

Natural Rights, Under-Specified Rights, and Bills of Rights

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Article abstract

The lawers of antiquity defined justice as "giving to each what is his ius [due, right]": *ius suum cuique tribuere*. Until or unless someone can rightfully claim "that is owed to me [him, or them]" there is no issue of justice. For any practical purpose, the discourse of rights depends on our ability to recognize with some precision who owes what to whom. Bills and charters of rights typically enumerate things which the government owes to citizens or persons. Since World War Two, domestic and international declarations have emphasized obligations of states to recognize human or natural rights. However, these lists often include "rights" which are rather general and under-specified. Under-specified rights have two deleterious consequences for constitutionally limited governments. First, such "rights" inspire the belief that persons have rights prior to anyone knowing precisely what they are. Second, under-specified rights typically burden courts with the task of discovering on a case by case basis the precise nature of the right under dispute. Since bills or charters of rights aim to limit the government, we might doubt whether this purpose is really achieved when the government must specify the right on an *ad hoc* basis. These problems are investigated in light of U.S. constitutional history.

Natural Rights, Under-Specified Rights, and Bills of Rights*

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ABSTRACT

The lawers of antiquity defined justice as “giving to each what is his ius [due, right]” : ius suum cuique tribuere. Until or unless someone can rightfully claim “that is owed to me [him, or them]” there is no issue of justice. For any practical purpose, the discourse of rights depends on our ability to recognize with some precision who owes what to whom. Bills and charters of rights typically enumerate things which the government owes to citizens or persons. Since World War Two, domestic and international declarations have emphasized obligations of states to recognize human or natural rights. However, these lists often include “rights” which are rather general and under-specified. Under-specified rights have two deleterious consequences for constitutionally limited governments. First, such “rights” inspire the belief that persons have rights prior to anyone knowing

RÉSUMÉ

La justice a été définie par les juristes de l'antiquité comme étant « rendre à chacun son ius » (dû, droit) : ius suum cuique tribuere. À moins que quelqu'un ne puisse légitimement réclamer un « dû », la question de justice ne se pose pas. En pratique, la question de droits dépend de notre habileté à reconnaître avec précision qui doit quoi à qui. Généralement, les chartes et déclarations de droit énumèrent ce que le gouvernement doit aux citoyens ou aux individus. Depuis la Seconde Guerre mondiale, les déclarations internes ou internationales ont souligné les obligations des États à reconnaître les droits de la personne ou droits naturels. Par contre, ces droits sont le plus souvent des « droits » généraux et non spécifiques. Cette non-spécificité entraîne deux conséquences néfastes pour des gouvernements constitutionnellement limités.

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precisely what they are. Second, under-specified rights typically burden courts with the task of discovering on a case by case basis the precise nature of the right under dispute. Since bills or charters of rights aim to limit the government, we might doubt whether this purpose is really achieved when the government must specify the right on an ad hoc basis. These problems are investigated in light of U.S. constitutional history.

Premièrement ces « droits » incitent à croire que les individus ont des droits avant même que l'on puisse les définir. Deuxièmement, le fait que les droits soient non spécifiques oblige les cours à définir à chaque cas la nature du droit en litige. Alors que les chartes et déclarations de droits ont pour but de limiter et diriger le gouvernement, il y a lieu de se demander si ce but est réellement atteint lorsque le gouvernement se voit à chaque fois dans l'obligation de définir ce droit de façon ad hoc. Ces difficultés sont analysées à la lumière de l'histoire constitutionnelle américaine.

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I. INTRODUCTION

According to the dictum of the classic lawyers, justice is defined as “giving to each what is his *ius* [due, right]” : *ius suum cuique tribuere*. Until or unless someone can rightfully claim “this is owned to me [him, or them]” there is no issue of justice. Whether we are speaking of natural or positive law, justice ensues only when two conditions are satisfied. First, there is a thing (*ius*) that belongs to someone else (*suum cuique*); second, there is an act that gives (*tribuere*) the *ius*.¹ For the lawyers of antiquity, justice can be exercised “only after something has been attributed to someone,

1. For a useful analysis of the traditional dictum, see J. HERVADA, *Natural Right and Natural Law : A Critical Introduction*, Pamplona, Servicio de publicaciones de la Universidad de Navarra, 1990, pp. 19-45.

that is when someone can say — at least in a certain manner and under a certain aspect — that that something is his”.²

