The Fiduciary Theory of Governmental Legitimacy and the Natural Charter of the Judiciary

Luke A. Wake
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“Public Office is a Public Trust.” –Grover Cleveland, 1876

Abstract

In legal academia, there are various claims as to the proper role of the courts and the standard of review to be employed in evaluating claims of right. These competing judicial philosophies have been the subject of great debate in recent years. Yet underlying these debates is the question of rights and whether men are entitled, in justice, to assurances of personal autonomy, or whether the concept of rights is a mere legal fiction.

In a recent article in the Journal of Law and Philosophy, Evan Fox-Decent argues that individuals are entitled, at a minimum, to certain guarantees of bodily integrity and basic freedoms. He concludes that the State owes her citizens the duty to act in their best interest as a fiduciary because justice will not allow a party to unilaterally assert power over the interests of another unless such authority is exercised to promote those interests. This article builds upon Fox-Decent’s fiduciary theory of governance, offering it as an alternative to social contract theory and a more useful paradigm for conceptualizing the basis and scope of individual rights.

Application of the fiduciary theory, as understood through the lens of classical natural law theory, mandates that government must respect the individual’s right to better his or her own life. As such the fiduciary theory holds that the State must generally forbear on actions which may interfere with the individuals’ liberties and proprietary interests. Accordingly, in defining the scope of rights, the judiciary must not presume a regulation interfering with those interests to be legitimate, but on the contrary must employ an exacting standard of review to ensure that the regulation does not offend the moral basis of the sovereign-citizen relationship.

I. Introduction

In modern parlance, the concept of rights is all too often used cheaply. Some speak of rights dogmatically; others speak of rights as if they were malleable tools for constructing society in whatever manner one might please. There have been attempts to define a concrete list of human rights, and to order legal systems so as to protect such rights. Yet all of this begs the question as to whether there is any truth to the assertion that individuals are endowed with certain inalienable rights, and if so what are those rights and their scope?

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In this article, I build upon Evan Fox-Decent’s fiduciary theory of governance, applying it in the judicial context to set forth a method for resolving disputes and defining individual rights and their scope. I argue that the judicial body is naturally chartered with the duty to resolve disputes as to the relative rights of individuals. Courts could resolve those disputes through application of rules created to further established public policies, but such rules are not sure to foster a just state of affairs. I argue here that justice may only be served if the dispute is resolved in consideration of each parties’ sphere of autonomy, which is premised upon their inherent dignity.

I conclude that the government, as a fiduciary of the people, must respect the autonomy of each individual. Therefore a judicial system must: (1) allow individuals broad access to the courts to challenge encroachments upon liberty and proprietary interests; and (2) scrutinize government actions with deference toward the individual’s liberty and proprietary interests.

II. The American Judicial System

In order to ground this otherwise abstract discourse, I have chosen to focus on the American judicial system. While the principles discussed here are universal, it is helpful to consider how they have been applied, or misapplied, in an existing legal regime. I have focused on the American legal regime, not only for practical reasons, but also because it was crafted so as to yield justice with explicit appeals to natural law and natural rights in its foundation.¹

A. The Original Emphasis on Natural Rights

The Founding Fathers justified their severance from monarchical rule by appealing to the inalienable rights of men to be free from tyranny.² In declaring their independence, they asserted their natural rights, which they believed had been violated through despotic British rule.³ They had concluded that the crown had offended the mandates of natural justice.⁴ Implicit in their assertion of independence was a set of philosophical assumptions, which are not self-evident, but are to be understood through reason. The first assumption was that individuals are by their nature free, and endowed with natural rights.⁵ The second is that government can justly be rejected where it fails to respect these

¹ Randy Barnett, Restoring the Lost Constitution, 235 (Princeton University Press, 2004) (The Ninth Amendment refers to unenumerated natural rights, affirms their existence and mandates that they must not be ‘denied or disparaged.’).
² See U.S. Decl. of Independence (“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, deriving their just Powers from the consent of the governed. That, whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it…”).
³ Id. (asserting a “long train of abuses” had been perpetrated by the English crown).
⁴ Id.
⁵ See Clinton Rossiter, The Political Thought of the American Revolution, 81 (Harcourt, Brace & World, Inc. 1963) (1953) (“The state of nature – described by Locke as the state of ‘men living together according
natural rights. These assumptions were the product of classical liberalism’s social contract theory.7

Indeed, the revolutionary generation was deeply influenced by natural law thinkers of the classical liberal school – particularly John Locke.8 It is well documented that the founders almost universally believed in the concept of natural law and that they intended to create a Constitution that would respect the natural rights of individuals.9 This was their clear intention, and is well documented in the debates at the constitutional conventions, in the Federalist Papers, and in the writings of the founders.10 An analysis of the writings of Thomas Jefferson, James Madison, John Adams and most every constitutional delegate confirms this point.11 Their conception of rights was firmly established as part of their contemporary political socialization.12

At the time, the belief in natural rights was so prevalent that the chief political factions debated, not as to the existence of rights but, as to the wisdom of selectively choosing certain rights for incorporation into the Constitution’s Bill of Rights.13 The Anti-Federalists argued that the attempt to select specific rights for protection in a Bill of Rights would inevitably fail to adequately guarantee men’s natural rights because it would be impossible to list every conceivable right.14 Many also objected to the incorporation of what they viewed as inalienable rights into the Constitution, precisely

6 Id.
7 Id.
8 Id.
9 Id at 215-216 (There was political consensus among the American revolutionaries that, “Government must obey the commands of natural law or release men from obedience.”).
10 See e.g., John Jay, The Federalist, Federalist No. 2 (J.E. Cooke ed., Wesleyan University Press 1961) (1787) (“Nothing is more certain than the indispensable necessity of Government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.”); University of Chicago, Virginia Ratifying Convention, Proposed Amendments to the Constitution, Chapt. 14, Doc. 43 (June 27, 1788), available online at http://press-pubs.uchicago.edu/founders/documents/v1ch14s43.html (last viewed 5/18/2010).
11 See e.g., Thomas Jefferson, Jefferson Writings, A Summary View of the Rights of British America, 120-121 (Merrill D. Peterson ed., Penguin Books 1984) (“That these are our grievances which we have thus laid before his majesty, with that freedom and sentiment which becomes a free people claiming their rights, as derived from the laws of nature, and not as the gift of their chief magistrate…”); James Madison, Madison Writings, Memorial and Remonstrance Against Religious Assessments, 31 (Jack N. Rakkove ed., Penguin Books 1984) (1785) (“If ‘all men are by nature equally free and independent,’ all men are to be considered entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights.”).
12 See supra, at FN 5.
13 Elliot, Debates, 167 (James Iredell, North Carolina ratifying convention, Tuesday, July 29, 1788) (“It would not only be useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.”).
14 Id.
because they believed that no state had the power to deny or to create such rights.\footnote{15} Moreover, there was concern that if specific rights were to be guaranteed, all those not specifically listed may be subject to abridgement; this was objectionable because they believed man to be naturally at liberty to do whatever he should please, so long as in doing so he respected the rights of others.\footnote{16}

