# What Does *The Realist Turn* Mean for Originalism and American Public Life?

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**ABSTRACT**

At a time of loss of confidence and spiritual crisis in America and the West, a turn to metaphysical realism is a potential remedy. Douglas B Rasmussen and Douglas J. Den Uyl's book, *The Realist Turn*, provides that remedy for law and public life in a secular setting that could have wide appeal. That turn to realism revives the natural law tradition, which both challenges originalism—because it demonstrates the need for reason and knowledge, rather than history, to reveal the meaning of rights—and provides a justification for ontological trust that can renew America's declining public life.

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## I. INTRODUCTION

We are at a moment of needed cultural change. American society, and one might say the West generally, is perceived to be in decline largely because of a loss of confidence in the traditional values of Western Civilization, including natural rights and constitutional democracy. The Presidential election of 2016, Brexit, and the rise of

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populist movements all reflected this loss of confidence, a failure of belief.

The decline is spiritual and is also reflected in the deaths of despair and falling life expectancy. One can even see it in the very low approval ratings for President Joe Biden when objective conditions in the country are not that bad. If a Republican defeats Biden in 2024, approval ratings for that President will likely be almost as low.

I have written that this loss of belief is the "Death of God Come Home to Roost."[1] Without God as the traditional guarantor of the Good, the True and the Beautiful, we are subject to the post-modern conviction that values are just idiosyncratic opinions, without connection to anything real. Even the Justices on the U.S. Supreme Court—all of them in 1992[2]—have joined opinions proclaiming that values are just human constructs.

In this context, history has no shape and hope is an illusion. All that is left in public life is power and struggle. No wonder America is torn by hyper-partisan blocs whose members have alternative sources of news and who increasingly do not have contact with each other.

The result of all of this is distrust. As early as 1980, John Hart Ely, in *Democracy and Distrust*,[3] insisted both that value differences could not be rationally resolved and that some objective process or methodological alternative had to be found to ground judicial review. In Ely's case, that was process protection for democratic norms. At around the same time, the beginnings of originalism, which Ely called "Interpretivism," [4] and which arose out of the same skepticism about values, were surfacing.[5] Eventually, in developed originalism, the needed objectivity would be supplied by text and history.

Even earlier, in 1971, in political philosophy, John Rawls attempted to supply the needed objectivity to resolve intractable differences in values through an imagined original position. For many

1. BRUCE LEDEWITZ, THE UNIVERSE IS ON OUR SIDE: RESTORING FAITH IN AMERICAN PUBLIC LIFE 5 (2021) [hereinafter LEDEWITZ, UNIVERSE].

2. Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 115-116 (2016).

3. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

4. *Id.*

5. By 1984, Robert Bork was already arguing his variant of original-intent originalism. *See* Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension between Originalism and Democracy*, 80 CHI. L. REV. Dialogue 243 (2013) (recounting Bork's variant of originalism). Of course, the originalism movement was famously attacked in 1980, before it was even a movement. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

years, his book, *A Theory of Justice*,[6] was practically required reading in many law schools.

Whatever one thinks of the success or failure of these efforts to shore up American public life, and place it on acceptable foundations, the starting point of skepticism remained. Therefore, American public life could not be healed in these ways. Things got worse.

What was needed was the realist turn—some way to link values, ethics, morality, and judgment to something real in the world. A realist turn actually began in science in the 1970's.[7] And it continues.[8] Glimmerings are now beginning to appear generally in the culture, for example in the arts,[9] and in philosophy via the renewed interest in the thought of Alfred North Whitehead.[10]

Now comes a book—*The Realist Turn*[11] ("*TRT*")—and a project—the book is the third in a trilogy[12]—that takes the realist turn into the heart of politics and law. The authors, Douglas B. Rasmussen and Douglas J. Den Uyl, take this turn with such thoroughness and confidence, and in a strictly secular fashion, that they may finally dent this culture's unreflective and half-hearted nihilism. We have never really been nihilists, as Bruno Latour might say.[13] Maybe we have just needed some help in coming to terms with the Death of God.

This essay is not a review. Rather, my purpose is to speculate on the potential impact of *The Realist Turn* on American public life in general, on law in particular, and on originalism, very specifically.

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6. JOHN RAWLS, A THEORY OF JUSTICE (1971).

7. Stathis Psillos, "*The Realist Turn in the Philosophy of Science*," *in* THE ROUTLEDGE HANDBOOK OF SCIENTIFIC REALISM 20 (Juha Saatsi ed., 2017).

8. *See generally id.*.

9. *See generally* CHRISTINE REEH-PETERS ET AL., , THE REAL OF REALITY: THE REALIST TURN IN CONTEMPORARY FILM THEORY (Stefan W. Schmidt et al. eds., 2021).