An enduring philosophical problem is the ground of things-that-are-owed. How is it that someone can claim “this is owed to me [or him, or them]”? At least some positivists (*e.g.* Hobbes) have held that the command of the sovereign creates both the thing to be given (the *ius*) and the obligation to give it (the *debitum*).³ On this view, the human legislator has the unenviable task of attributing to persons things (*iura*) which hitherto were not assigned to them. By and large, natural lawyers have held the opposite: that there exist certain *iura* to be given — by the individual to the community (legal justice), by the community to the individual (distributive justice), and by individuals to one another (commutative justice) — prior to obligations which arise from contract and statute.⁴

Bills and charters of rights, of course, tend to emphasize natural rights in the mode of distributive justice, because they typically aim at limiting and directing the actions of government by listing what the government owes to citizens or persons.⁵ In *The Natural Law*, the anti-Nazi lawyer and activist Heinrich Rommen observed that wherever there is a Bill of Rights, there is a “strong presupposition” that the human law must be in harmony with natural law.⁶ Rommen uses appropriate terminology when he says there is a “strong presupposition”. To say more than that would be to say too much, because a positivist can hold that bills and charters of rights are simply a template of positive law laid over the rest of the system of positive laws, and that what is assigned to each as “his own” is entirely a creature of legal convention. Yet Rommen is certainly correct from a historical point of

2. *Id.*, p. 28f.

3. “Theft, murder, adultery, and all injuries, are forbidden by the laws of nature; but what is to be called *theft*, what *murder*, what *adultery*, what *injury* in a citizen, this is not to be determined by the natural, but by the civil law. For not every taking away of thing which another possesseth, but only another man’s goods, is theft; but what is our’s, and what another’s, is a question belonging to the civil law”. De Cive VI.16. T. HOBBS, *Man and Citizen*, Bernard Gert ed., Indianapolis, Hackett Publishing Co., 1991, p. 185.

4. Thomas Aquinas summarizes this tradition when he says that the *ius* is suitably divided as (a) what arises *ex ipsa natura rei* (from the nature of the thing or case), (b) what arises *ex conducto, sive ex communi placito* (from agreement or consent); the latter ground of the *ius* is divided into what arises (c) *per aliquod privatum conductum* (from private agreement), and (d) *ex conducto publico* (from public agreement). S.t. II-II, q. 57, a. 2. So, there is more than one ground of a *ius*. We might expect that in any relatively well developed legal culture most *iura* are the creatures of human agreements at private and public law. The natural right tradition holds that there are *some* rights which follow from the very nature of the thing or the thing to be considered.

5. Insofar as bills, charters, and declarations of rights also make some mention of the obligation of the state to protect the common good, as well as its obligation to eradicate manifestly unjust modes of commutation between private persons, presuppositions about natural or human rights likewise come to include notions of legal and commutative justice.

6. H. ROMMEN, *The Natural Law: A Study in Legal and Social History and Philosophy*, Indianapolis, Liberty Press, 1998 reprint of 1947 edition, p. 261.

view. The post-World War Two human rights paradigm, symbolized by the *U.N. Universal Declaration of Human Rights* (1948), was imbued with the conviction that certain things belong to individuals by the fact of their membership in the human species. The historical record will also show that the American Bill of Rights was a prominent model for the framers of the post-war declarations and covenants concerning human rights. Rightly or wrongly, it was assumed that a profitable lesson could be learned from the American polity: namely, that government should be limited not only by institutional allocations of power (the constitutional principle) but also by lists of rights which hold governments to superordinate moral duties to give to each what is his own.

Let's assume, for the sake of argument, that there exist natural rights which can be discovered and then enumerated in bills or charters of rights. Let's also assume that there is in place a government to recognize, enumerate, and enforce these rights — to command that the *iura* be given. Even so, a list of natural or human rights along with a government disposed to enforce them is not enough. The *iura* must be formulated at a proper level of specificity before anyone (notably the government in cases of charters and bills of rights) can be bound by claims that *this belongs to me, him, them*. Take for example Justice Brandeis's famous dictum in *Olmstead v. United States* (1928) that the Bill of Rights includes "the right to be let alone". Brandeis articulated a general ground of a potential right — an important area of concern, as it were.⁷ So far forth, however, "the right to be left alone" is not a *ius* or a thing sufficiently specifiable for the purpose of anyone knowing precisely what is to be given. Are we speaking of privacy in the matter of government wiretaps (which was the issue before the Supreme Court in *Olmstead*), or are we speaking of a broad array of religious, familial, reproductive, and other lifestyle matters? The *United Nations International Covenant on Economic, Social, and Cultural Rights* (1966) declares that states have an obligation to bring about "continuous improvement of living conditions".⁸ This declaration is so under-specified that it is exceedingly difficult to grasp the nature and content of the putative obligation on the part of the government.