The revolutionary generation was inherently skeptical of centralized power, having just fought to secure their liberties after having suffered what they viewed as a long train of abuses under the English crown.\footnote{17} After that experience, many feared that centralized power would inevitably lead to despotism and the usurpation of what they viewed as their natural rights.\footnote{18} Accordingly, they were hesitant to confer power in the centralized federal government, and the states only assented to the Constitution after a vigorous debate between the Federalists and the Anti-Federalists.\footnote{19} Ultimately the Federalists prevailed and the Constitution was ratified by the states, but only after James Madison and Alexander Hamilton set forth a compelling defense of the federalist system, arguing that the Constitution adequately defuses power so as to ensure that the federal government would not descend into the same despotism that they fought against in the Revolution.\footnote{20}

Madison made clear in the Federalist Papers that he intended the Constitution to operate as a check upon government, so as to secure the liberties and rights of the people.\footnote{21} Thus the Constitution was crafted only to grant certain “enumerated powers,” which were intended to control the hand of the federal government.\footnote{22} Likewise he crafted the Constitution to include “checks and balances” so as to diffuse power and to control factions, which he believed posed a danger to the rights of political minorities.\footnote{23} In all of
this, he sought to protect the liberties and the rights of men by providing constitutional measures which he believed would prevent their usurpation.24

B. Shifting Judicial Philosophies

While the historical record makes clear that America’s Founding Fathers sought to encapsulate, the principles of natural law and natural rights in the Constitution, American courts have explicitly chosen not to rely on appeals to natural law in their decision making.25 In *Calder v. Bull*, 3 U.S. 386 (1798), Justice Samuel Chase argued that “the general principles of law and reason” forbid a legislature from enacting laws interfering with an individual’s rights. Yet his appeal to natural law was effectively quashed by Justice James Iredell’s stinging contention that the judiciary could not rest decisions upon abstract concepts of natural justice. Iredell argued that the concept of natural justice was simply too abstract to have any meaning or application in the judicial context, and that since men disagree as to what the natural law requires, the court ought not rely upon such principles in adjudication.26 Iredell’s view embodies and perhaps may be credited with inspiring, the predominant judicial philosophy in academia today, which at best dismisses natural law as being impractical or incomprehensible.27

The predominant legal philosophy in the modern age is that of legal positivism.28 Legal positivism rejects the concept of natural justice, and holds that the law is nothing more than what men say it is.29 On this view, the law is whatever we make it; there is no universal right or wrong, there are only consequentialist policy choices to be made.30 The legal positivist tradition was born from the consequentialist philosophies of Jeremy Bentham and James Austin, and was the driving force behind the progressivist movement

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25 Yet the natural law theorist would contend that the courts appeal to natural law whenever they make practical judgments based on reason in the interest of justice.
26 “The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.” *Calder*, 3 U.S. at 399.
27 Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century’s End, 51 (New York University Press, 1995) (“Most legal thinkers today remain committed to some version of positivist law…”).
28 Id.
29 Robert Alexy, The Argument From Injustice: A Reply to Legal Positivism, 3 (Oxford University Press, 2002) (“In the positivistic concept of law, then, there are only two defining elements: that of issuance in accordance with the system, or authoritative issuance, and that of social efficacy.”).
30 Id. (“All positivistic theories defend the separation thesis, which says that the concept of law is to be defined such that no moral elements are included… The great legal positivist Hans Kelsen captured this in the statement, ‘Thus, the content of the law can be anything whatsoever.’”).
of the 20th Century. The progressivist movement embraced the legal positivist philosophy, as it was much more conducive to their political objectives. The old natural law philosophies stood in the way of their social engineering efforts, because the natural law held that individuals possessed rights, which could not be violated; to the extent that those rights stood in the way of what the progressivists viewed as progress, they had to go. Legal positivism offered a compelling philosophical basis for setting aside the old notions of rights. Thus, the progressivist movement fostered and encouraged the modern judicial philosophies rejecting natural law, which were instrumental in radically changing the course of American constitutional jurisprudence.

Shifting legal philosophies led to a dramatic schism in American jurisprudence. Previously American courts had demonstrated a willingness to strike down regulations interfering with liberty and propriety interests. In one of the more striking examples of this judicial mentality, the Supreme Court struck down state regulations interfering with the individual’s right to freely contract in Lochner v. New York, 198 U.S. 45 (1905). Under Lochner, the interests of the individual were held above those of the public and the hand of the state was tied firmly to protect the individual’s rights; however, the Lochner decision is now scornfully rebuked by most legal scholars because its implications are viewed as anti-democratic. Following the Lochner decision, the courts invalidated many regulations interferencing with the proprietary rights of individuals, but this frustrated public
policies which had been proclaimed the democratic will of the people. Yet *Lochner* was eventually overturned as legal positivism displaced natural rights theories as the predominant judicial philosophy. Indeed, the progressive courts of the 20th Century would eventually dismantle the individual’s constitutional protections to the point that most any regulation would pass constitutional scrutiny.

Today, a regulation on individual liberty will be upheld if it has any conceivable rational basis, whether or not the legislature was actually motivated by that rationale in adopting the measure. There are a few narrow exceptions to that rule; our courts have chosen a handful of rights, that are viewed as important, and dubbed them “fundamental.” Laws and regulations interfering with those rights labeled “fundamental” are reviewed under strict scrutiny, which places the burden on the government to demonstrate that the regulation advances a compelling government interest and is narrowly tailored to achieve those ends. All other rights are treated as ‘non-fundamental’ and are subject only to rational basis review, which is tremendously deferential to the state and in contravention of the individual’s liberty interests. The non-fundamental rights are henceforth treated more as privileges, which may be taken away so long as the regulator’s decision does not appear to be arbitrary, capricious or completely irrational.

The court’s differential treatment between ‘fundamental’ and ‘non-fundamental’ rights was born in a 1938 Supreme Court decision, in the infamous footnote number four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Originalists argue that

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39 See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (repudiating the idea of freedom of contract); see also The Progressive Revolution in Politics and Political Science, supra at FN 33.

40 See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (“Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the fact made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”); Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law*, 16 (Cato Institute, 2010) (“The right to earn a living was transformed into a privilege that could be revoked whenever politicians decided that doing so would be a good idea.”).

