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Ralph F. Gaebler

Indiana University Maurer School of Law, gaebler@indiana.edu

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IS THERE A NATURAL LAW RIGHT TO PRIVACY?

RALPH F. GAEBLER

I.

Walter Murphy has recently argued that "the nature of the American Constitution requires recognition of a thick and powerful right to be let alone."¹ What is more, he believes this right is so deeply embedded in the Constitution that society cannot remove it, even through formally permissible means, such as amendment, without abrogating the Constitution altogether.

In general, there is nothing particularly surprising about the claim that the Constitution includes a right of privacy. And in Murphy's case, in particular, the claim rests upon thirty years of scholarship. Viewed as a whole, this body of work looms as one of the more passionate, and at the same time formidably coherent contributions to the literature of judicial politics.² As developed in his many articles and books, Murphy's claim for the existence of a right of privacy emerges from his conviction that, since all Constitutional decision-makers must adopt a judicial philosophy with substantive consequences, academic critics, in judging the judges, must in fairness

1. Walter Murphy, "The Right to Privacy and Legitimate Constitutional Change," in *The Constitutional Bases of Political and Social Change in the United States* (1990), pp. 213-14.

2. In addition to many articles in both law reviews and political science journals, Murphy has written, collaborated on, or contributed chapters to a number of books. His monographs include Walter Murphy, *Congress and the Court: A Case Study in the American Political Process* (1962), and Walter Murphy, *Elements of Judicial Strategy* (1962). His casebooks and textbooks include Walter Murphy and C. Herman Pritchett, *Courts, Judges, and Politics: An Introduction to the Judicial Process* (1986); Walter Murphy and M.N. Danielson, *American Democracy* (1979); Walter Murphy and Joseph Tanenhaus, *Comparative Constitutional Law: Cases and Commentaries* (1977); Walter Murphy, William F. Harris II, and James E. Fleming, *American Constitutional Interpretations* (1986); and Walter Murphy and Joseph Tanenhaus, *The Study of Public Law* (1972). Chapters in essay collections include *The Constitutional Bases of Political and Social Change in the United States*; Walter Murphy, "What is the Constitution?" in *La Costituzione Statunitense E Il Significato Odierno* (1990); Walter Murphy, "The Art of Constitutional Interpretation," in *Essays on the Constitution of the United States* (1978); and Walter Murphy, "Consent and Constitutional Change," in *Human Rights and Constitutional Law* (1992).

do the same.³ His is essentially a pragmatic claim, justified on the ground that it constitutes the best constitutional policy in a world of judicial politics where many legitimate and contradictory claims are possible.⁴

The second part of Murphy's claim, that the right to privacy may not be removed from the Constitution, is quite different. This is a normative claim, which shifts the justification of the right to privacy from a political to theoretical level.⁵ Thus, Murphy's otherwise unsurprising view that the Constitution includes a broad right of privacy invites analysis because of its theoretical implications. I will begin my analysis with a short review of Murphy's work, which traces its evolution from premises that are pragmatic and political to premises that are theoretical and normative. I will then consider the theoretical argument that he makes for a right to privacy. Here my observation will be that, at the theoretical level, Murphy's privacy claim is problematic because it interchangeably employs both natural law and positivist, consent theories to explain the nature of the Constitution. This leads to an internal contradiction between the idea that human rights are authorized by the Constitution and the idea that the Constitution is authorized by the existence of human rights. Even more important, neither of Murphy's theories, considered alone, provides a satisfactory account of the Constitution's continuing authority. For its part, the natural rights argument fails to admit of legitimate constitutional change. On the other hand, the positivist argument fails to explain why we should be bound by the consent of the founding generation, or alternatively, how it can justify a permanent right to privacy. Finally, I will propose an alternative way to account for the Constitution's continuing authority that evades

3. Murphy stated this conviction explicitly in "The Art of Constitutional Interpretation," in *Essays on the Constitution of the United States*, p. 155. "One who spends much of his time setting difficult tasks for judges, analyzing their failings, and on occasion snidely criticizing them for being less than perfect has a moral obligation to lay his own head on the block of logic-chopping and explain how the problems of constitutional interpretation should properly be solved."

4. This is precisely the standard to which Murphy holds constitutional decision-makers. *Elements of Judicial Strategy*, p. 2. "The role of [the] scholar, insofar as it is critical, is . . . to determine not whether judges have influenced policy but whether that influence is to the benefit, both in the long and the short run, to society."

5. Although Murphy's specific claim for a non-revocable right to privacy is new, his claim that the Constitution, in principle, includes non-revocable provisions is not. See Walter Murphy, "An Ordering of Constitutional Values," 53 *S. Cal. L. Rev.* (1980), p. 703; and Walter Murphy "Slaughter-House, Civil Rights, and Limits on Constitutional Change," 32 *Am. J. Juris.* (1986), p. 1.

the pitfalls of both natural rights and consent theory. My resolution is itself based on a theory of the Constitution that harkens back to Murphy's early, pragmatic work, but denies that there can be a non-revocable right to privacy.