One needn't be a skeptic about natural or human rights to understand the problem posed by under-specified rights which so often find expression in bills and charters of rights. The *ius* will have to be specified by some legal procedure subsequent to the declaration of the right. Thus, people believe they have a right prior to anyone knowing precisely what it is. Notice that this problem is quite different than the problem of having to consider myriad contingent facts in order to assess a particular claim. Such complications often attend efforts to apply laws or to enforce contracts. We are

7. *Olmstead v. United States*, 277 U.S. 438, p. 478 (1928) (BRANDEIS, J., dissenting).

8. *U.N. International Covenant on Economic, Social, and Cultural Rights* (1966), §11. *The Human Rights Reader*, Micheline R. Ishay ed., New York, Routledge, 1997, p. 436.

speaking rather of a situation in which claims are made in advance of a *ius* or right. A generic area of concern entitles one to make a claim before anyone else (even the claimant) knows what is the *ius*. Where this situation prevails, courts must do something more than apply law to facts; they must specify what in fact someone is entitled to in the first place. This not only leads to the problem of “having” a right prior to anyone knowing precisely what it is or who is duty-bound to satisfy it, but also leads to rather arbitrary modes of specification in the work of constitutional or appellate courts.

In varying degrees, the problem of under-specified natural rights afflicts the United States, Canada, and, increasingly, the European Union. Despite the good will to submit themselves to bills, charters, and other instruments which hold government to the dictates of natural justice, these polities chronically find themselves in the situation where citizens believe they “have” rights not merely prior to the state, but prior to the specifications that would allow anyone to know precisely what right they enjoy. Not surprisingly, there is considerable controversy when courts are called upon to specify the enumerated rights.

In this paper, I shall make two sets of points. *First*, I will consider why the framers of the U.S. Constitution resisted any constitutionalization of the rhetoric of natural rights, and why, in fact, they resisted the adoption of a bill of rights. It is true that this Constitution and constitutional mentality no longer exist in the United States. The Bill of Rights was adopted in 1791, and since the 1890s it has been developed by federal courts to such an extent that most Americans sincerely believe that ordered liberty is chiefly a creature of the Bill of Rights rather than the articles of the original Constitution. Here, I shall not recount this history in any detail. Rather, I want to look at the problem of trying to enumerate natural or human rights, using U.S. constitutional law as our main example. This would seem especially important, if for no other reason because the American model has exerted such influence elsewhere. *Second*, I will make some more properly philosophical observations about the problem of enumerated, but under-specified, rights.

II. RESPONSIBILITY FOR MAKING NATURAL JUSTICE EFFECTIVE IN HUMAN LAW

If one surveys the great treatises on natural law, from Thomas Aquinas to Hugo Grotius, one will be struck by the fact that philosophers and jurists took it for granted (i) that natural justice is of primary interest to legislators, and (ii) that lawmakers legislate for a government of general jurisdiction, having moral police powers.

Given the conviction that there exist rules and measures of justice antecedent to the positive law of the state, it would seem to follow that whoever makes law is most immediately responsible for ensuring that statutes

and policies are in harmony with the natural law. This is not to say that judicial and executive powers in a polity have no interest in the natural law. Rather, it is only to make the obvious point that human law first connects or disconnects with the natural law in the act of legislation. Without a legislative act, there is nothing of a public nature to execute and nothing to adjudge.

On the model of a government of general jurisdiction, having moral police powers, it is not difficult to picture, in a general way, how political institutions are related to natural law. The human legislator has the task of making the natural law effective in the political community. In the first place, this will involve using principles of natural justice for remedial purposes. Some natural principles of justice will be re-presented, by way of codification. For example, natural law precepts forbidding murder and theft will be acknowledged in criminal codes. In the second place, the human law will recognize certain limits on its own power. At least in the western constitutional polities, the rights and duties of persons at private law, the rights of the church, and the rights of persons are typically recognized as setting some limits to the jurisdiction of the state. In the third place, the human legislator will use creatively the rules and measures of the natural law for the purpose of making more determinate rules and measures such as are needed by the people.

This scheme, only briefly elaborated here, corresponds rather nicely to the work of state governments. The governments of the several states are (or were) governments of general jurisdiction having police powers. In the *Commentaries*, William Blackstone described police power as “the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners : and to be decent, industrious, and inoffensive in their respective stations”.⁹ Police power, then, covers (very generally) the power of a *civitas* to legislate on those things which concern the entire body politic. Notice that Blackstone said “like members of a well-governed family”. Such a polity is more or less like that of the state governments, thirteen of which preexisted the U.S. government.