10. ROLAND FABER, THE MIND OF WHITEHEAD: ADVENTURE IN IDEAS (2023). I am not suggesting that Whitehead's understanding of reality is akin to that of traditional metaphysical realism, which Whitehead might well dismiss as an appeal to "naked existence." Nevertheless, Whitehead falls more on the metaphysical realism side, although it would be better to say of him that something is happening rather than something is there. Certainly, for Whitehead, the universe is engaged in values.

11. DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, THE REALIST TURN: REPOSITIONING LIBERALISM (1st ed. 2020) [hereinafter TRT].

12. The first two books were NORMS OF LIBERTY: A PERFECTIONIST BASIS FOR NON-PERFECTIONIST POLITICS (2005) and THE PERFECTIONIST TURN: FROM METANORMS TO METAETHICS (2017).

13. *Compare* BRUNO LATOUR, WE HAVE NEVER BEEN MODERN, (Catherine Porter trans., 1993).

## II. ORIGINALISM IN MORAL CRISIS: THE ARRIVAL OF COMMON GOOD CONSTITUTIONALISM

With the confirmation of Amy Coney Barrett as a Justice on the Supreme Court in October 2020, originalism stood triumphant as the dominant form of constitutional interpretation. The Supreme Court then contained a five-Justice majority of essentially self-proclaimed originalists. One may quibble over whether these Justices have actually practiced originalism, and originalism still has its critics of course, but the method has no coherent, popularly accessible, alternative.[14]

The collapse of living constitutionalism,[15] some form of which had simply been constitutional interpretation before originalism, was complete with Justice Elena Kagan's 2010 announcement that "We are all originalists."[16] It is true that Justice Ketanji Brown Jackson did not endorse any method of constitutional interpretation at her confirmation hearing in 2022,[17] but she certainly did not defend living constitutionalism.

The reason for the collapse of living constitutionalism, whether David Strauss's common law version[18] or any of the many other variants,[19] was the same value skepticism that empowered originalism. If values really are just made up and if there really is nothing to reason about, then what attraction could any common law method have? The point of the common law was to purify law through reason over time. It was a realist endeavor. And this problem recurs with any non-originalist

14. This assertion may not seem fair to Richard Fallon, whose monumental 2018 book, *Law and Legitimacy in the Supreme Court*, certainly aimed at being such an alternative. *See generally* Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO J. L. &PUB. POL'Y 287 (2020) [hereinafter Solum, *Themes from Fallon*]. But Fallon is simply not popularly accessible in the way that living constitutionalism and originalism are. Ordinary people can understand the idea that the Constitution does not change versus the Constitution must be brought up to date. I'm not sure what people think of reflective equilibrium.

15. Randy Barnett argued that what I am pointing to here had been apparent quite early. Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L.REV. 611 (1999) ("Originalism has not only survived the debate of the eighties, but it has virtually triumphed over its rivals.") [hereinafter Barnett, *Originalism for Nonoriginalists*].

16. Conor Casey & Adrian Vermeule, *If Every Judge is an Originalist, Originalism is Meaningless*, WASH. POST (Mar. 25, 2022), https://perma.cc/BA26-FEW6.

17. *See* Bruce Ledewitz, *Toomey's vote against Ketanji Brown Jackson set a dangerous precedent. Here's why*, PA. CAPITAL-STAR (Apr. 14, 2022), https://perma.cc/4LLQ-Y5PR.

18. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

19. *See* Solum, *Themes from Fallon*, *supra* note 14 at 298 (considering all non-originalist theories of constitutional interpretation to be within the living constitutionalism group, and giving a list of the "major forms").

approach. Without a commitment to objective moral principles, any form of living constitutionalism is not coherent.

At the moment of its apparent success, however, originalism was attacked as amoral by what came to be called "Common Good Constitutionalism."[20] In March 2020, Harvard Law Professor Adrian Vermeule published an article entitled "Beyond Originalism" in *The Atlantic*. The subtitle of that article explicitly raised the issue of applying morality in judicial decisions: "The dominant conservative philosophy for interpreting the Constitution has served its purpose, and scholars ought to develop a more moral framework."[21] Vermeule's 'book, *Common Good Constitutionalism*, followed in 2022.[22]

At the time, I did not understand what the fuss was about. As a dedicated "living constitutionalist," I had always thought of originalism as skeptical toward moral judgments. I thought that was its point.

I was aware that originalism could be, and had been, defended on normative grounds,[23] and as a theory of language[24] that purported to have nothing to do with moral skepticism as such.[25] And certainly there is nothing amoral in Lee Strang's natural law originalism,[26] among many other flavors of originalism.