41 Robert Levy & William Mellor, The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom,192-93 (Penguin Group, 2008) (“Without deciding the issue – because it was not before the Court – Chief Justice Stone suggested in a footnote that some rights might be entitled to more protection... The Court accomplished precisely what the Federalists had feared: It declared, in essence, that only those rights specifically enumerated in the Constitution, plus selected rights associated with political processes (such as voting) or with protection of minorities, would be judicially enforced.”).

42 *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (“Our opinions applying the doctrine known as ‘substantive due process’ hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.”).

43 See supra FN 41.

44 See supra FN 41.

45 *Id.* at 193 (“*Carolene Products* represented the beginning of a two-tiered approach to enforcing rights. Those rights that had fortunately been specifically enumerated would receive meaningful protection, but unremunerated rights, such as the right to enter into contracts or the right to practice a trade, would receive
there is no basis in the Constitution for such deferential treatment between rights. Indeed, the Founding Fathers intended the Constitution to operate to control the hand of government, to protect individual rights. They sought to guarantee our rights by spelling them out in the Bill of Rights, and by explicitly providing that the Bill of Rights represented a non-exhaustive list of our rights; the Ninth Amendment provides that, “[T]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” Yet many rights which were viewed as important, and originally conceived as being protected by the Ninth Amendment, have been set aside as unimportant. Accordingly, the bifurcated treatment of rights operates to effectively void most any rights not explicitly spelled out in the text of the Constitution.

Still, even amongst those rights which the Founders explicitly sought to protect in the Bill of Rights, not all rights are treated equally. Those rights viewed as inherent to the democratic process, such as the right to vote and to free expression, have been afforded the greatest of protections by our courts, but, for example, the protection of private property, which is guaranteed under the Fifth Amendment, has been treated far more conservatively. Whereas a law interfering with one’s right to vote or to engage in political discourse will most likely be struck down under strict scrutiny review, a law

only ‘rational basis’ scrutiny. Sadly, the Court has repeatedly reaffirmed that holding, and with each iteration the language of the test has become more and more deferential to government power.”).

46 See Supra FN 41.
47 Annals, 1:456 (Statement of Rep. Madison) (“It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive that it may be guarded against.”).
48 U.S. CONST amend. IX.
49 For example, economic liberties and property rights are now exposed and vulnerable to the will of regulators, in contravention of the Ninth Amendment as originally intended. See Supra FN 41 at 195 (Quoting Clark Neily) (“Most of us have a drawer or closet in our home where we put things that are not important enough to have their own place but are not quite worthless enough to throw away either. That is what the rational basis test is for the Supreme Court – a junk drawer for disfavored constitutional rights the Court has not explicitly repudiated, but that it prefers not to enforce in any meaningful way.”).
50 See Supra FN 1.
51 Moreover, the Court has not gone out of its way to recognize the right to privacy as a fundamental right, despite the fact there is far less evidence that the founders originally conceived of a right to privacy. See e.g., William v. Lee Optical, 348 U.S. 483 (1955) (upholding special interest regulation barring opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist on rational basis review); Roe v. Wade, 410 U.S. 113 (1973) (disallowing restrictions on abortion under penumbras and emanations theory).
52 See Washington Legal Foundation, Amicus Curiae Brief, Palazzolo v. Rhode Island (Noting the Supreme Court’s differential treatment between First and Fifth Amendment rights: “Suppose that First Amendment doctrine included a rule excusing content discrimination when the government could show that the speaker had no reasonable expectation that his speech would influence public policy. Just as this rule would clearly turn the words of the First Amendment on their head by privileging government censorship over the freedom to speak, so too routinely deploying ‘reasonable investment backed expectations’ as a justification for denying takings claims turns the Fifth Amendment upside-down by privileging confiscation, or the substantial loss of property, over compensation.”).
interfering with one’s right to use and enjoy their property will usually be upheld under the rational basis standard.\(^{53}\)

While originalist constitutional scholars take issue with the court’s bifurcation of rights into the fundamental and non-fundamental dichotomy, other scholars defend the modern court’s treatment of rights on grounds similar to those advanced by Justice Iredell in *Calder*; they often argue that the original intentions of the Founding Fathers is unknowable for one reason or the next.\(^{54}\) They point to contradictory evidence in the historical record, or a lack of such records, and contend that the endeavor to seek an original interpretation is, at best, a futile pursuit.\(^{55}\) Just as Iredell concluded that the concept of natural justice should be dismissed because it is difficult to ascertain, so to do many of the defenders of modern constitutional jurisprudence dismiss the originalist interpretation.\(^{56}\) Thus, being that the originalist endeavor is said to be futile, many legal scholars advance a progressive judicial philosophy which posits that there is no set meaning to the constitution, but rather that the Constitution is a living document, and that its meaning changes with time.\(^{57}\)

The concept of a living constitution is fundamentally divorced from the bedrock philosophical principles the Founding Fathers held as self-evident truths.\(^{58}\) This progressive judicial philosophy is not grounded in the concept of natural justice, for it rejects the grounding principle of objective right and wrong, and instead views the Constitution as free-floating and malleable with the changing needs of society.\(^{59}\) The

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53 Land use restrictions are upheld if they bear “a rational relation to the health and safety of the community, *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926). The courts interpret the Fifth Amendment so narrowly that even a regulation devaluing a property by 85 percent, without compensation, will likely be upheld as constitutional. *See Supra* FN 41 at 175 (“The application of the so-called parcel as a whole doctrine extinguished any remaining hope for Penn Central. In effect, the Court said, ‘Sure, you lost $150 million, but look at all the things the government let you keep!’”). An unconstitutional taking is only recognized where the government has physically invaded a property, completely deprived a property of all economic value, or in some instances where the owner can demonstrate deprivation of distinct “investment backed expectations” in a convoluted balancing test established by *Penn Central v. New York City*, 438 U.S. 104 (1978). *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (discussing takings doctrine); *see also* David Breemer, Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?, 38 Urb. 81, _ (2006) (“there is [hardly] no readily identifiable pattern to state court investment-backed expectations decisions, except that they tend to evolve, with each new set of facts, to challenge the reasonableness of the claimant’s investment backed expectations.”).

54 *See e.g.*, Dennis J. Goldford, The American Constitution and the Debate Over Originalism, 61 (Cambridge University Press, 2005) (“At best, [original] intentions are but one of the criteria of constitutional argument – even if they are ascertainable, which in most (perhaps all) present-day instances they are not.”).

55 Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U.L. Rev. 1097, 1138 (2006) (“because there is no single, objective original meaning that can be discerned from the incomplete and often contradictory historical record, originalism pretends to an apolitical objectivity that it cannot deliver.”).

56 *Id*.

57 *See Supra* FN 54 at 59 (Concept of a “living constitution” is premised upon the idea that “the Constitution’s meaning should evolve with time.”).

58 *Id*.