But the U.S. Constitution is a different kind of instrument because this government is not (or was not) a government of general jurisdiction, having an indefinite scope of police powers. As one of the framers, James Wilson, observed, the government created under the U.S. Constitution was “a system hitherto unknown”.¹⁰ For the U.S. government was not merely limited by rules of law, nor limited by a feudal-like system of customs and common laws; nor was it limited merely by the separation of

9. W. BLACKSTONE, *Commentaries of the Laws of England*, Facsimile of 1st edition 1769, IV cap. 13, University of Chicago Press, 1979, vol. IV, p. 62.

10. J. WILSON, Opening Address at the Pennsylvania Ratifying Convention (Nov. 24, 1787), in *The Debate on the Constitution*, 791, p. 793 (Library of America 1993).

powers. This government was limited by other governments, according to the principle of dual sovereignty.

In *Democracy in America*, de Tocqueville contended that the entire genius of this new government is summarized in the following four sentences of Federalist-45 :

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the state governments are numerous and undefinable. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce, with which... the power of taxation will, for the most part, be connected. The powers reserved for the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.¹¹

According to Madison, the political rule of this new regime consists of two quite distinct kinds of government — different kinds, not merely different orders of magnitude. In Federalist-51 he writes : “In the compound republic of America, the power surrendered by the people is first divided between *two distinct* governments[...] Hence a double security arises to the rights of the people”.¹² On the one hand, there are governments of general jurisdiction, having moral police powers. As Madison says, their powers are “numerous and undefinable” because their objects extend to all of the things “in the ordinary course of affairs” that bear upon the common good. On the other hand, there is a government of delegated and enumerated powers. Many, if not most, aspects of human well-being — marriage, religion, education, crime — do not (immediately) fall under its direction. Rather, they fall under the direction of governments of general jurisdiction, which were the states.

From this, we can adduce two institutional reasons why the U.S. Constitution is so abstemious in mentioning rights. *First*, given a government of “few and defined” powers, one is chiefly interested in whether that government has a power, and only secondarily (but not unimportantly) in how it is used. In this respect, an abundance of moral language would prove counterproductive. To worry whether the use of a power is morally adequate to various objects and ends (education, health, religion, etc.) is to put the cart before the horse. The first question is whether that government has been delegated power over a specific object or end. *Second*, because it is not a government of general jurisdiction, having moral police powers, many areas of human conduct which are most immediately and vividly related to moral considerations fall outside its jurisdiction. In the original Constitution, even slavery was left primarily to the states. The states, having “numerous

11. A. DE TOQUEVILLE, *Democracy in America*, J.P. Mayer ed., New York, Doubleday-Anchor, 1969, p. 115.

12. Federalist # 51. *The Federalist Papers*, London, Penguin Classics, 1987, p. 321.

and indefinable” powers, reach many more ends. Thus, it is entirely appropriate that the state constitutions should expressly include the moral axioms and theorems which guide these powers.

It should be emphasized, however, that this does not mean that the U.S. Constitution is not informed by moral principles; it is only to say that their exposition is indirect, in keeping with the nature of the instrument and its ends. This indirection represents a deliberate effort by the framers to discipline how we should think about the limits of governmental power. Rather than listing all the moral norms that ought to guide the use of legislative, executive, and judicial powers, the Constitution tries to state as precisely as possible who has authority over a certain scope of objects.

Enumerated powers do not necessarily tell us whether any particular law made in pursuance of a power satisfies or thwarts natural justice; nor does it immediately tell us whether a liberty exercised in the absence of a power is exercised rightly or wrongly, from a moral point of view. So, for example, Article I (§8) of the U.S. Constitution gives Congress authority to grant temporary rights to authors and inventors for their respective writings and inventions. Interestingly, it is the only place where the word “right” is mentioned in the original Constitution. This article does not, however, tell us how this Congressional power ought to reach a Kevorkian suicide machine, much less which, if any, writings have redeeming social value. Unlike ordinary moral reasoning, which is only satisfied when the choice is fully adequate to the concrete particular, the articles of the Constitution merely tell us who has what power, not how the power is to be used to secure the moral right.