Nevertheless, originalism never shed its origin in skepticism. In debate with originalists I have often been told that without originalism, the Constitution could mean "anything." The classic conservative figure and former Federal Judge, Michael McConnell, wrote that the Supreme Court most lacks legitimacy when it directly engages moral reasoning.[27] The iconic Justice Antonin Scalia wrote in his account of his own originalist method—textualism[28]—that the Eighth Amendment's conception of cruelty must mirror that of the framers and not be open to

20. In 2007, Vermeule had raised criticisms of common law constitutionalism on grounds that in part paralleled and in part differed sharply from Common Good Constitutionalism. Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COL. L. REV. 1482 (2007).

21. Adrian Vermeule, Beyond Originalism, THE ATLANTIC (Mar. 31, 2020), https://perma.cc/XP7X-3PTV.

22. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (1st ed. 2022).

23. *See* Barnett, *Originalism for Nonoriginalists*, *supra* note 15.

24. *See* Lawrence B. Solum, *Semantic Originalism*, ILL. PUB. L. & LEGAL THEORY RSCH. PAPERS SERIES No. 07-24, 30 (2008).

25. This claim is subject to challenge. *See* Ash McMurray, *Semantic Originalism, Moral Kinds and the Meaning of the Constitution*, 2018 BYU L. REV. 695 (2018).

26. LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019).

27. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997).

28. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Guttman ed., 1997).

interpretation as something for moral philosophers to "play with in the future."[29]

In fact, Scalia famously wrote in his dissent in *Planned Parenthood v. Casey* that values could not be decided rationally but were something to vote on,[30] which made Scalia sound much more like Stephen Douglas than Abraham Lincoln.

And, as John McGinnis and Michael Rappaport have written, originalism eschews the values of the interpreter in favor of those of the framers as expressed.[31] Therefore, there are in principle no value disputes to resolve in originalism.

This has all been known from the start. So, I expected originalism to shrug at Vermeule's attack. Originalism had always been regarded as a proper mode of constitutional interpretation in part because this is a culture of skepticism about moral claims. An attack that originalism is insufficiently moral should have elicited no interest at all.

But that is not what happened. The best indicator of the concern that Vermeule's criticism engendered was the early part of a generally critical book review of *Common Good Constitutionalism* by Randy Barnett, one of the leading voices and theorists of originalism.[32] Before proceeding to his critique, Barnett actually joined in Vermeule's attack on originalism and did so quite expressly:

> In fairness, Vermeule has located a genuine deficiency in the conservative legal movement that I have criticized for as long as I have been a part of it. For a variety of reasons, constitutional conservatives—for want of a better label—tend to focus almost exclusively on the proper reading of the "positive law." They shy away from any systematic consideration of justice or morality, deeming these topics to be outside the proper province of the judiciary. As a result, many conservative legal academics and jurists dismiss the relevance of natural law, natural rights, and even the Declaration of Independence to their theories of law and legal interpretation.[33]

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29. *Id.* at 145.

30. "Value judgments, after all, should be voted on, not dictated." Planned Parenthood v. Casey, 505 U.S. 833, 1001, (1992) (Scalia, J., dissenting), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

31. John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 391-92 (2003) ("[O]riginalists eschew an approach that would consider the values of a modern interpreter. Originalism requires that we give effect to the Framers' values, as expressed in the language of the document itself.").

32. Randy Barnett , *Deep-State Constitutionalism*, CLAREMONT REV. OF BOOKS 33 (2022) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

33. *Id.*

Why such concern now? Barnett himself has sometimes been content to argue in instrumentalist terms rather than taking on the burden of establishing natural rights in normative grounding directly.[34]

There are strictly politically pragmatic reasons that might attract originalists to direct moral engagement now. Specifically, Justice Harry Blackmun's proto-originalist dismissal of the personhood of unborn life in *Roe*[35] might be thought to block any effort to recognize such a right to life unless originalism became more morally capacious. Similarly, on the economic front, it would be hard to return to the night-watchman state without something more than traditional originalism.

In other words, the framers will not get you where you need to go and, if the political base demands that you get there, you must at least try.

But I now recognize that the fundamental reason that originalism proved to be open to Vermeule's attack is that many of its proponents are genuinely uncomfortable with its skepticism. It was possible to ignore this issue when criticism of originalism came from the left. That critique usually omitted any mention of moral relativism or nihilism,[36] confining itself to the tired and unsuccessful challenges that originalism was incoherent or inconsistent or both. The left could hardly criticize originalism's value skepticism when it more than shared in the culture's nihilism.[37]

Vermeule, on the other hand, is of the political right, is morally robust, and develops his critique out of a version of Roman Catholic social teaching. When someone like that says you are amoral, it demands a response.