59 *Id*. 
concept of the living constitution is the product of legal positivism, and its predominance manifests the shift in the philosophic mind-set of the political elite. With this shift, the old philosophical moorings were untethered by progressive courts, and the Constitution was set adrift. Yet the question remains as to whether the originalist view of rights, grounded in a conception of natural justice, is a more appropriate judicial philosophy?

C. Defense of Originalism

If a judicial philosophy is concerned with that which is just, then it should seek to remedy injustice, and while it may be that different philosophies rest upon different conceptions of justice, it may be said, as a categorical matter, that justice is to be pursued and injustice is to be avoided, in the same vein as Thomas Aquinas said that “good is to be done and evil is to be avoided.” On this point, it cannot be held that originalism is categorically a proper judicial philosophy unless it may also be said that every Constitution (as originally intended) works justice and avoids injustice. Yet, we can easily imagine a society creating a Constitution which we would perceive as innately unjust; imagine, for example, a constitutionally mandated caste system. Thus it may be said that the originalist judicial philosophy is only appropriate where a Constitution, as originally intended, furthers justice itself.

60 Routledge Encyclopedia of Philosophy, Vol. 7, 466 (Edward Craig ed., Routledge 1998) (“the Hartian version [of legal positivism] rests… on the customs of at least the official and political classes in a state, whose practices concerning the recognition of certain criteria for the validity of legal rules define the ultimate ‘living constitution’ of a state, its ‘rule of recognition.’”).

61 Commentators have suggested that current American jurisprudence lacks an apparent guiding principle, because the Court has failed to consistently treat constitutional rights as of equal importance. See Supra FN 41 at 191-97. Among those rights specifically spelled out in the Bill of Rights, the Court protects certain rights with much greater fervor, for example, the First Amendment and the Fourth Amendment have been afforded the most liberal of constructions to protect the rights specifically set-forth and corresponding ancillary rights, but the Second Amendment has been interpreted very narrowly. See e.g. District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (striking down ordinance banning handguns, while making clear that the Second amendment cannot be construed broadly to allow individuals to carry any weapon in whatever manner they should choose); Citizens United v. FEC, 130 S. Ct. 876, 898 (1974) (applying strict scrutiny in review of laws burdening political speech). Yet the Court’s treatment of rights is all the more muddled by the fact that the court identifies certain rights, not specifically enumerated in the Constitution, as “fundamental” deserving of more stringent constitutional protections. See e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (ruling that the Constitution protects the right of privacy). There is no apparent basis for treating the right to travel as any more fundamental than the right to make an honest living; both involve seemingly important liberty interests, but only one is accorded meaningful judicial protection. See e.g. Saenz v. Roe, 526 U.S. 489 (1999) (recognizing the right to travel as a fundamental right); Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) (upholding regulation of economic liberties). Moreover, this seemingly arbitrary treatment of rights also appears to encourage and further the view that rights are whatever the court proclaims them to be, as opposed to being the product of an objective universal law governing human behavior. This may be said to account for the prevalence of the cynical view, that ‘judges will do what the will,’ which is often espoused as “legal realism.” “Legal realism” is a form of a legal positivistic thought. Law in a Social Context, 36 (Kluwer ed., Deventer 1977). Such cynicism appears to reflect an almost existentialist longing for meaning and purpose, which may be said to be lacking in the pervasive post-modern judicial philosophies rooted in legal positivism. Indeed, if there is no objective truth to the concept of natural rights, then the entire law is nothing more than what we make it.


63 See Supra FN 1 at 52 (“when consent is lacking, a constitution is legitimate only when it provides sufficient procedures to assure that the laws enacted pursuant to its procedures are just.”).
In order to identify what justice requires, we must consider whether there are objective truths, as to right and wrong, in nature. It could be that there is no truth to the concept of natural justice. It may be that legitimate sovereignty is nothing more than a question of who has a monopoly on power within a geographical region. Yet, our intuition suggests otherwise.

History demonstrates that government can perpetrate the most heinous acts imaginable with frigid calculation and bureaucratic detachment. We need only look to the Nazi concentration camps for a startling 20th Century reminder of this point. We innately understand that the Nazi regime was wrong, even if we cannot articulate why beyond our visceral reactions to their atrocities. This suggests that we have an intuitive sense of justice and injustice. It also suggests that governmental regimes may be unjust, and that not all government actions can be viewed as legitimate. In considering what justice requires of the state, we must then seek to demarcate the boundaries between legitimate governance and mere assertions of state power.

III. Defining Rights in Consideration of What Justice Requires in the Relationship Between Sovereign and Subject

A. Critique of Social Contract Theory

In today’s western democracies, the social contract theory has traditionally been conceptualized as the foundation for legitimate governance. Social contract theory holds that man is naturally at liberty, and that he cedes some of his natural liberties in a contract with government, in order to secure certain benefits that only government can...


65 In England, monarchial rule had always been justified by appeals to God; however, the monarch was considered to be under the law of God, and was therefore not considered the maker of the law. Henry de Bracton, De Legibus et Consuetudinibus Angliae, bk. 1, p. 38 (c. 1235) (Translated in Albert Beebe White, The Making of the English Constitution, 449-1485, at 268 (1908)). Yet following the execution of King Charles I in 1649, the Devine right of monarchial rule was brought into question. John Neville Figgis, The Devine Right of Kings, 143 (Cambridge University Press, 1914) (“It was the execution of Charles and the exclusion of his heir that led men to dwell upon the distinction between a de facto and de jure authority.”). English philosophers therein began to conceive of the government in a different light, with a view that government may be rejected in certain circumstances. The same questions were raised, and with greater force, during the American Revolution. See Individual Rights Reconsidered, 4-6 (Tibor R. Machon ed., Hoover Institution Press 2001) (discussing Thomas Paine’s influential pamphlet, which questioned the legitimacy of continued English governance over the colonies). Indeed, the very legitimacy of government was called into question by the revolution.

66 See e.g. Plato, Crito (David Gallop trans., Oxford University Press, 1997) (360 BC).

67 See Paul E. Sigmund, Natural Law in Political Thought, 74-89 (University Press of America, 1971).
Social contract theory was first advanced by Thomas Hobbes; he said that, in a "state of nature" man was completely at liberty, but that his unbridled freedom made for a tumultuous, disorderly and perilous existence. He argued that men, motivated by their primal fears, desired security and order; thus, he postulated that man essentially barter away some of his natural freedoms in order to attain security of his person and property. He called this process of giving up freedom the social contract.

Similarly, John Locke believed that men were naturally free in a state of nature, but he did not view our natural state as quite the same treacherous and volatile state as did Hobbes. Nonetheless, he reasoned that government was necessary to protect individual interests. Thus, he advanced a theory of social contract which held that men gave either tacit or actual consent to be governed, thereby giving up some of their natural liberties and rights in exchange for the benefits of governance. Under both Hobbes' and Locke's formulations, governance over the individual is justified upon the moral basis of the individual's consent. Indeed, consent would legitimize governance because, in consenting to be governed, we accept limitations on our liberties willingly. Yet, in practice we do not actually consent to be governed.