It is indeed a moral question whether Congress ought to underwrite inventions which are likely to serve immoral purposes. We can assume that, implicit in the grant of power, is a norm requiring those who use the power to use it reasonably, in accord with the common good. This level of reasoning, however, is not *constitutionalized* by the Constitution. It is left to the judgment of Congress, and ultimately to the people who are represented therein. The Constitution leaves to Congress the responsibility of using its delegated power in such ways which make natural justice effective in the political community — or at least in that part of the political community over which the national legislature has power to act. If it does not have delegated power over a certain object or end, there is no need to inquire further into the moral specifications of its legislation or policies. It is assumed that in the absence of delegated power, some other agent (private or public) has responsibility to address the matter at hand.

To summarize : it is one thing to ask whether a government has been delegated a power; it is quite another thing to ask whether a power is used rightly (from a moral point of view). If a government has plenary powers, then a bill of rights can do nothing more nor less than provide additional rules concerning how those powers are to be used. Hence, natural law or natural rights will make their appearance as moral limits on the government. If, however, a government does not have, as Madison said, “numerous

and indefinable” powers, a bill of rights will have to have a completely different function. In this case, a bill of rights will have to make more clear precisely which powers the government lacks.

From the very outset, critics of the U.S. Constitution complained that its lack of explicit moral language was a defect. Anti-federalists urged that the Constitution be adopted only if it included a bill of rights. And in this century, Article-III courts came to believe that the sparse and lawyerly language of the U.S. Constitution contains hidden moral substance that courts must make explicit.¹³ This is not the place to review the complex historical reasons for this new perspective. Here it will suffice to say that the U.S. government became over time a regime that certainly appeared to be a government of general jurisdiction with “numerous and indefinable” powers. This was the fear voiced by the anti-federalists in the late eighteenth century, who believed that the new government would inevitably become a regime of plenary powers, and hence a bill of rights was needed to correct or at least mitigate its use of such power. In any event, from the judgment that the U.S. government is no longer a regime of “few and defined” powers, the interpretation of the Bill of Rights would have to change accordingly. It would become a device not for saying whether government has a power, but rather for judging how that power ought to be used. Thus, the Bill of Rights would become a sluice-gate not merely for a moral debate about the actions or inactions of the U.S. government; of necessity, it would also become a constitutional debate.

In a rare moment of candor, Justice Jackson took note of the change in perspective in *West Virginia v. Barnette* (1943).

True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men’s affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than

13. The Fourteenth Amendment (1868) created federal supervisory and enforcement powers over some of the police powers of the state governments. Although the amendment did not make the federal government a government of general jurisdiction, it sowed the seeds for that transformation. For the power to supervise police powers is, at least operationally, to have police powers. Since the police powers of the states are, as Madison said, “numerous and indefinable”, the supervisory powers of the U.S. government will be enlarged accordingly. Once the Article-III courts got into the business of incorporating the Bill of Rights against the states, it is not surprising that judges would feel compelled to introduce substantive moral principles.

we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.¹⁴

In *Barnette*, the Supreme Court had to decide whether state governments could require public school students to join in a flag-salute ceremony. Jehovah's Witnesses had refused to do so, on grounds of religious conscience. The Court ruled that individuals enjoy a right not to be compelled to utter what is not in their mind. Although the majority of the Court could find no particular text of the Constitution that recognized such a right, much less one that recognized such a right as a federal matter, they reasoned that this immunity from state-imposed symbols could be inferred from the meaning of the First Amendment. Justice Jackson, writing for the majority, contended that the *laissez-faire* philosophy had been dealt a blow by the New Deal, at least as regards matters of economic liberty. The Court, by Jackson's admission, was unable to check the U.S. government's surging powers which attended the Great Depression, the New Deal, and national mobilization during World War Two.¹⁵ Having lost the battle of delimiting power according to a strictly constitutional criterion of whether a power was delegated in the first place, Justice Jackson and the Court decided to limit power by a moral argument keyed to individual rights. This betokened a great change in the habits of American constitutional law. Implicitly, government was now thought to have plenary powers which needed to be checked by appeals to unenumerated individual rights.

Justice Jackson also points to another problem. How can the Court move from the "majestic generalities" of the Bill of Rights to rights adequately specified? Without specification these rights are virtually useless for the purpose that Jackson has in mind. After slight hesitation, Jackson asserts that the Supreme Court will have to specify the rights, presumably on a case by case basis.

III. ENUMERATION OF POWERS AND THE ENUMERATION OF RIGHTS

The potential problem of vaguely formulated rights was not unknown to the founders. In his magisterial *Commentaries on the Constitution of the United States* (1833 edition) Chief Justice Story wrote :

That a bill of rights may contain too many enumerations, and especially such, as more correctly belong to the ordinary legislation of a government, cannot be

14. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, p. 639f.