But what could that response be? How could originalists shed their skepticism?

Certainly, a turn to religious foundations would not answer the need. While Vermeule's account is not literally religious, it is likely to feel religious in its assumptions and metaphysics to anyone who is secular. The subtitle of the book review of *Common Good*

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34. LEDEWITZ, UNIVERSE, *supra* note 1, at 140-41.

35. Roe v. Wade, 410 U.S. 113, 157 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Blackmun purported to rely on text and history, stating "[a]ll this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158-59.

36. I like to think I was an exception to that. *See* Bruce Ledewitz, *"Judicial Conscience and Natural Rights: A Reply to Professor Jaffa*," 10 U. PUGET SOUND L. REV. 449 (1994).

37. *See* Kieran Setiya, *The Politics of Disenchantment: On Wendy Brown's "Nihilistic Times"*, LOS ANGELES REV. OF BOOKS (Apr. 27, 2023), https://perma.cc/W9AD-RXFA.

*Constitutionalism* by Micah Schwartzman and Richard Shragger is "Adrian Vermeule has a new constitutional theory that hides its religious foundations."[38]

For this reason, Vermeule is not a person whose thinking will appeal to the culture. The reason we are mired in nihilism is the perceived Death of God. So, accounts of reality by those for whom theism is not a problem, or who even implicitly rely on it, as Vermeule does, cannot supply what is needed—a morally robust, thoroughly secular account of natural rights that might move both left and right back to some form of metaphysical realism.

I really did not think this would be possible. But then, in April, I read a tweet by Barnett pointing to just such an account of reality: *The Realist Turn*, by Rasmussen and Uyl ("*TRT*").[39] Barnett called it technical and not accessible, but I did not find it so at all. In the next section, I will describe how *TRT* accomplishes a secular grounding of natural rights before proceeding to what *TRT* might mean for law particularly and for the culture generally.

## III. HOW *THE REALIST TURN* MAKES ITS CASE

Out of necessity this account is just a sketch. My purpose is not to set forth the authors' argument fully, but to acquaint the reader with it so as to appreciate the implications of *TRT* for law and public life.[40]

As stated, *TRT* is the third of a trilogy. The arguments of the two previous books, *Norms of Liberty*[41] and *The Perfectionist Turn*,[42] are summarized in *TRT* and the argument of this trilogy as a whole is brought to its conclusion.

The authors are making a case for liberty. They ground the politics of a free society in natural rights. And they derive natural rights from substantive claims in morality, epistemology and ontology.

For the authors, natural rights are not the basis of morality. One does not live a moral life by respecting the rights of others, though that is of course minimally required. Natural rights, instead, are metanorms—a structure, in other words—that allows for human flourishing. The authors link the ethical order to the political/legal order through the concept of natural rights.

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38. Micah Schwarzman & Richard Shragger, *What Common Good?*, THE AMERICAN PROSPECT (Apr. 7, 2022), https://perma.cc/86C6-EGSV.

39. *See* TRT, *supra* note 11.

40. A very able summary of the argument in TRT is provided by David Kelly in his review. David Kelly, *Concepts and Natures: A Commentary on The Realist Turn*, 42 REASON PAPERS 6 (2021)

41. *See* source cited *supra* note 12.

42. *See* source cited *supra* note 12

Simply put, human beings have natural rights because natural rights provide the necessary space for human beings to perfect their nature in their own, agent specific, way.

The argument is strictly secular. The first step is in moral theory: In neo-Aristotelian fashion, the authors first set forth an individualized human nature that it is a human being's obligation to perfect. This perfecting is Eudamonia, or human flourishing. Flourishing is a way of living, not an attitude.

The moral standard of flourishing is universal, while the specific nature of flourishing depends on the characteristics of each person. As David Kelly nicely puts it, "my flourishing is a good for me, yours for you."[43]

Human flourishing requires individual self-direction. It is not something that can be imposed by the state. This is so for two reasons. First, self-direction is both a means and an end. It is itself "fundamental to the very nature of human flourishing."[44] As a means, it must be actively practiced. Second, the agent specific nature of human flourishing precludes any universal prescription, such as might be provided by a political authority.

But how can a political or legal order govern universally given this individualized nature of human flourishing? The authors call this "liberalism's problem"[45] solving which is the central concern of the entire project.

Natural rights solve liberalism's problem by creating a space for all people to perfect themselves individually. That is the reason that natural rights are not themselves moral principles but are the highest political obligation to protect. Protecting natural rights is the very purpose of a political order.