II.

Given his origin as a political scientist rather than constitutional theorist, it is not surprising that Murphy's first major work, entitled *The Elements of Judicial Strategy*, analyzed the political dimension of judicial decision-making.⁶ The explicit purpose of this work was "to explore the capabilities of the judicial branch of government to influence public policy formation" within the range of choices considered legitimate by society.⁷ In doing so, Murphy did not assume that individual judges were necessarily committed to particular policy goals, or if committed, necessarily conscious of their commitment. However, he did assume that judicial decision-making inevitably affects public policy, and that judges, in exercising their discretion, must adopt a coherent strategy. Thus, in *The Elements of Judicial Strategy* Murphy developed a core idea that the substance of the Constitution consists of the strategic choices deemed appropriate for judges in their decisions.

In his subsequent work Murphy continued to focus on the Constitution-in-action rather than on the Constitution-as-theory. In particular, in "The Art of Constitutional Interpretation" Murphy examined interpretation as a particular form of judicial strategy. At the same time, he began to develop his own strategic approach to interpretation. Here Murphy stated his "belief" that the Constitution embodies a hierarchy of values. According to this hierarchy, substantive values generally take precedence over procedural values, and the substantive value that "has become" most fundamental is human dignity. Murphy "rest[ed] his case" for this view on "the internal logic of the polity as the framers built it and as it and its values have developed since 1787."⁸

It is important to note that Murphy's language implied that his view was nothing more than a pragmatic effort to take account of our actual political experience under the Constitution. It was therefore a theory only in the sense that a lawyer would construct a "theory

6. Walter Murphy, *supra*, note 2.

7. *Ibid.*

8. "The Art of Constitutional Interpretation," *Essays on the Constitution of the United States*, pp. 155-56.

of the case;" it attempted to derive meaningful principles from a given set of factual circumstances, but made no claim to exclusive interpretive legitimacy. Thus, it is not surprising that Murphy "rested his case" as if he were presenting a legal brief, and that this brief was predicated simply on his "belief" that it best explains the Constitution's historical development. Murphy expected no more of judges than he did of himself. In the view he expressed here, judges must construct a principled approach to constitutional decision-making simply because, in the inevitable clash of interests, they must be able to justify their decisions.

Thus, the view that Murphy expressed in "The Art of Interpretation," that the Constitution must be interpreted to promote human dignity, did not rest on any natural law theory. In fact, it is characteristic of Murphy the pragmatist that he viewed natural rights philosophy simply as a persistent, rhetorical influence in our constitutional history that judges must take into account, and might possibly exploit in constructing their own interpretive theories. He even suggested a strategy judges might adopt to accomplish this when he stated, "[T]he Preamble and the Ninth Amendment provide ready vehicles to transport [theories of natural law] into contemporary society."⁹

Murphy identified a number of problems inherent in the process of constructing interpretive strategies, one of which is the necessity of reconciling competing constitutional values by establishing a hierarchy among them. In connection with this hierarchy he suggested the possibility, among several, of arguing that the Constitution contains unamendable provisions. The method he suggested for making such an argument was, again, in the nature of a legal brief rather than a philosophical proposition. He suggested that one might argue the following: constitutional amendments are laws, therefore where the Constitution prohibits Congress or the States from making any law, as in the First Amendment (applied to the States through the Fourteenth), the Constitution prohibits amendment. While noting that this argument has in fact been made, and therefore is "hardly fanciful," Murphy also made no claim that it is necessarily correct.

"The Right to Privacy and Legitimate Constitutional Change" clearly builds on this earlier work. In particular, Murphy's claim that the Constitution includes a broad right to privacy is derived from his earlier claim that the Constitution, most fundamentally, protects human dignity. However, this new claim is no longer grounded in

9. *Ibid.*, pp. 154-55.

the context of judicial politics or judicial strategy. Most importantly, Murphy presents his argument for the existence of a broad right to privacy not as *a* legitimate reading of the Constitution, but as the *only* legitimate reading of the Constitution. As a consequence, its exemption from amendment becomes necessary rather than arguable.¹⁰ Hence the entire process of constitutional change becomes subject to normative rules that distinguish legitimate from illegitimate forms of change.

Murphy's new argument contradicts his earlier view that the Constitution is a political process, in which what is legitimate is essentially a factual question of what is reasonably within the range of the arguable. Murphy is still concerned with what the Constitution is, rather than what it ought to be, but he now views it as a philosophical construct rather than as the ever-changing product of political forces. In essence, Murphy has converted his own, explicitly personal view to the only correct view by grounding his justification in normative theory. In order to demonstrate the limitations inherent in this view of the Constitution, it is necessary to look more closely at the argument for privacy that Murphy makes.

III.