Notions of popular sovereignty arise from social contract theory on the supposition that the people may demonstrate their consent to be governed through the democratic process; however, participation in the democratic process does not represent actual consent. At best, we might infer tacit consent from participation in the democratic process; however,
this is a dubious inference. One may fervently object to his government's assertion of sovereignty over him, but may feel inclined to participate in the democratic process with an aim to preserve his self-interests without ever accepting his government as a legitimate sovereign power. The idea that the individual tacitly consents to be governed by exercising political rights in a democratic system presupposes that those rights are granted to the individual by the state, and infers consent from an ambiguous action.

Similarly, Plato suggested that we may demonstrate our consent to be governed by the state in our failure to leave its boundaries; however, this presumes that we can leave our native country at will. While this may have been possible in Hellenic times, it is no longer that simple to leave one's country of origin. For example, I could not simply move north of the 49th parallel, from the United States to Canada, without dealing with American and Canadian customs and immigration laws. I would simply encounter another sovereign power asserting authority over my person. Moreover, Plato presupposes the authority of the State, and likewise presumes that we may infer consent from an ambiguous action.

We simply cannot justify government by the theory of consent, unless we actually seek explicit consent from each individual. If we were given the opportunity to choose to either accept or reject governance, we could truly enter into a contractual relationship with our government, negotiating the terms of our consent, and the services it will afford us; however, government does not give us this option. Instead, the State asserts its authority over us regardless of whether we actually assent. It is evident that the state's assertion of power is most always made unilaterally, but contracts are never unilateral affairs. As such, the contractual theory of governance is, at best, an imprecise articulation of the requirements of legitimate rule.

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79 Id.  
80 See Id.  
81 Other theories of tacit consent are suspect for similar reasons. John Stuart Mill argued that, "everyone who receives the protection of society owes a return for the benefit." John Stuart Mill, On Liberty, 60 (1859), available at http://www.netlibrary.com/Reader/On_Liberty. This supposes that we have a choice to reject public benefits, which are often thrust upon us without regard to whether we actually want them. Supra FN 1 at 22-25. If given the choice, the individual may well say that she does not care to pay for that benefit and would rather do without it; why then should she be compelled to pay for that benefit, or to owe anything to the state, when she rejects the benefit conferred?  
82 The decision to remain in one's home country may be motivated by many things. One might reject their sovereign's authority and wish to move, but they might also find the costs of moving to be prohibitive. Moreover, one might simply prefer life in their current community, despite their disapproval of the government; we could not infer consent from that common scenario. See Supra FN 1 at 17-19.  
83 See Id. at 30.  
85 Now to be fair, the social contract theory was never really meant to offer an accurate portrayal of the relationship between the sovereign and her subjects in so far as we have discussed in practical terms; the theory was advanced more as a thought exercise, and was meant to help us conceptualize pre-societal rights. While the social contract theory may indeed help us conceive of rights as antecedent to the formation of the State, and may help us reject the premise that rights are granted by the state, the theory offers little guidance in discerning what rights the individual retains against the State. While it suggests that
For the reasons set forth above, we cannot explain the nature of the sovereign-subject relationship in contractual terms. More fundamentally, in characterizing the relationship in such terms, social contract theorists have failed to offer a framework through which we may define rights and their scope. There is no way to identify the terms of a theoretical contract. Indeed, even assuming that we have consented to governance, the question remains, how much power have we ceded to the State? If indeed we are naturally free, then how can the State assert power over us, and what rights do we now retain against the state?

B. The Fiduciary Theory of Governance

Whereas the social contract theory does little to help us define the scope of our rights, Evan Fox-Decent of the McGill University's faculty of law has offered a theory of governmental legitimacy rooted in the law of agency, which may be more helpful. He suggests that the sovereign-subject relationship is best characterized in the context of a familiar legal relationship: the fiduciary-beneficiary relationship. He argues that the role of the sovereign is analogous to that of a fiduciary in agency law, and that a fiduciary relationship naturally exists between the sovereign (the fiduciary) and the subject (the beneficiary). In examining the government's actions through the lens of the "fiduciary relationship," we may discern between a mere assertion of sovereign power and a legitimate exercise of such power, thus demarcating the rights of the individual against the powers of the State.

A fiduciary relationship exists in law where one party (the fiduciary) is given administrative power over the interests of another (the beneficiary), as is the case with any relationship in which one party is commissioned by the next to provide a service. The fiduciary acts as an agent, on behalf of the beneficiary, and is bound to carry out the responsibilities conferred upon him or her with reasonable competence. The fiduciary is typically charged with responsibilities which require the exercise of reasonable judgment, as to what course of action should be taken. As such, the principle obligation of the fiduciary to the beneficiary is that of loyalty in the exercise of reasonable discretion.

Fox-Decent suggests that we may turn to the common law principles governing fiduciary relationships as we seek to evaluate the government's actions and define the scope of our rights. He suggests that the fundamental question to be asked is whether or not the sovereign has violated the trust which is the basis of every fiduciary relationship. Where we have somehow bargained away some of our rights in exchange for the benefits of governance, it fails to explain how that bargaining process occurred, and by what terms our supposed consent was made.

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86 Supra 84 at 533.
87 Id.
88 Id. at 541.
89 See Restatement (Third) of Agency § 1.01 (2006).
90 See Supra FN 84 at 541; Alan R. Palmiter, Corporations § 11.1.2 (Aspen Publishers, 2003).
91 See Corporations, Supra FN 90 at § 11.1.2.
92 See Supra FN 84 at 541.
93 See Id. at 546-47.
the trust has been respected, the government may be said to have acted legitimately, but
where the trust has been violated, it may be said to have acted illegitimately.\(^\text{94}\) Accordingly, he argues that governmental legitimacy rests on the moral basis of trust, not
consent.\(^\text{95}\)

1. What About Consent?

In recognition of man’s natural autonomy, the law typically requires that a party seeking
power over another’s interests must obtain proper consent; however, where consent is
unavailable, fiduciary obligations of loyalty may arise on the basis of trust.\(^\text{96}\) For
example, an unconscious patient cannot consent to an operation that can save her life;
however, her doctors may act in her best interest, on the basis of her trust.\(^\text{97}\) Rather than
presuming that the doctors cannot act to save the patient’s life for failure to obtain
informed consent from the unconscious patient, the law presumes, absent contrary
evidence, that the individual would want her medical providers to act in her best
interest.\(^\text{98}\)

While typically fiduciary relationships are established in a contractual agreement, the law
recognizes certain circumstances in which a fiduciary relationship may arise without
consent. A fiduciary relationship arises (without contract) in the common law, "if one
party (the fiduciary) has broad discretionary power of an administrative nature over the
interests of another (the beneficiary), and the beneficiary is unable, either as a matter of
fact or as a matter of law, to exercise the entrusted power."\(^\text{99}\)

We may say safely that the state has assumed discretionary power of an administrative
nature, which private parties cannot exercise. The state alone may enact laws and compel
individuals to follow the law by means of force. The state claims special sovereign
powers which, by definition, are exclusively held by the state. These sovereign powers
are of an administrative nature, for they are exercised in the interest of the management
and supervision of society on the whole, and they necessarily require discretion, as does
any administrative function. Thus, we may say that when the state assumes the role of an
administrator over society, claiming exclusive powers and governing over the interests of
individuals, it assumes the rule of a fiduciary, owing an obligation of loyalty to the
individuals over whom it claims power.