15. For studies on this part of the story, see : R. HIGGS, *Crisis and Leviathan : Critical Episodes in the Growth of American Government*, Oxford, Oxford University Press, 1989; H. ARKES, *The Return of George Sutherland*, Princeton, Princeton University Press, 1994.

doubted. Some of our state bills of right contain clauses of this description, being either in their character and phraseology quite too loose, and general, and ambiguous; or covering doctrines quite debatable, both in theory and practice; or even leading to mischievous consequences, by restricting the legislative power under circumstances, which were not foreseen, and if foreseen, the restraint would have been pronounced by all persons inexpedient, and perhaps unjust. Indeed, the rage of theorists to make constitutions a vehicle for the conveyance of their own crude, and visionary aphorisms of government, required to be guarded against with the most unceasing vigilance.¹⁶

Story's point was aimed at the anti-Federalists, who (in Story's view) misunderstood the nature of the U.S. Constitution. But his deeper point touches upon an important question of practical philosophy. Do vaguely formulated principles of natural rights really limit government in the ways their proponents imagine?

Before turning to the philosophical issue, it would be useful to recall the historical context of the dispute over the Bill of Rights. Story's remark was made in reference to Alexander Hamilton's famous argument in Federalist # 84, that a Bill of Rights is unnecessary. Hamilton contended that "the Constitution is itself, in every rational sense, a Bill of Rights".¹⁷ Insofar as a constitution delegates and enumerates the powers of the state (here, the U.S. government), there is no need to limit the state by the addition of natural rights claims, nor indeed any kind of rights claims. Hamilton asked: "[W]hy declare that things shall not be done which there is no power to do?"¹⁸ Accordingly, the internal structure of the government protects rights, by spelling out precisely what the government cannot do. If Article-I (which enumerates Congressional powers) gives Congress no power to make laws respecting an establishment of religion, there is no reason to reiterate the want of power in an amendment. Hamilton concluded: "Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights and which would sound much better in a treatise of ethics than in a constitution of government".¹⁹

The options presented by Hamilton are simple. We could, in the fashion of moral philosophers, first identify a body of moral rights, and then erect institutions of government as so many implications of those rights. For example, from the proposition that individuals have an inalienable right of conscience, we could declare in the Constitution that government may not abridge the right of religious conscience. Or, we could, in the

16. J. STORY, *Commentaries on the Constitution*, Bk. III, ch. xlv, Durham, Carolina Academic Press, 1987, p. 979.

17. Federalist # 84, *The Federalist Papers*, p. 477.

18. *Id.*, p. 476.

19. *Id.*, p. 475f.

fashion of the framers, limit the institutions and activities of the government, from which there would flow certain liberties enjoyed by the people.²⁰

On the first model, the duties of government are derived and explicated from antecedent rights claims; on the second model, rights are enjoyed as liberties exercised in the absence or specification of a governmental power. On the second model, public and justiciable rights do not appear prior to the actual institutions of law and government. The same result can be generated by either starting point, for citizens cannot be molested or impaired in their religious duties whether we start from the want of power on the part of Congress to make such laws or whether we start from the right of citizens to religious conscience. However, the framers, eschewing the first model, avoided the problems characteristic of natural rights discourse : (i) there are no rights antithetical to the rule of law; (ii) there are no vague propositions about justice; (iii) there is no lack of clear and precise instructions to the government about the nature and scope of its powers, for the government is not being asked to interpret its powers as though they were implications of a list of human rights.

James Madison wrote in *Federalist-51* : “In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself”. The federalist argument was that while it is relatively easy to enumerate governmental powers, it is relatively difficult to formulate abstract principles of justice or of natural rights which have sufficient specificity or adequacy to the matters which come under dispute. A government that will not conform its activities to the powers delegated to its people is not apt to be a government that will limit its activities to the abstract aphorisms of natural rights. In fact, rather than limiting the government, abstract rights Hamilton warned, “would furnish to men disposed to usurp, a plausible pretense for claiming that power”. Once government is commissioned to secure the end of generally stated moral desiderata, government will not only claim the power to interpret the scope of these ends, but will also claim power over the means to achieve them. Since the former are general and indefinite, so too are the latter. Everyone believes that they have rights, but no one actually knows what they are until an organ of the government specifies them.