Murphy makes two distinct arguments to support his conclusion that the Constitution must be interpreted to include a broad right of privacy. He describes the first argument as based on "constitutional content."¹¹ It begins with the assertion that the American Constitution rests upon, or possibly even includes, two political theories, which he calls "constitutionalism" and "representational democracy." Constitutionalism denotes the view that the Constitution primarily embodies personal liberties. Representational democracy denotes the view that the Constitution primarily embodies a structure of government based on popular sovereignty. Although poised in opposition to each other, both of these sub-texts are necessary to make sense of the Constitution, or as Murphy puts it, to render the document more than "the political version of a seed catalogue." In other words, the Constitution is a balancing act; it employs the device

10. "The Right to Privacy and Legitimate Constitutional Change," p. 214. See also *supra*, note. 5.

11. "The Right to Privacy and Legitimate Constitutional Change," in *The Constitutional Bases of Political and Social Change in the United States*, p. 220. All quotations in this section are from this article.

of checks and counter-checks not only in its provisions for the structure of government, but even in its philosophical outlook.

However, constitutionalism is clearly the more important philosophy of the two, at least for the purpose of establishing the right of privacy.¹² "The essence of constitutionalism," according to Murphy, "is that citizens bring rights with them into society." These rights comprise a "zone of autonomy," within which "each individual should be immune from governmental regulation, even regulation that an overwhelming majority of society considers wise and just." Thus, the right to privacy is implied by the political theory of constitutionalism, which in turn is part of the Constitution. Murphy also argues that the right of privacy is implied by the theory of representational democracy, a claim that I will take up later.

Murphy's second argument, which he describes as based on "constitutional function," is equally direct. It begins with his commitment to the ideas that the Constitution is a "binding statement of a people's aspirations for themselves and their nation." In other words, the Constitution is not merely a charter for government, but serves as the foundation of a moral community as well. From this premise Murphy argues that the Constitution must include a right of privacy because "the notion of a people as free and autonomous as they can be in an interdependent world is and has been among the values, goals, and aspirations of U.S. society."

Murphy finds evidence of the Constitution's "aspirational" character in its Preamble and in the Declaration of Independence, which he also regards as a foundational document. Thus, Murphy really regards the U.S. as bound by a constitution, that includes the Constitution of 1787, as amended, the Declaration of Independence, the two political philosophies already mentioned, and possibly other foundational documents or ideas as well.¹³ This is not to say that we

12. In a classic article on the subject, Edward S. Corwin argued that the Constitution embodies a "Doctrine of Vested Rights" and a "Doctrine of Police Power." Corwin, "The Basic Doctrine of American Constitutional Law," 12 *Mich. L. Rev.* (1914), p. 247. These two doctrines are equivalent to Murphy's theories of Constitutionalism and representational democracy. Corwin claimed that the doctrine of vested rights "is the more fundamental doctrine," p. 247, and like him Murphy gives preference to the theory of constitutionalism. "The Right to Privacy and Legitimate Constitutional Change," in *The Constitutional Bases of Political and Social Change in the United States*, p. 224.

13. Murphy is not the first to view the Constitution this way. Sanford Levinson has recently stated his understanding of the Constitution in strikingly similar terms. See S. Levinson, *Constitutional Faith* (1988). In referring to Murphy's unwritten and continuing compact I shall continue to use the term "Constitution."

can understand Murphy's argument simply by reading, phrase by phrase, his admittedly expanded constitution. In a sense, this argument denies that the Constitution can be read at all; rather, it is a continuing compact, some of whose evidence is composed of written documents.

The first argument judges the legitimacy of government according to its adherence to those rights that citizens bring with them into political society. It thus grants to those rights the status of natural law, and in so doing reveals its Lockean lineage. More specifically, it derives from Locke's Second Treatise the following points: first, and fundamentally, that the sole function of government is to protect natural rights; second, that people cannot legitimately consent to form any government that is not dedicated to the preservation of natural rights; third, that legitimate government ceases to exist if it ceases to protect natural rights; and fourth, that citizens, having once joined political society, cannot rebel against it unless it ceases to protect natural rights. Murphy's adherence to those points is manifest in his proposition that any attempt to revoke fundamental constitutional values, including the right of privacy, would itself be unconstitutional, even if carried out by means sanctioned in the Constitution.

Murphy also derives from Locke both the substance of natural law, and the means of knowing it. According to Locke, human beings naturally have dominion over their property, which includes their liberty. "The natural liberty of man," he states, "is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule."¹⁴ Suitably updating Locke's world view to account for our concern with mental self-possession, Murphy states that "without controlling a core of physical and psychological space, without being able to share some aspects of our lives only with those whom we choose, we would be unable to define ourselves, to develop our talents and personalities, or to live with dignity or any autonomy. . . . Any meaningful theory of constitutionalism demands a wide ambit for a right to privacy." In short, man's natural right is to be free. Although Murphy's words imply that this right is somehow logically deducible, he is, in fact, at a loss for logic; like Locke, who claims simply that the law of Nature is discernible to each through the exercise of reason, he settles for the argument that it is self-evident.