Drawing upon the work of Lon Fuller, Fox-Decent argues that the relationship between
sovereign and subject is essentially reciprocal in nature, with trust being an essential and

\(^{94}\) Id.
\(^{95}\) Fox-Decent suggests that this, "trust can be thought of as an unarticulated and legitimate expectation that
the fiduciary powers will be exercised on her behalf and for her ends, rather than the fiduciary’s ends." Id.
\(^{96}\) Id. at 548.
\(^{97}\) See Id.
\(^{98}\) Id.
\(^{99}\) Id. at 541.
morally legitimizing element of this social arrangement. Under this view, order is maintained by the subject's adherence to the sovereign's promulgated law upon the expectation that the sovereign exercises power in the best interest of the subject.

Fox-Decent endorses Fuller's argument that when a lawgiver abides by procedural rules of rationality, what Fuller calls the "principles of internal morality," there is a sort of understanding between government and citizen as to what rules and conduct are expected. In this regard, it may be said that these reciprocal obligations reflect "interlocking, and often unarticulated expectations." For example, we expect that government officials will not appropriate funds for their own private gain. Even if there was no positive law requiring government officials to refrain from using public funds for their own self-interest, we would view such an action as a breach of public trust because there is an expectation, at least, in western democratic societies, that the government exists to serve the people. Government is then viewed as corrupt if it acts in violation of that general expectation, even if we have not explicitly spelled out what we expect from our government. Such expectations naturally arise out of a sense that the very purpose of having government would be frustrated if its agents did not faithfully exercise the powers they have been entrusted with.

As such, Fox-Decent argues that legal subjects will have certain expectations of their government under any system of governance; however, that is particularly true in democratic societies, where there is a general expectation that government exists to serve the people for whom it represents. Such expectations are likely the product of liberal political socialization, which has traditionally taught democratic principles as a means of holding government accountable.

Yet Fox-Decent does not suggest that trust or normative expectations should provide for a shifting moral basis for the law at all; instead, he argues that the moral basis for governance is to be grounded in a respect for human dignity. He argues that it matters
not whether "subjects actually trust the state to comply with the rule of law."\textsuperscript{109} Trust comes into the equation in so far as it may be said that individuals are essentially at the mercy of the sovereign's will. In this regard, the relationship between sovereign and subject may be analogized to that between a parent and child in that the parent naturally has an obligation to act in the interest of the child; there is no guarantee that the parent will in fact live up to these responsibilities.\textsuperscript{110} The subject, like the child, can only trust that those making decisions affecting his or her person will do so in their best interest.\textsuperscript{111} The vulnerability of the child, and the subject, is then a morally significant factor, but the duty to honor that trust, nonetheless, is rooted in the moral obligation to respect the individual's autonomy, which exists regardless of the actual expectations or trust, as Fox-Decent makes clear. Indeed, it is precisely the individual's vulnerable state which gives rise to the equitable principle that no individual should be able to exercise power over the interest of another, without the fiduciary obligation to do so in their best interest.\textsuperscript{112}

2. Respect for Human Dignity

Fox-Decent's fiduciary theory of governance is based upon what he calls the moral obligation to respect the subject's trust, which he suggests is an essential element of the reciprocal nature of governance; however, this raises a deeper question as to what is the basis for concluding that trust is morally relevant in the first place? Put another way, what is the basis for concluding that the sovereign has any obligation to the subject? This question cuts to the heart of both Fox-Decent's arguments and our inquiry on natural rights.

At its core, Fox-Decent's theory rests upon a view of the individual as a naturally autonomous being with inherent dignity, which thereby gives rise to a moral obligation to respect that individual as a free moral agent.\textsuperscript{113} While Fox-Decent does not purport to spell out political rights, he concludes that at a minimum, the rule of law naturally requires respect for what we consider human rights.\textsuperscript{114}

Human rights are, "justifiable on grounds of human dignity, the Kantian idea that persons are to be treated as ends always, and never as mere means to another's ends."\textsuperscript{115} Fox-Decent argues that the rule of law must affirm our human dignity, thereby recognizing those rights fundamental to our personal autonomy.\textsuperscript{116} He argues that the rule of law entails "...a commitment to a view of the person as free and self-determining," which

\textsuperscript{109} Id. at 546.
\textsuperscript{110} Id.
\textsuperscript{111} Emmanuel Kant believed that parents owe a fiduciary-like duty to their children because they brought their children into the world without their consent. Id. In a similar way, government organized itself without our consent and intends to govern us from the moment of our birth, regardless of our consent. Therefore, the sovereign is obligated, out of respect for our natural autonomy, and our intrinsic dignity, to act in our best interest.
\textsuperscript{112} Id. at 548.
\textsuperscript{113} Id. at 550-59.
\textsuperscript{114} Id. at 576-78.
\textsuperscript{115} Id. at 576, 577.
\textsuperscript{116} Id. at 578.
necessarily entails a commitment to the precept of human dignity. In other words, the concept of rights entails those protections and entitlements guaranteeing our bodily integrity. This necessarily includes the right to life, to security in our person and property, and the right to act as a free and autonomous being.

Fox-Decent subscribes to the Kantian view that human beings are to be differentiated from other things because humans alone have dignity; our capacity to reason and to freely make choices makes us free moral agents with inherent dignity. This view is consistent with classical Aristolean and Thomastic natural law theory, which holds that our ability to reason and to act freely separates us from other beings. Thus, it may be said that Fox-Decent's theory, while rooted in a Kantian conception of human dignity, is consistent with classical natural law theory in so far as his theory is tailored in consideration of our human capacity for reason.