Though moral life is individualistic, the authors go to great lengths to show that human beings are inherently social. *TRT* is not an account of human beings isolated from social bonds and networks. It is not communitarianism, but it is not hostile to communal efforts, either.

The authors actually set forth the argument above in the first two books of the trilogy and merely reprise it in *TRT*. The goal of the third book, *TRT*, is to argue that this account is not merely instrumental—that is, that a political order with these premises will work well—but is objectively true. That in turn requires a defense of metaphysical realism, both epistemologically and ontologically, which can be seen in their basic definition:

43. Kelly, *supra* note 39, at 7.
44. TRT, *supra* note 11, at 39-40.
45. *Id.* at 27.

> Metaphysical realism involves both an ontological thesis and an epistemological thesis. The ontological thesis is that there are beings that exist and are what they are independent of and apart from anyone's cognition. The epistemological thesis is that the existence and nature of these beings can be known, more or less adequately, sometimes with great difficulty, but still known as they really are.[46]

Metaphysical realism is required for the authors' account of natural rights both because that account requires that there be beings with natures that we can know and because without "realism with respect to normative concepts in particular, the case for natural rights does indeed fall apart."[47]

Given the centrality of metaphysical realism to the authors' argument, one might expect an elaborate defense of it. Instead, the authors basically assert that metaphysical realism is "self-evident," [48]and they do not bother to provide a full account of what self-evidence is and how it works.

I don't mean that the authors do not engage serious objections. They engage, very convincingly, the conceptual relativism of Hilary Putnam, which I had previously considered an insurmountable objection to metaphysical realism.[49]

The authors do explain what they mean by metaphysical realism. Actually, in their invocation of "awareness"[50] and "preconceptual or prelinguistic" perceptions,[51] the authors sound something like Whitehead's account of prehension and experience.[52]

But the authors do not take full-scale anti-realism, whether based on idealism, constructivism or materialism, very seriously.

For me, this was a liberating insight. Not only does it echo the Declaration of Independence, which also regards rights as self-evident truth,[53] but it also places the burden where it belongs—on those who

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46. *Id.* at 188.
47. *Id.* at 144.
48. *Id.* at 218.
49. *Id.* at 230-37. Putnam had argued that because situations can accurately be described differently, metaphysical realism cannot be true. The authors respond that the "same situation can have diverse and consistent descriptions . . . ." *Id.* at 234.
50. *Id.* at 205.
51. *Id.* at 220.
52. To try to explain this point further here would be beyond the limits of this paper. Those interested in Whitehead's account of experiential reality should go to the monumental work by Roland Faber, THE MIND OF WHITEHEAD: ADVENTURE IN IDEAS (2023).
53. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men." THE DECLARATION OF INDEPENDENCE (U.S. 1776).

regard our common sense of an objective world around us as some form of illusion.

When someone like Stanly Fish tells me there is no text here,[54] the "no text" to which he is referring is, inconsistently, referencing a particular text: as in the assertion that "Hamlet means anything I say it means." Fish does not really mean "no text," as if I might mistake his lecture on Hamlet for a lecture on Twelfth Night. He means merely the quotidian observation that there have been lots of interpretations of Hamlet. So what? Why leap from that to asserting that there is no truth?

Similarly, one who asserts that human beings have no nature inconsistently knows who is a member of the class of human beings versus other animals.

Thus, it is hard to be an anti-realist without self-refutation.

More fundamentally, we all act as if there are other beings that we can, in some incomplete sense, know. Certainly, that is the case with anyone writing or reading an article like this one in a journal.

The metaphysical realism of *TRT* is what the authors call "moderate."[55] Natural rights do not exist in a timeless realm. Rather, human rights are the necessary legal and political framework in which enduring human nature perfects itself.

The confidence and thoroughness of the account in *TRT* might inspire a new cultural engagement with values and a new appreciation of our constitutional heritage. I will return to that theme in the last section.[56]

The authors are fully within the conservative tradition. The natural rights they specify are life, liberty and property. They deny that positive natural rights exist. They identify with Robert Nozick's 1974 book, *Anarchy, State, and Utopia* and use him to suggest that taxation is akin to slavery. They invoke the thought of Ayn Rand.[57]

But one of the great strengths of *TRT* is that the authors separate, and invite the reader to separate, the method of their investigation from their conclusions.[58] The nature of human beings is just that—a matter of nature. It is not something to be debated in an arid and abstract philosophical anthropology but rather is to be subjected to empirical investigation.

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54. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1982).

55. TRT, *supra* note 11, at 190.

56. *See infra* Part III.

57. This is not meant as an evaluation of their argument. I only mean to place them within a very politically conservative context.