14. John Locke, *Two Treatises of Government* (P. Laslett, ed. 1967).

Although straitforward and powerful, Murphy's natural rights argument has several problems. To begin with, if natural rights themselves are binding, and not the Constitution that states them, one must wonder in what sense the Constitution is a foundational "statement" at all, to borrow a term from Murphy's second argument. The conclusion is inescapable that the Constitution is at best an act of recognition, an agreement to submit to certain rules of government, which are legitimate only because they recognize and protect our natural rights. Following Murphy's argument, we must discount both the original understanding of the Constitution, and the subsequent process of re-inventing and re-understanding it, in establishing fundamental and constitutional meaning.¹⁵ Murphy himself recognizes the irrelevance of the Constitution as a binding statement of moral aspirations in his remark that "insofar as provisions of the constitutional document of 1787 legitimized slavery, those provisions were unconstitutional."¹⁶

15. Locke's own argument harbors a similar weakness. On the one hand, he views the act of joining political society as so fundamentally transformational that, having once done so, a citizen cannot change his mind and quit. On the other hand, he views political society as purely a matter of convenience, a remedy for those "inconveniences" that arise from the fact that each favors himself and his friends in the state of Nature.

16. One might argue that the constitutive act is not necessarily rendered irrelevant by the fact that the resulting constitution contains an unconstitutional provision; that conclusion follows only if the provision in question is voided by a higher law, which authorizes the constitution in the first place. At least one alternative argument can be made that the provision in question, in this case the Constitution's recognition of slavery, is void because it is inconsistent with the remaining provisions of the Constitution taken as a whole. Murphy endorsed this interpretive strategy in *An Ordering of Constitutional Values*, p. 747, as a method of establishing a hierarchy of constitutional values. In support of this approach he cited *The Southwest Case* 1 BVerfGE 14, 32 (1951), in which the German Federal Constitutional Court said that "[a] single constitutional provision cannot be interpreted alone and in isolation. Each such provision stands in a meaningful relationship to all remaining constitutional provisions, which present an inner unity." (Author's translation) Despite this language, *The Southwest Case* provides doubtful aid to Murphy for several reasons. First, the Court based its interpretive approach, at least in part, on the explicit authority of a constitutional provision, Art. 79, Sect. 3 of the *Basic Law*. This textual reliance limits the decision's general value, and implies that even within the context of German constitutional law inconsistencies are not to be eliminated simply for the sake of achieving consistency. In addition, the Court did not hold unconstitutional the clause at issue, Art. 18, Sect. 2, but merely interpreted the extent of federal legislative authority under that clause in light of other relevant constitutional provisions. In short, the German Federal Constitutional Court's admonition to respect the *Basic Law's* "inner unity" is not the same open-ended approach that Murphy endorses. He invites us to view the Constitution as "a statement of purposes, a web of overlapping grants of authority, assorted prohibitions against some sorts

The argument that the Constitution derives from natural rights removes its meaning from the influence of human agency, and therefore introduces a second problem, that of constitutional change. Of course, Murphy recognizes that the Constitution is constantly developing, but this contradicts his natural rights theory, unless one assumes that natural rights change over time. Murphy does not make this argument, but he does adopt Ronald Dworkin's well-known distinction between concepts and conceptions.¹⁷ According to Dworkin's argument, basic moral concepts, such as fairness, do not change, although specific conceptions do. Thus, the conception of what is fair in one generation may, and probably will, fail to resonate with a subsequent generation. By adopting Dworkin's distinction, Murphy seeks to resolve the contradiction between the stasis of his natural rights argument and the obvious fact of constitutional change.

Unfortunately, the distinction between concepts and conceptions is unable to bear the task that Murphy has set before it. The sheer amount of constitutional change has been too great. For example, the idea of equality extracted from the Civil War amendments represents, at the very least, a constitutional revolution. Moreover, the initial adoption of those amendments reflected, quite literally, the victory of one morality over another. In the face of such change, the distinction between concepts and conceptions is reduced to little more than a verbal formula that covers up, but does not resolve the basic contradiction.