Kant's categorical imperative was also influential upon Fuller, who Fox-Decent acknowledges as the inspiration for his theory. Fuller accepted Kant's argument that humans should be respected as free moral agents and should, therefore, not be treated as means to another's ends, but as ends in themselves. In The Morality of the Law, he contemplated the connection between the law and morality, and offered a list of eight principles for what he called the "internal morality of the law." Fuller argued that his rules of internal morality represent the logical formalistic requirements necessary for a promulgation, or a prohibition, to be properly characterized as law. He derived these rules from considerations of what he conceived as the sovereign's inherent obligation to respect the individual as a free moral agent.

Viewing the individual as a free moral agent, Fuller's principles of internal morality provide that the law must be: (1) established in general rules, rather than ad hoc commands; (2) published, or otherwise made known to affected parties; (3) focused on future behavior, and must not be retroactive; (4) understandable; (5) coherent, so as to

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117 Id. at 577.
118 Id. at 576, 577.
119 Id. at 551.
120 Critics argue that the idea of “human dignity” is simply a human construct; many legal positivists have denied the existence of moral rights on the same theory. While there is force to this argument, the concept of human dignity is rooted in the idea that our human capacity to reason, and make rational choices, differentiates us, in a morally significant way, from other creatures. An animal cannot reason on the same level as a human. For example, a dog may be able to reason that it will be punished for doing X, and rewarded for doing Y. The dog is then capable of being trained, but is incapable of being a “free moral agent,” in the same sense as a human. Thus our capacity to reason that an action may be morally good or bad is unique to our human nature. Still, our ability to grasp conceptions of morality does not illustrate our human dignity, it only evinces it.
121 It may be argued that where we deny our reason in our actions, we undermine our very dignity. Aquinas put forth a similar argument in Summa Theologica when he reasoned that individuals could be put to death by the state for certain crimes, because in committing such crimes the “man departs from the order of reason and consequently falls away from the dignity of his manhood…” See supra FN 65 at 2667.
122 Supra FN 84 at 535.
123 Id. at 533, 577.
124 Supra FN 106 at 33-38.
125 Supra FN 84 at 533, 550-51.
avoid contradictions; (6) aimed at creating only those legal duties and proscriptions on behavior that subjects have the ability to follow; (7) changed infrequently, so as to allow subjects to orient their actions accordingly; and (8) applied with congruence between the rules, as pronounced by the sovereign, and their administration.\footnote{Supra FN 106 at 33-38.}

These principles concerned the structural and administrative requirements that he argued were necessary for a rule to be considered law.\footnote{127 Fuller contends that the rule of law requires a basic respect for the individual's capacity to freely make choices, and as such, it must respect the individual's dignity as a free moral agent, by making it possible for the individual to understand and comply with the demands of the sovereign. The rules of internal morality provide a framework for evaluating the legitimacy of a given law in consideration of whether the law respects the individual as a free moral agent capable of following the law.\footnote{128 Thus he reasoned that we can differentiate between a legitimate law and a rule backed by mere force by considering whether the lawgiver complied with the principles of internal morality.\footnote{129 While the principles of internal morality are based upon the moral conceptions of freedom and human dignity, Fuller's theory of internal morality does not go so far as to require that the law must respect the dignity of the individual in its substance.\footnote{130 If the principles of internal morality were the only limitations placed upon a sovereign, the sovereign would be within its right to promulgate laws which would violate our conception of human rights.\footnote{131 Fuller set forth a defensible anti-positivist argument that did not expose itself to the relativist's predictable line of attack on political morality.\footnote{132 In focusing solely on the formalistic requirements necessary to respect the moral concepts of freedom and human dignity, Fuller's theory of internal morality indicated only that there is a morality to the law, without endorsing any specific conception of political morality other than a view of the human as a free moral agent.}}}}}}}}}}}}}

\footnote{Fuller first introduced the principles of internal morality by illustrating the eight mistakes law makers may fall into when attempting to formulate law. See Supra FN 84 at 533, 538-37. He told the story of King Rex who failed in his many attempts to reform his country's legal system because in each attempt he violated the principles of internal morality. Id. "Rex's bungling career as a legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster." Supra FN 106 at 68. Fuller was not arguing that King Rex had merely failed to make "good law," or "sensible law," but rather, he argued that Rex had entirely failed to make legitimate law. See Id. at 68-72.}}\footnote{At least our capacity to reason and choose our actions must be respected by the law. See Supra FN 84 at 555-59.}}\footnote{Id. at 550-01.}}\footnote{Id. at 540, 550-51.}}\footnote{Id. at 533, 537, 540, 550-51.}}\footnote{Id. at 533, 545.}}\footnote{Id. at 545.}}\footnote{Id. at 538-539.}}\footnote{In this manner, Fuller's theory of the natural law was particularly powerful in the positivist – anti-positivist debate, as his principles of internal morality indicated only that there is a morality to the law, without endorsing any specific conception of political morality other than a view of the human as a free moral agent.}}
Fuller’s theory of the law is fundamentally based upon moral precepts, which he contends cannot be divorced from the law because, once the law is stripped of all morality, it can only be viewed as an assertion of power. Yet the principles of internal morality have been subject to criticism from natural law theorists, like Fox-Decent, who contend that the rule of law must entail, not only procedural moral precepts but also, substantive moral precepts. Fuller simply balks at the notion that we can define substantive morality precisely because such moral evaluations are more controversial and, on some level, inherently political. Still, if we are to accept the premise that the law must be grounded in some morality, and if the moral grounding is said to be a respect for the individual as a free moral agent with human dignity, it does not make sense to conclude that the ‘rule of law’ must only provide for procedural safeguards for that moral consideration, unless those procedural safeguards are indeed sufficient to adequately ensure that those moral concerns are not violated in the promulgation of law. Fuller’s theory then appears to be internally inconsistent in so much as he has argued that the law must have a moral grounding, without endorsing a rule of law which would actually operate to restrain the sovereign from violating the pertinent moral precept. It does not make sense to say that moral considerations somehow require the laws respect in its procedural formation if they are not important enough to require respect in its substance. Fox-Decent’s theory of the law is more protective of this moral precept than is Fuller’s because he asserts that the sovereign owes a fiduciary duty to the subject in every action, which restrains the lawmaker from acting in any way that would violate the fundamental rights of the subject.

3. Applying the Fiduciary Theory of Governance

Since government actors stand in a position to promulgate laws, which will affect the interests of others, in the same way that corporate agents may affect the interests of their shareholders in making everyday business decisions, Fox-Decent argues that the sovereign should owe its subjects the same duties of loyalty as the corporate agent would owe the beneficiary-shareholder. Under this formulation he argues that the sovereign "acts with legal authority if, and only if, it respects the fiduciary obligation of its subjects." We can then distinguish between legitimate exercise of power and mere rules backed by force by applying the standards of agency law in our analysis of government actions. In sum, we can define both the legitimate functions of government and the rights of the individual, by considering whether a given measure respects the individual's dignity; however, since government must serve the interests of many

136 Supra FN 84 at 540.
137 Fuller has also been subjected to criticisms by legal positivists, who contend that the law must be divorced from conceptions of morality. See E.g., Josheph Raz, The Rule of Law and its Virtue, 211 (Clarendon Press, 1979).
138 Supra 184 at 541.
139 Id. at 542.
individuals, the government must also ensure that the measure in question benefits the public on the whole.