58. *Id.* at 226-230. This section is entitled "On Being Fallible and Limited." The authors are not insisting that their knowledge, of human nature, for example, is beyond doubt. They insist, however, that human beings have a nature and that the claim to know something about it is a warranted and testable claim.

Those of us with a different view of human nature, self-direction and flourishing are free to make our case.

Indeed, if I had one criticism to make of *TRT* it would be that the authors do not take their own injunction about empirical investigation with sufficient seriousness. For all the talk of nature in the book, there is nothing really about the universe of which human beings are a part. While the authors appreciate the social nature of human life, its cosmic aspects are missing.

Nor is there anything in the book about the lessons of actual anthropology concerning human nature. If one looks to anthropology, the natural rights to life and liberty, which the authors champion—in the sense of human self-determination—may well appear anthropologically in all human history across cultures and time.

The same may be true in a sense with regard to the right of property. That is, all successful human societies seem to have some sense of private property.[59] But the idea that the proceeds of a large-scale social project, whether a hunting party or a corporation, might be privately and individually owned, as opposed to socially shared, seems to be a late conception in human history. I don't believe there is anything natural about that. However, this is a quibble. What we have in *TRT* is a newly presented framework to refresh the institutions of classic liberalism. That is an impressive and needed[60] contribution. The question then becomes, what are the implications of this framework for law and society?

## IV. APPLYING *TRT* TO CONSTITUTIONAL INTERPRETATION: NARROWING ORIGINALISM

The framework of *TRT* clarifies the question, does the Constitution protect natural rights? Given that framework, the answer has to be, of course the Constitution protects natural rights. Protecting natural rights is fundamentally what governments are for.

After all, that is what the Declaration of Independence says: "to secure these rights, Governments are instituted among Men."

This helps one understand why the framers did not think that a Bill of Rights was necessary. A list of rights would, in a sense, be both redundant and incomplete. Redundant because the entire constitutional structure was intended to secure natural rights. Incomplete because natural rights are never, and cannot be, completely specified.

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59. This is the impression I have from reading Nicholas Christakis' book, BLUEPRINT: THE EVOLUTIONARY ORIGINS OF A GOOD SOCIETY (2020). I don't remember if Christakis writes this, but every society he examines, without exception, contains some form of property not held in common with the group.

60. Really needed. *See* Patrick J. Deneen et al., *Is Liberalism Worth Saving?*, HARPER'S MAGAZINE (Feb. ), https://perma.cc/Y85M-XQ8Z.

This is also why in his review of *Common Good Constitutionalism*, Barnett favorably cites *Troxel v. Granville*,[61] which established the constitutional right of parents to a large measure of control over the raising of their children.[62] Barnett is critical of the dissent by Justice Scalia, which recognized that this parental right was the sort of right that the Declaration of Independence had in mind, and that the Ninth Amendment protects, but nevertheless refused to judicially enforce.[63]

If we have a system of judicial review, then it is the responsibility of judges, as it is any other part of the government, to protect natural rights. Natural rights must be part of any legal/political structure.

This judicial obligation is therefore not a function of text per se, although there is textual warrant for such judicial decision-making, whether in the Ninth Amendment or the Fourteenth Amendment's Due Process or Privileges or Immunities Clauses. Protecting natural rights is a function of the nature of government.

This is not exactly new. American courts have traditionally protected some natural rights, as *Troxel* shows. But *TRT* goes further in the implication of its methodology than does current case law. After all, the right of parenting is well established in our legal tradition. Therefore, that right satisfied what can be called the *Glucksberg*[64] standard that the only non-enumerated rights that can be judicially recognized are those that are, "objectively, 'deeply rooted in this Nation's history and tradition.'"[65]But history and tradition are simply irrelevant to the *TRT* framework of natural rights.

For example, I assume that within the *TRT* framework, the authors would view both *Griswold v. Connecticut*, which recognized a constitutional right, at least in a married couple, to use contraception,[66] and *Eisenstadt v. Baird*, which extended this right to unmarried persons,[67] as correctly decided. Despite historical religious prohibition and legal proscription, this right seems to me to be reasonably included in human self-direction whether or not objectively deeply rooted.

Even if I am wrong about my conclusion, human self-direction rather than history and tradition would remain the proper standard for judicial recognition of a natural right.

Within the framework of *TRT*, nothing *a priori* can tell us whether some claim involves a natural right. The matter must be investigated in

61. Troxel v. Granville, 530 U.S. 57 (2000).
62. Barnett, *supra* note 32.
63. *Troxel*, 530 U.S. at 91-92 (Scalia, J., dissenting).
64. Washington v. Glucksberg, 521 U.S. 702 (1997).
65. *Id.* at 720-21 (quoting Moore v. East Cleveland, 531 U.S. 494, 503 (1977) (plurality opinion)).
66. Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).
67. Eisenstadt v. Baird 405 U.S. 438, 454-55 (1972).

terms of each claim. This opens up the possibility of judicial error, of course. But any judgment, including simple factual ones, can be mistaken. Originalism's use of history is subject to error also.