A third problem with Murphy's natural rights theory of privacy relates to his contention (or concession) that the Constitution incorporates both the political theory of constitutionalism and the

of governmental action, a catalogue of individual rights, and descriptions of proper processes of policymaking," and from this jumble to distill a hierarchy of values with human dignity at its pinnacle. This distillation requires recourse to fundamental values not explicitly included in the Constitution, or in other words to natural law, to determine the preeminent importance of human dignity within the constitutional scheme. Thus, I believe Murphy's position comes much closer to that taken by the Bavarian Constitutional Court in a decision quoted with approval by the Federal Constitutional Court in *The Southwest Case*. "That a constitutional provision itself might be void is not rendered conceptually impossible by the fact that it comprises part of the constitution. There are constitutional principles that are sufficiently fundamental, and which express to such an extent a law that precedes even the constitution, that they bind the framer and may void any lesser constitutional provision that conflicts with them." (Author's translation) Decision of 10 June 1949-Vf52-VII-47- and decision of 24 April 1950-Vf42, 54, 80, 88-VII-48; 9, 118-VII-49, cited in 1 BVerfGE 14, at 32. It is interesting to note that in his more recent *The Right to Privacy and Legitimate Constitutional Change*, Murphy cited to this passage from *The Southwest Case*.

17. Ronald Dworkin, *Taking Rights Seriously* (1977), ch. 5.

theory of representational democracy. In light of his argument that the right of privacy derives from natural law, he can view the Constitution as legitimate only if the struggle between these two opposing theories does not entrench upon that right. He does argue that this is the case, by claiming that the theory of representational democracy, like the theory of constitutionalism, implies the existence of a broad right of privacy.

It is important to note that whereas Murphy views privacy as the "essence" of constitutionalism, he sees it as merely a functional prerequisite to the effective implementation of democratic theory. He states: "A political system that rests on free and open debate, association, and political choice also needs a wide scope for privacy." The first problem with this conclusion is that democracy functionally requires only those aspects of privacy that permit one to be an informed political participant. Surely such a conception of privacy is more circumscribed than the "zone of autonomy" Murphy associates with the theory of constitutionalism. More important, as pointed out above, under Murphy's natural rights argument the legitimacy of the Constitution rests not upon the incorporation of any political theory, but upon its embodiment of the natural right to be free. Protection of this natural right does not require the existence of democratic government, and, as Locke points out, legitimate government can be monarchical or oligarchical, as well as democratic. From this one must conclude that the theory of representational democracy is not fundamentally part of the Constitution at all. Therefore, there is, once again, a conceptual conflict between Murphy's portrayal of the Constitution as an open-ended process involving the struggle between two opposed political theories and his alternative portrayal of the Constitution as the embodiment of the natural rights people "bring . . . with them into society."

Murphy's second, functional argument restores the notion of the Constitution as a compact. According to this argument, the Constitution is, first and foremost, a constitutive act, one that "called the American nation into being" and "formed us as a people. . . ." In addition, through this voluntary act we explicitly committed ourselves "to a particular view of the human person and the purposes of government."

One should note that in speaking of the constitutive act, Murphy uses the past tense. Although no adherent of the idea that the Constitution ought to be interpreted according to "original understanding," Murphy nevertheless grants special formative status to the generation that actually tore our constitutional bond to Great

Britain asunder. However, this special status is difficult to square with Murphy's view of the Constitution as a process, a collective enterprise stretched not only across space, but across time as well. Why should this Constitution, formed by several generations of Americans who lived 250 years ago, bind us still? In what sense did we form it? It is precisely in the hope of finding possible answers to these questions that we turn to Murphy in the first place.

One possible counter-argument might be that the constitutional generations deserve special formative status because they were especially aware of acting constitutionally. This argument has the merit of squaring with the general view of the Constitution as a collective enterprise. However, it raises another problem, or consequence which we ought to be aware of, namely the possibility of entropy, or that the decline of our nation's constitutional awareness will lead to the disappearance of the Constitution altogether. In light of his emphasis upon the creativity of the founding generations, perhaps we should read Murphy's work as a call to re-involvement in the face of constitutional neglect. However, this is difficult to reconcile with his view that the constitution is still robust enough to require a "muscular and capacious" right of privacy. Since Murphy clearly does not believe that the Constitution has atrophied, he must mean either of two things. First, he might be saying that we remain sufficiently self-conscious in our commitment to the Constitution as a communal charter that guarantees privacy. If that is his argument, it cannot be squared with his emphasis upon the formative character of the founding generation. On the other hand, he might be saying that, once formed, the Constitution does not derive its authority from our continued self-consciousness as a constituted community, which simply raises once again the question of how we can be bound in perpetuity by a particular historical moment. In either case, the counter-argument outlined here cannot fairly be imposed on Murphy as a way to explain this conundrum.

Another counter-argument might be that, having once institutionalized the values espoused by the founding generations, we must continue to adhere to them short of obvious signs that we no longer subscribe to them. In other words, we must give good weight to the institutions and values we already have before overturning them. This is a practical argument that seems to take account of our actual social and political practices, but it has a very practical problem. How much evidence is necessary to show that we no longer agree on the value of broad personal autonomy? Not surprisingly, Murphy interprets the abortion debate as involving merely a difference

of opinion about the degree of privacy a person should have. But this debate might equally well be read as a disagreement, in general terms, about the value of an absolute zone of privacy or the completely free development of personality. In addition to this practical problem, there is also the conceptual problem that this argument runs counter to Murphy's view that the broad right of privacy may not be removed from the Constitution at all, regardless of what sort of social compact we might wish to have. Again in what sense is such a Constitution ours?