20. These are what Wesley Hohfeld would call “liberties”; that is to say, the absence of a power or a right creates a zone in which others are free to act. W.N. HOHFELD, *Fundamental Legal Conceptions*, New Haven, Yale Univ. Press, 1919. So, for example, the 1st Amendment does not recognize a right of conscience. Rather, it declares a lack of Congressional right or power over matters religious. Citizens, then, are free to exercise their religious conscience in the absence of Congressional power. Now, it might be true that citizens, by the mere fact of being human, have a natural right to religious liberty. The 1st Amendment does not contradict that idea. But neither does it constitutionalize such a far-reaching and under-specified right as the right to free conscience.

Here, we can recall Justice Story's criticism of state bills of rights, which "contain clauses of this description, being either in their character and phraseology quite too loose, and general, and ambiguous; or covering doctrines quite debatable, both in theory and practice; or even leading to mischievous consequences, by restricting the legislative power under circumstances, which were not foreseen, and if foreseen, the restraint would have been pronounced by all persons inexpedient, and perhaps unjust".

Examples of this problem are abundant, especially in the dicta of the courts. Take the case of *Planned Parenthood v. Casey* (1992), where the Supreme Court tried to expound the principle of justice limiting the moral police powers of the state governments on the issue of abortion. The Court maintained that: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State".²¹ This particular right, without further qualification, would give citizens an immunity from virtually all positive law. So stated, it could mean anything. A right that can mean virtually anything does not limit the government. Rather, such a right authorizes the government both to meddle in social relations for the purpose of securing open-ended claims of justice, and (paradoxically) to make constant exceptions to the alleged right whenever its open-ended character seems to conflict with some compelling governmental function. Vaguely formulated "rights" must prove extremely difficult to adjudicate in a fair, public way. *À propos* of the *Casey* dictum, in the context of litigation, how can the right to define the meaning of the universe be ascertained by a judge, since the right is essentially a right to enjoy private, if not idiosyncratic, meanings? As Simone Weil said: "To set up as a standard of public morality a notion which can neither be defined nor conceived is to open the door to every kind of tyranny".²²

There may well be a kernel of moral truth in the *Casey* dictum, but as it stands the "right" is under-specified. Until it is further specified, no one can know who is bound to do (or not do) *what* to whom. And so long as that condition persists, there is no *limit* to the government.²³ On the one

21. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, p. 2807 (1992).

22. S. WEIL, "Human Personality", *Selected Essays*, Richard Rees trans., Oxford, Oxford Univ. Press, 1962, pp. 9-10.

23. Take, as another example, the recent *U.N. Convention on the Rights of the Child*. Article twelve asserts "that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child". Article thirteen asserts "that the child shall have the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of child's choice". *Convention on the Rights of the Child*, Nov. 20, 1989, 28 I.L.M. 1448, 1461. Moral desiderata are not the same thing as morally binding prescriptions, even if one tries to compel these desiderata into the rhetoric of moral prescriptions.

hand, we have a principle of unbounded individual liberty; on the other, a government responsible for enforcing that principle in a very arbitrary manner.²⁴

IV. CONSEQUENCES FOR CONSTITUTIONAL LIMITS ON GOVERNMENT

Inadequately specified moral or human or natural rights claims have some very deleterious consequences for constitutionalism.

First, generalized rights claims do not always limit the government, for government will inevitably have to make exceptions to the exercise of the alleged right. It is not merely coincidental that the U.S. Supreme Court invented the criterion of “compelling state interest” at the same time it (the Court) started down the path of interpreting the Constitution in the light of substantive rights rather than in the light of enumerated powers of government. Under-specified rights, then, not only permit the individual to make a claim in advance of truly binding term of justice, but such rights also permit the government to brush aside the right when it can demonstrate some compelling utilitarian reason for doing so.²⁵

Second, even under optimal conditions of a government that sensibly deliberates about how to fill the “gap” between rights and rights exercised rightly (which is the same thing as the gap between merely putative rights and actual rights), the government does not have a sufficiently precise idea of how to direct and limit its powers. For every under or over-specified rights claim we will have to commission the government to discover precisely what it is that the government must promote, protect, and secure. Since no one knows precisely who is obligated and what they are obligated to do or not do, the constitutional system will become dystelic, and ultimately unjust. It is one thing to suffer morally confused individuals, it is far more dangerous to suffer a government that acts blindly, without direction — especially when the confusion stems from the fundamental law of the constitution rather than from a stupid or unjust policy or statute.