Nothing in *TRT* justifies artificially narrowing judicial judgments about natural rights to what history and tradition specify. And, as Justice John Harlan reminds us, a truly wrong decision by the Court "could not long survive."[68] This means that *Dobbs v. v. Jackson Women's Health Organization*,[69] which utilized the *Glucksberg* standard to overturn *Roe v. Wade*,[70] would have to be rewritten. Its conclusion might be correct, but, given the presumed natural right of bodily integrity in a pregnant woman, overturning *Roe* would have to rest on the natural right to life of an unborn child.

Nothing in *TRT* would prevent recognizing that right to life, despite the proto-originalist rejection of due process personhood for the unborn in *Roe* itself.[71]

In these ways, we can begin to see the implications of *TRT* for recognition of non-enumerated natural rights. Text, history and tradition can play only a limited role in this process.

A second question is how *TRT* would treat natural rights that are embedded in the text of the Constitution—that is, textual natural rights. I presume we can include in this category, among others, the right to free speech, the free exercise of religion, and perhaps the right to be free from cruel punishment. All of these would seem to be included in the necessary possibilities of human self-direction.

Again, assuming that these are natural rights, under the *TRT* framework, text and history are inappropriate standards by which to interpret their meaning. Each generation would have to decide anew on the reach of these natural rights through empirical investigation and reason.

And, in fact, that is how these rights have unfolded, despite the claims of originalism. No one could seriously argue that the jurisprudence of the First and Eighth Amendments in any way follows text and history. And this is largely true even of the recent decisions by the self-proclaimed originalist majority on the Supreme Court.[72]

This fact may be explained by an unexpressed judicial intuition that the interpretation of freedom of speech, freedom of religion and freedom from cruel punishment requires substantive judgment. Common law

68. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *See generally*, Bruce Ledewitz, *Justice Harlan's Law and Democracy*, 20 J. L&POL. 373 (2004).

69. Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).

70. Roe v. Wade 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

71. *See supra* text accompanying note 35.

72. *See, e.g.*, Carson v. Makin,142 S.Ct. 1987 (2022).

constitutionalism is not a bad way for judges to conduct an ongoing empirical, moral and rational investigation into the meaning of natural rights.

But at this point, there is another, complicating consideration. Assuming that the framers of these provisions did intend to enact natural rights, they also had some specific objects in mind—exemplars, if you will, of the right in question. In the case of free speech, for example, the framers plainly intended to prohibit most instances of prior restraints.[73] Am I suggesting that some future generation might decide that this protection is really not part of the natural right of freedom of speech?

My answer is no and this shows that judicial decision-making must proceed on two levels in interpreting textual natural rights. The "mischief,"[74] as it is called, that the framers had in mind to prevent in enacting a constitutional provision must be accorded full weight. Here, the methodology of originalism has a clear role to play. But that role does not include restricting the expansion of a natural right.

This two-step analysis can be seen even more plainly in application to non-natural rights that are also guaranteed in the text of the Constitution. In the case of the Second Amendment, for example, I assume that the right to bear arms is not a natural right, as opposed to the right of self-defense that it includes, which plainly is a natural right. Many human societies have not recognized a right to firearm possession per se.

*District of Columbia v. Heller*,[75] which recognized the right to bear arms as an individual right,[76] also recognized its purely instrumental character—the right to bear arms is meant to ensure the existence of state militias. [77]

This does not mean that the right to bear arms is insignificant. It must be afforded judicial protection along the lines of its public meaning when adopted, just as originalist methodology provides, and as the *N.Y. State Rifle & Pistol Association v. Bruen*[78] Court purported to do.

But there would be no reason to expand the right to bear arms since it is not a natural right.

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73. I am not referring here to the question of going beyond such expectations within originalist theory, *see e.g.*, Matthew Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression*, 17 COMM. L.& POL'Y 329 (2012), but the opposite issue: can courts reject this original expectation? Bunker actually uses the prior restraint question as a starting point. *Id.* at 336.

74. *See generally* Samuel Bray, *The Mischief Rule*, 109 GEO. L. REV. 967 (2021).

75. District of Columbia v. Heller, 554 U.S. 570 (2008).

76. *Id.*at 635.

77. *Id.* at 595-635.

78. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S.Ct. 2111 (2022).