Finally, Murphy must also confront the problem that his functional argument contradicts his natural rights argument on two other counts as well. First, in restoring the compact theory of the Constitution, the functional argument urges that the Constitution itself launches, and therefore legitimates, rights recognized and deemed important by those who choose to join together in civil society. Such a Constitution is truly aspirational because it reflects society's struggle to create itself. However, the very fact that it launches rights into existence means that those rights do not precede the agreement. In other words, by insisting that the constitutional agreement is binding, the functional argument contradicts the natural rights argument that the rights are binding.

As a corollary, the functional argument also disagrees with the natural rights argument about the permissibility of constitutional change. Unless natural rights themselves can change over time the natural rights theory of the constitution recognizes no fundamental change as legitimate. This argument has the merit of providing a yard stick by which to judge the moral rightness of all constitutions, but in view of the degree of constitutional change we have experienced in the United States, forces us to conclude that either our current Constitution is, or our original was, illegitimate. The functional, compact theory of the Constitution accounts for constitutional change, but leaves us uncomfortably without any yard stick with which to measure the moral correctness of constitutions in general. In addition, a constitution based on agreement is quite fragile; it is, at least theoretically, open to the possibility that it will cease to exist for lack of continuing agreement on what it should provide.

IV.

Thus we see that Murphy's defense of the right to privacy suffers from a number of internal contradictions relating to the nature and authority of the Constitution. On the one hand he presents a static view, embracing more than the constitutional document and judicial

review, to be sure, but ultimately unable to account for the Constitution as an evolving, political process, in which each of us reaffirms faith in the polity. On the other hand he presents an open-ended view, which calls us to account for our constitutional commitment, but is unable to sustain his claim that the Constitution includes a broad, non-revocable right of privacy.

In essence, this contradiction derives from Murphy's insistence upon justifying privacy both in terms of natural law and in terms of consent, that is to say, on the ground that we have, as a factual matter, agreed as a society that privacy is fundamental. This latter justification harkens back to his earlier work, in which he would have justified the right to privacy as a theory of the constitutional case that makes the most sense, and perhaps had won out in the political marketplace. But if Murphy wants to make an argument based on natural rights, why does he insist on retaining a political, or consent-based explanation for the right of privacy as well? One explanation, of course, is that he must still account for constitutional change. The Constitution is an historical institution, and the right of privacy, as a matter of record, was created by judges in the recent past. But there is more to Murphy's ambivalence than that. Based on the fact that Murphy's advocacy of a non-revocable right to privacy evolved naturally out of his earlier work, I would argue that Murphy has, perhaps inadvertently, exposed a problem attributable to the very language of liberal constitutionalism, which itself harbors a potential contradiction between natural rights and consent theory within its rhetorical repertoire. In other words, the tensions to which I refer have emerged from Murphy's work precisely because he has consistently spoken the same language of liberal constitutionalism throughout his career.

Hanna Pitkin brilliantly dissected the contradiction of liberal constitutionalism twenty-five years ago in a two-part article entitled "Obligation and Consent."¹⁸ She pointed out that since, in traditional liberal constitutionalism, the terms of the original social contract are self-evident (i.e., derived from natural law), personal consent to obey is irrelevant to one's obligation to do so. You are obligated to obey, and therefore government is legitimate, because it adheres to the original contract. In other words, if government is good, you are obligated to consent.

18. 59 *Amer. Pol. Sci. Rev.* (1965), p. 990; and 60 *Amer. Pol. Sci. Rev.* (1966), p. 39.

Pitkin proposed that the consent theory of legitimacy in liberal constitutionalism ought to be replaced by a "nature of the government theory" or recharacterized as a "hypothetical consent theory." According to the hypothetical consent theory, a legitimate government is one to which we ought to consent, whether or not we have done so. Quite aside from being a correct explication of what we really think, this theory is interesting because it allows us to continue speaking the language of consent while thinking thoughts of natural law.¹⁹ This, of course, is precisely what Murphy has done. At the same time, it allows us to conceal, and therefore to ignore the contradiction between consent theory and natural law theory, unless, as in Murphy's case, we insist on arguing our constitutional cases explicitly on the basis of both.

