thus, any proposed answer to the question "what is to be done?" must explain how it contributes to the fruition of human life. To do this, it must propose an interpretation of human existence within which the action to be taken makes sense, then explain how it will achieve that goal. Of course, all practical arguments can be disputed because, like scientific truths, they are not amenable to irrefutable demonstration. However, again like scientific truths, practical arguments are not for that reason "arbitrary" or "cognitively empty."[62]

The characteristics identified by Spragens as most crucial in a legitimate political culture are quite familiar. They include participation, liberty, equality, rights, and what might be called informed democracy. This should not come as a surprise, for the originality of Spragens' argument is not in the values it finds normative, but rather in the way it makes them so. On the other hand, Spragens' liberal alchemy does have a particular flavor, which it would be unfair not to attempt to convey. Spragens' main concern is to reconcile liberal individualism with the communitarian critique of it; he does this by endorsing a form of democracy focused on "*homonoia*," or friendship. He tries to find a balance that recognizes a limited capacity to discover common conceptions of the good.

All this can best be felt in Spragens' conceptions of liberty and participation. Participation is an obligation of civic virtue because individual aspirations are the raw data from which the common good must be distilled. Yet, in Spragens' mind, participation is not the same thing as simple interest

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60. *Id.* at 120.
61. *Id.*
62. *See id.* at 121.

articulation, but a matter of sharing in a collective judgment as to what the common good is in light of all the interests put on the table. It involves an act of imagination that focuses on the interests of the group to which one belongs, rather than on simply getting what one wants. At a psychological level, it involves perceiving oneself and one's aspirations as existing primarily in a group context. Like participation, individual liberty, in Spragens' estimation, serves group ends. Since outcomes depend on the force of the best argument, liberty is necessary to ensure that argumentation is not deformed by leaving out or overemphasizing any one set of interests. Liberty is not grounded in the "putative right of the individual to 'freedom of expression.'"[63]

The emphasis on common good leads back to liberalism's focus on the individual through the observation that no outcome can truly be good or common that does not respect individual autonomy. Hence Spragens' conception of equality emphasizes the need for absolute moral equality, but not economic equality. Similarly, "a right is quite simply a demand that can be predicated on the essential attributes of a rational being."[64] What emerges from all this is a rather traditional liberal view, qualified by a heightened recognition that our individual aspirations cannot be separated from our common fate. It is this recognition, that our individual senses of fulfillment depend on common action, which grants normative force to the process whereby we decide how to act.

The force of Spragens' argument depends primarily on the aptness of the analogy he draws between science and politics. Therefore, it is worth noting that he draws it not by assimilating politics to science, but by assimilating science to politics. In other words, he decisively rejects the concept of truth as "*theoria*" in favor of the concept of truth as "*praxis*." However, if one accepts this aspect of Spragens' argument, it becomes difficult to accept his further claim to stand outside the debate between conventionalism and moral realism.

> To assert that authority in a rational enterprise is vested democratically in the conscience of all participants, [he states], is not necessarily to deny the supposition of the natural law tradition . . . . It is only to recognize that, in practice, any putative *jus naturale* must be validated by a form of *jus gentium*.[65]

Strictly speaking, this claim may be true. However, the power of Spragens' argument rests upon a conception of mutable goodness. According to this conception, the truthfulness of goodness is a function of how well it explains things to our changeful imaginations. This is the conception he develops in

63. *Id.* at 153.
64. *Id.* at 157.
65. *Id.* at 169 (emphasis in original).

his analogy of science and politics, and in my view, it is hostile toward moral realism, if not logically irreconcilable with it.

What are the consequences of Spragens' concept for constitutional theory? Like Walker, Spragens negotiates between the moral absolutism of natural, or higher, law approaches and the self-denying incoherence of liberal approaches that endorse the principle of majoritarianism. Yet he also accomplishes something more, for one cannot help but recognize that our Constitution sets out a rational process of self-governance which presupposes the moral autonomy of its citizens. Thus, Spragens' argument has the advantage of providing normative force to that which the Constitution actually does. In other words, it has great explanatory power.[66]

Of course, the detailed structural requirements of rational constitutional praxis are not self-evident. For example, that Spragens finds political legitimacy in a process does not necessarily lead to the conclusion that constitutional theories derived from his argument will be proceduralist or especially concerned with avoiding judicial activism. The corollary principle of participation does require democracy, yet it does not subordinate all practices to majority preference. In this regard, the constitutional entailments of Spragens' theory are less definite than Walker's unequivocal endorsement of judicial self-restraint.[67]

Despite the different concerns and underlying commitments of their arguments, Spragens and Walker share a fundamental insight that normative theory cannot evade, and must incorporate, the modern intuition of moral indeterminacy. Together, they demonstrate that this is possible regardless of whether or not one believes in the existence of an independent moral order. Having moved the theoretical debate about political obligation beyond this impasse, they open up a new challenge to those who would apply this fund of insight to the elaboration of theories of constitutional interpretation.

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66. Walker argues that his theory has explanatory power because it accounts for the Constitution's moral invocations. *See supra* text accompanying notes 9-14. However, Augustinian ethics, especially when presented by Walker as an antidote to the overly optimistic moral realism of Moore, emphasizes the modest role of the state. "In Augustine's estimate," writes R. A. Markus, "the task of the state in the economy of salvation would be rather to establish the conditions in which men may work out their own salvation in relative peace and security than actively to promote their individual salvation through legislation and coercion." R. A. Markus, *Augustine, St.*, *in* THE ENCYCLOPEDIA OF PHILOSOPHY 198, 205-06 (Paul Edwards ed., 1967). This ethical stance would appear to entail a constitution much less overtly moralistic than our own, and thus there is a dissonance between Walker's theory and the Constitution. In my view, in any case, moralistic language is a far less definitive attribute of our Constitution than is the framework of government it establishes.

67. Walker emphasizes that judicial self-restraint should be "proximate" rather than principled because it arises out of pragmatic awareness of mankind's (and one's own) fallen state, rather than from a positivistic theory of constitutional legitimacy.