This example suggests a role for judicial interpretation of the text of the Constitution similar to the role of Congress in constitutional interpretation suggested by Justice William Brennan in *Katzenbach v. Morgan*.[79]

In that case, Brennan suggested a ratchet approach: Congress was not free to undercut judicial interpretation of a constitutional right. But Congress could act on its own interpretive authority to expand the reach of a constitutional principle.[80]

In specific application in *Morgan*, despite the fact that the U.S. Supreme Court had held in *Lassiter v. Northampton County Board. of Election* that English language literacy requirements for voting do not facially violate the Fourteenth Amendment, [81] the Court permitted Congress to ban English language voting requirements in certain circumstances under its §5 authority to enforce the Amendment. [82]

In parallel fashion, judges would use originalist methodology to identify the minimum reach of rights granted by the Constitution, and would never restrict that application, but would be free, at least in the case of textual natural rights, to use their own judgment as to expand future applications of the right.

Thus, text and history would continue to play a role in constitutional interpretation. But originalism would not have the last word in many judicial decisions.

## V. WHAT *TRT* COULD MEAN FOR AMERICAN CULTURE

For law, the important contribution of *TRT* is that it renders natural rights a proper subject of judicial interpretation. The book potentially changes the process of constitutional interpretation.

But for the culture, the importance of *TRT* is that it renews metaphysical realism.

The basic problem of American public life is a lack of trust. But it is hard to see how there could be trust without a common world. If literally everything is some kind of human projection or production, then we will just have to struggle with each other to make sure that my projection or my production triumphs. This is a recipe for derailed public life.

On the other hand, if both I and my opponent agree that there is something there, independent of us, then there is at least potentially a common standard for us to apply and common knowledge for us to discover.

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79. Katzenbach v. Morgan, 384 U.S. 641, 648-651 (1966).
80. *Id.* at 648-651, 651 n.10.
81. Lassiter v. Northampton County Bd. of Election, 360 U.S. 45, 53-54 (1959).
82. *Katzenbach*, at 657-58.

So, C.S. Lewis was right all along that the fundamental division in intellectual life is between those who assert that the universe is a kind of thing and that we human being are a kind of thing—and that truth can be derived from that—and those who deny that claim.[83] *TRT*, and metaphysical realism in general, affirm that claim.

But, of course, *TRT* is not the first effort to establish some form metaphysical realism. What makes me think that the authors might succeed?

Well, they very well may not, of course.

But there are several considerations that make me think we are turning a corner culturally and that *TRT* is the right account of metaphysical realism for this moment.

For one thing, the crisis in American public life today is so obviously dangerous that people are looking for a fundamental explanation of what went wrong and perhaps are open to a change in outlook.

Second, anti-realism is getting old. While it remains culturally dominant, I doubt it has really convinced ordinary people. All that is needed to defeat it is a persuasive alternative. *TRT* is sufficiently learned and thorough in its defense of metaphysical realism that it may finally tip the balance—or contribute to doing so.

Third, *TRT* is fully secular, without in any way exhibiting hostility to religion. That is an unusual combination in this culture. That creates an enormous potential audience for *TRT*.

Finally, and most important, *TRT* asks a question—what is the nature of human nature? It also asks what the governance implications are for that human nature.

The authors answer those questions. That is the whole point of their project. But the authors acknowledge that their method is open to others to apply and to reach their own conclusions. I am evidence that one can enthusiastically follow them without fully agreeing with them.

I have written elsewhere, following Bernard Lonergan, that the way a culture in decline renews itself is by asking a fundamental question.[84] In my case, it was the question: "is the universe on our side?" In the case of *TRT*, the question involves human nature. In both instances, a community that actively and rationally pursued these matters, which

83. C.S. LEWIS, THE ABOLITION OF MAN, 6 (2022.): "[T]he doctrine of objective value [is] the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are." *See generally* BRUCE LEDEWITZ, HALLOWED SECULARISM: THEORY, BELIEF, PRACTICE 161 (2009) ("Lewis called the doctrine of objective values '"The Tao"' "'because all traditional value systems shared this viewpoint.'")

84. *See* LEDEWITZ, UNIVERSE, *supra* note 1, at Ch. 6.

Lonergan called cosmopolis,[85] really would usher in a new and positive era in American public life.

## VI. CONCLUSION

Randy Barnett was right to bring attention to *TRT*. He and other originalists may disagree with my purported application of the book, but we will agree that *TRT*, and the authors' project generally, is an enormous contribution with a great potential for legal and cultural renewal.

Now, what remains, is to honor that contribution in the only way that the authors would wish—to take it seriously by debating its meaning and its role in our future.

85. *See id.* at 121.