That Murphy has used the language of consent to argue for the existence of a natural law order is evident from the fact that he wants, at least in part, to bind us to the consent allegedly given by the founding generation to the values he wishes to make permanent. This is the only way he can argue that the Constitution requires our consent, but that we cannot change its fundamental values. However, as I have already pointed out, the theory of "representational democracy," which rests upon the idea of consent, is really supplemental to Murphy's "constitutionalist" argument. Moreover, if one were seriously to argue that the authority of constitutional values rests on consent, it would be difficult to argue for a non-revocable right to privacy.²⁰

19. One clear example of this is the Irish Constitution, which ingeniously, and explicitly, reconciles natural law theory and consent theory by incorporating natural law in its written provisions. Most prominently, the Preamble states that the constitution was adopted "[i]n the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred." The Preamble goes on to say that the Constitution was adopted "so that the dignity and freedom of the individual may be assured," and "true social order attained. . . ." In addition, specific articles of the Constitution recognize the existence of natural rights in the areas of family life, education, and property. *Bunreacht Na Heireann*, Arts. 41, para. 1; 42, para. 1; 43, para. 1 (Republic of Ireland). However, this attempt at reconciliation still raises the question whether a constitution regarded as a compact that calls the political community into being, can incorporate a source of law whose authority is completely external to the constitution.

20. I say difficult, rather than impossible, because a counter-argument can be made that we need some degree of privacy, in the sense of the right to be let alone, in order to come together voluntarily in a political community. However, Murphy does not make this argument, and I would claim that it is impossible to argue for a non-revocable right to privacy within the terms for consensual constitutionalism he sets out.

If we do take the consent theory seriously, rather than metaphorically, there are further conceptual difficulties to overcome. Pitkin also pointed out that a genuine consent theory cannot justify the obligation to obey because the obligation to keep one's word is no more self-evident than is the obligation to obey on the ground that one has given one's word. In other words, to the consent theorist who says that we are obligated to obey because we have consented, one can always ask, why should I keep my word? Quite simply, "there are no absolute, first principles from which this obligation could be derived." Therefore, we could not, through consent, legitimate the Constitution, and some explicit catalog of the values it contains, even if there were some formal means of granting consent for each generation.

If we cannot ratify a version of the Constitution through explicit consent, either our own or that of the founding generation, who is to say whether, for example, it contains a right to privacy? Pitkin argues that each individual must and does decide for himself, and is responsible for his or her decision. However, not all judgments are arbitrary or whimsical. Some are rational and responsible, and therefore more likely to be right, in the sense of having carefully considered the character of the government and all relevant circumstances. Nevertheless, in the last analysis Pitkin explicitly recognizes that the "ought" in her hypothetical consent theory is not demonstrable, but rather a range of possible answers within the publicly accepted realm of argumentation.

This is the true alternative to natural law theory.²¹ Translated from the realm of general political theory to that of constitutional theory,

21. Murphy states that I mistake "what arguments from natural law/natural rights are all about. They are arguments from and about principles. The conclusions are subject to all the short-comings of human reason." In conjunction with this, he makes a well-taken point that natural law, at least according to Aquinas, does not imply moral stasis. However, natural law must at least imply the existence of moral reality, a set of propositions about goodness that are true independent of our possibly fallible perception of them. I argue only that any claim to a natural law right of privacy presupposes the existence of these propositions, and invests them with final authority, rather than the constitution that possibly embodies them. For if the constitution did not embody the propositions, they would nevertheless continue to be true.

While I might agree with Murphy that there must be some right of privacy, I would not argue that it flows from moral reality because that calls into question the Constitution's claim to authority. I would argue instead that the right of privacy derives from the act of constitution-making and the process of living under a constitution, both of which presuppose the use of reason in solving civic problems. And, as Murphy says, the exercise of reason requires breathing room for each

it argues that each individual is responsible for constructing and making the case for his or her own idea of what the Constitution demands. The legitimacy of any given version depends on its reasonableness, both intrinsically and in terms of what is politically possible. Thus, this theory assumes the gradual accretion and evolution of political circumstances that define the limits of what ideas and strategies are legitimate, not in a normative sense, but in a real, practical, and morally compelling sense.

When viewed this way, Pitkin's argument takes us back to where Murphy started, in analyzing the actual, political context in which the Constitution develops. In my view it is a particularly apt way of understanding the Constitution, for it allows us to take account of the Constitution in a way that makes practical sense. According to this theory the Constitution is a crucible, a metaphoric language in which we can, as a society, form a rough consensus about what range of readings is legitimate.²² By thus providing us a language in

individual. In turn, I would argue that constitutions are authoritative because they embody appropriate principles of government for human beings, as we currently conceive them to be, i.e., morally autonomous, reasoning individuals. Let me emphasize that the normative authority of constitutions, according to this view, rests upon their congruence with a *subjective* view of human nature. This view is reasonable because it offers us the best explanation of our experience of the world, but it makes no claims to the existence of any moral reality.