Third, whereas a crudely framed policy or statute can be corrected through the ordinary political process, a morally improper right at the constitutional level can generate a crisis of conscience for the entire polity. This problem surfaced in an especially critical way with the *Dred Scott* decision of 1857. With regard to the notion that owning slaves is a fundamental or natural right, Abraham Lincoln observed: “Its language is equivalent to saying that it is embodied and so woven into that instrument [viz. the Constitution] that it

24. On the evolution of such generalized rights claims in U.S. constitutional law, see R. HITTINGER, “Liberalism and the American Natural Law Tradition”, (1990) 25 *Wake Forest Law Review*, 429-499.

25. Hence, the common good makes its appearance in the scheme of justice precisely at the point that the state can override rights. This is a predictable result of under-specified rights.

cannot be detached without breaking the constitution itself".²⁶ "If slavery is right", Lincoln said, "all words, acts, laws, and constitutions against it, are themselves wrong, and should be silenced, and swept away".²⁷ In the same vein, James Madison, a slave holder, argued at the Constitutional Convention that it would be "wrong to admit in the Constitution the idea that there could be property in men".²⁸ With consummate clarity, Madison understood that to recognize such a right in the fundamental law would forever take the matter of slavery out of the sphere of governmental prudence, and would bind the entire polity to the protection of a wrong. Such "wrongs" can enjoy a kind of legal immunity in the case of legislative toleration, or in the case where a constitution does not delegate to government (or a certain sector of it) the power to address the wrong. But as both Madison and Lincoln understood, toleration and the want of power are entirely different than grounding the wrong in a claim of natural right.

Fourth, the constitutionalization of natural rights tends to erode civil amity because citizens are encouraged to play a legal version of atomic warfare. Partisan groups look to the courts to re-write the fundamental law on their behalf. Rather than winning a right in an ordinary civil action, victory in a constitutional court wins the power to shape the basic constitutional values. This, then, produces an atmosphere that is very nearly the opposite of what is supposed to be achieved by a bill of rights. A bill of rights is supposed to limit the arbitrary power of the government by placing exacting restrictions on how the people can express their will through the organs of government. Some rights are not supposed to be up for grabs. Yet, to the extent that ordinary politics is displaced in favor of constitutional or bill of rights politics, people inevitably come to believe that their rights are only as good as their success in bringing their own partisan agenda before the bar. The stakes of winning and losing are so severe that there can be no compromise. This problem of over-heated constitutional politics is especially to be avoided in polities like Canada and the United States, which are deeply pluralistic societies. In such societies, it is essential to ensure that the organs of power are not commandeered by one group. Civil amity requires that every group learn how to engage in civil conversation. How can I live with my neighbor, if he or she need only convince a court (rather than the rest us) to recognize a right to "define the meaning of the universe"? Imagine a society that suffers a perpetual constitutional convention that, case by case, rewrites the social contract. Then, imagine the resentment of citizens who discover that they have no effective voice in that process. This is precisely what

26. Speech at Columbus, Ohio (September 16, 1859), in *Lincoln: Speeches and Writings 1859-1865*, New York, The Library of America, 1989, p. 53.

27. Address at Cooper Union (Feb. 27, 1860), *id.*, p. 129.

28. M. FARRAND ed., *The Records of the Federal Convention of 1787*, rev. ed., 4 vols, New Haven, 1937, II, p. 417.

happens when partisan groups bring their agenda to constitutional courts. Only the litigants win the power to reshape the social contract.

The framers and ratifiers of the U.S. Constitution certainly believed in natural rights. But to their credit, they were exceedingly cautious about writing these principles directly into the fundamental law. Instead, they opted for a Constitution of enumerated powers, which spelled out precisely what the government cannot do. How, from a moral standpoint, the government should do the things it is constitutionally enabled to do is left mostly to the judgment of the people and their government. In framing this kind of fundamental law, they believed that the institutions of government would be broadly congruent with natural principles of justice. How the actions of government are to be made more adequate to the requirements of natural justice is deferred to the deliberative skills of ordinary legislation.

They understood that from unbounded individual liberty comes despotism. An under-specified right is nothing other than an unbounded liberty. But since only a Court can discover the limits to the right, the judicial power (willingly or unwillingly) comes to share in that unboundedness. And thus, one of the best ways to limit the despotic tendencies of government is to eschew broad and under-specified rights claims. Far from disparaging principles of natural justice, the American framers took care to protect those principles from the exuberance of ideologues. The specific institutional character of the U.S. Constitution is one among many different kinds of constitutional order. It differs sharply from those constitutions which display the powers and ends of a government of general jurisdiction. To this extent, it is not necessarily a model for any other polity. But its institutional wisdom about the problem of rights drawn too broadly has value for political and legal philosophers.

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