22. The language of constitutional argumentation is in a certain sense metaphoric because it requires us to justify outcomes, that seem right for reasons of their own, in terms of their alleged constitutional authority. As a result, we are forced to argue for interpretive strategies rather than for specific outcomes. These strategies then compete for public acceptance and ultimately define the range of legitimate constitutional readings. In addition, whether one argues from desired outcome to interpretive strategy, or instead begins with an interpretive strategy that entails certain outcomes, the process of argumentation remains the same. In the latter case one's interpretive strategy rests upon a conception of what the Constitution is, which in turn seems right for reasons of its own, but must be justified in terms of the Constitution itself. This is true even if one's conception is historical, for in addition to the indeterminacy of historical evidence of what the Constitution directs, the preference for establishing the Constitution's meaning in historical terms itself relies on a particular idea (not found in the Constitution) about what renders the Constitution authoritative. However, the metaphoric quality of constitutional argumentation by no means undermines its authenticity; rather, like any good metaphor, the Constitution is somehow transformational, in this case granting moral arguments a political authority that renders them prescriptive in the real world. For a similar view of constitutional language, see L. Carter, *Contemporary Constitutional law-making: The Supreme Court and the Art of Politics* (1985). Carter suggests that we should try to understand constitutional jurisprudence as a form of art that imposes meaning on social reality, and thereby sustains our faith in group norms that we recognize are not final or absolute. However, where Carter emphasizes the purely aesthetic value of constitutional language, I would urge that its transformational

which to converse and to listen to one another, the Constitution assures that our judgments will be more rational, more humane than they would otherwise be, and therefore more likely to be "right." Unlike the natural rights theory of the Constitution, it allows us to accept as legitimate what is undoubtedly a fact, the existence of constitutional change due to conflict between contradictory, and equally compelling arguments over such questions as whether the Constitution includes a right to privacy.

Murphy's purpose, finally, is to take account of things as they are, to render an account of our confused constitutional experience that is both meaningful and honorable. Given that goal, I think Murphy should abandon the attempt to demonstrate the existence of a permanent right of privacy, and accept the implications of his earlier, political theory of the Constitution. Privacy, according to that model, is not something we are owed, but fully contingent upon our ability to persuade one another to value it. Documented in Constitutional language or not, the right will exist, and should exist, only so long as those who participate in the constitution-making process—judges, elected officials, unelected bureaucrats, citizen-litigants, citizen-advocates, etc.—continue to find it analytically important to their collective vision of what it means to be a free person in the late twentieth century.²³

power requires more systematic explanation, perhaps in the context of an anthropological investigation of the social function of metaphor.

Natural rights arguments do not properly fall within the metaphoric language of constitutional argumentation because they do not refer back to the Constitution for justification. They assert an *a priori* legitimacy which is its own justification. In their boldest form, natural rights arguments lead to the explicit assertion that constitutional decision-makers (usually judges) should justify the Constitution by infusing it with morality found elsewhere. See Stephen Macedo, *The New Right v. The Constitution* (1987), especially chapters seven and eight. However, the natural law approach still *seems* to count as an acceptable interpretive strategy because, in reality, it can be accepted publicly only when its consequences fall within the realm of the reasonable. It has, therefore, exercised a persistent influence on the Constitution as an evolving, long-term political settlement.

23. My argument amounts to a claim that constitutional authority is legitimated by its usefulness as an instrument for directing the application of practical reason to problems of civic life. Identifying practical reason as the normative foundation of constitutionalism commits me to full agreement with Murphy's claim that "some arguments are better than others and that we can . . . tell the difference, providing we fully and dispassionately utilize our minds."

The difference between us is more one of degree than of substance. Murphy tentatively suggests that the exercise of reason, and therefore the status of human beings as autonomous moral agents, depends on each person "claim[ing] a private space against others." [For a compelling argument that moral responsibility does, indeed, depend on the capacity to reason, see Susan Wolf, *Freedom Within Reason*

Murphy himself seems to be moving in the other direction. He states in "The Right To Privacy and Legitimate Constitutional Change" that "I do not believe that moral standards can, in the final analysis, be relative." Is this a hint that his work is headed towards a thorough-going, natural rights absolutism? One must hope that this is not the case, and perhaps take solace from the fact that the statement appears in a footnote, as if to suggest that Murphy himself hesitates before its constitutional implications.

(1990).] Thus, Murphy is concerned primarily with protecting the freedom of those individual "actions" and "deeds" that issue from our reason, and which render us moral agents.

I, too, am convinced that living in a constitutional polity requires individuals to be able to act freely. For, as Murphy points out, "[i]f others control our actions, our deeds cannot be products of our reason." Where Murphy and I seem to differ is in my concern that individual freedom of action be preserved not only against the claims of the state, but also in relation to individuals' mutual responsibility for shaping the community in which they live. I fear that the judicial expansion of personal rights under the fourteenth amendment, whether by recourse to natural law or some other means, threatens to impoverish our political life by limiting our freedom of future political action. Moreover, with respect to those freedoms that are constitutionalized, our loss of political maneuvering room will lead to a corresponding diminution of collective moral responsibility for future developments precisely because we can no longer act freely in accordance with practical reason. After all, the full and dispassionate use of our minds is only meaningful if it is continuously engaged in making decisions that affect the quality and character of civic life.