4. Critique of the Fiduciary Theory of Governance

While the fiduciary theory of governance may have merit, it nonetheless gives rise to a number of problems in defining the scope of our rights. Fox-Decent concludes that, at a minimum, the rule of law naturally requires a respect for human rights; however, we are left to determine what those rights are and whether there are any guiding principles in defining what good governance entails beyond that basic precept. Moreover, his theory, although consistent with liberal political thought in so far as it is based upon a conception of individual autonomy, could be used to justify paternalism. While Fox-Decent suggests that the law of agency provides a legal framework for evaluating governmental actions, law governing the fiduciary-beneficiary relationship is only so helpful. We are left only with the seemingly vague principle that the sovereign should respect the individual's inherent dignity, and trust.

a. The Problem of Paternalism

In formulating the sovereign-subject relationship in fiduciary terms, we run a risk of encouraging paternalism. While classical liberals contend that a requirement to govern in the best interest of individuals is best fulfilled where individual liberties are maximized, other political philosophies lead to different conclusions. For example, the progressive movement, from which modern liberalism was born, generally views government as a tool for social engineering; those in the progressive tradition are more apt to believe that the hand of government should be used to solve, what they perceive as social problems through regulation, generally at the expense of individual liberty. As such, progressives tend to advocate a different, and more often paternalistic, conception of governance in the best interest of individuals.

"Paternalism is the restriction of a subject's self-regarding conduct primarily for the good of the same subject." For example, there are increasingly stringent regulations on the sale of tobacco products throughout the United States and Canada; such regulations are justified on paternalistic grounds. Health advocates argue that these regulations are ultimately in the best interest of the subject, despite the fact that the regulations deny...

140 Id. at 576-78.
142 See e.g., Lawrence M. Mead, The Rise of Paternalism: Supervisory Approaches to Poverty, 14 (The Brookings Institute, 1997) (discussing paternalistic policies aimed at alleviating poverty).
subjects both consumer freedoms and economic liberties. Advocates of these regulations essentially endorse a view that government should take care of us.\footnote{145}

Aside from the moral questions raised when taking away the liberty of individuals, paternalism is problematic because it presumes that the promulgator of law can know what is best for individuals with diverse interests.\footnote{146} Despite the fact that we may act irrationally at times, it is nonetheless a natural human instinct to seek that which is good for oneself. Thus, if we are to view the government as a fiduciary of the people, soft-paternalism may be preferable, whereby the sovereign may foster our natural inclinations to seek good for ourselves, by meddling as little as possible in our affairs, and acting only to encourage rational behavior. This concept of soft paternalism is more palatable to classical liberals, as it does not impede liberty in the same way as traditional hard paternalism.\footnote{147} Yet, given that the fiduciary duty entails an affirmative obligation to act in the best interest of the beneficiary, Fox-Decent's theory may be interpreted by most individuals as a practical mandate, entailing a moral obligation, for hard paternalistic governance. As such, conceptualizing the role of government as that of a fiduciary of the people may endanger the rights of individuals by encouraging the view that the government knows what is best for us.

b. Nearly Unfettered Discretion

On first blush the fiduciary theory of governance appears to offer a substantive framework for evaluating governmental actions and defining our rights; however, when one attempts to apply the law of agency to government actions, it becomes clear that this theory would allow for most any action. The common law provides that a fiduciary owes a beneficiary a duty to (1) act in good faith, (2) in the honest belief that the action is in the best interest of the beneficiary, and (3) on an informed basis.\footnote{148} If a state was to apply this standard of review as its sole constitutional principle, most every governmental action would be upheld on review. Of course state actors would be required to refrain from self-serving actions and from creating policies without considering the consequences; but, beyond that, they would have virtually no check on their authority.\footnote{149} The promulgators of law in this state would be free to enact most any policy, so long as they had a reasonable belief that it served the best interest of the people.

\footnote{145}There are actually two forms of paternalism: (1) soft paternalism, which seeks simply to encourage the subject to make better decisions for him or herself, and (2) hard paternalism, which is more restrictive of liberty. \textit{Id.} at 659, 661.
\footnote{146}Paternalism presumes that the policy maker can know better than the individual what serves the individual’s interest. \textit{Id.}
\footnote{147}See \textit{Id.}
\footnote{148}See Corporations, \textit{Supra} FN 90 at § 12.1.
\footnote{149}In agency law a fiduciary must refrain from acting where there is a perceived conflict of interest, unless the beneficiary gives consent after full disclosure. In the governmental context, this would require decision makers to refrain from making policy decisions, which they stand to benefit from. Presumably lawmakers could act where there is a perceived conflict of interest if the democratic process represents popular consent based upon full disclosure. Yet, the government's fiduciary duties are ultimately managed by the judiciary, and our legal tradition requires recusal in cases where a judge's decision may be tainted by personal interests in conflict with individual litigants.
In such a system, the law of agency would hold the sovereign bound to act only in the best interest of its subjects, but the sovereign would be in a curious position of legislatively deciding what policies were in the best interest of the subjects, while arbitrating disputes over the question. In the context of traditional fiduciary-beneficiary relationships, we have a judicial system to check and limit fiduciary discretion; but, in the governmental context you run the risk of the government determining what is in the best interest of the people, without any check on that decision (except in democratic systems where there is a majoritarian check, which does not safeguard individuals). In practice the sovereign does not always practice self-restraint. Yet, supposing there existed a legal system, governed by this sole constitutional principle that the government owed the citizens a duty of fiduciary loyalty, and supposing further that this system was blessed with a judiciary which scrupulously honored its fiduciary duties in reviewing challenged government policies, we would nonetheless find that most any government action could be upheld on review.

Under such a constitutional system, the sovereign would owe fiduciary duties to every subject equally, and thus a requirement to act, with reasonable care, in the best interest of each individual would translate to a duty to act in the public interest in the aggregate. In this manner, the relationship between sovereign and subject is most analogous to the fiduciary relationship between a corporation's officers and her shareholders. Yet, it is much easier to define what the fiduciary duty entails in the business context; as the corporation exists for the sole purpose of benefiting the financial interests of its shareholders. In the governmental context, it is much more difficult to determine what the public's interest entails, and there is no reason to believe that the public interest can be boiled down to any one specific measurable variable such as economic prosperity, liberty, or some conception of happiness.

Even where the purpose of the fiduciary relationship is clearly defined in financial terms, as is the case with corporations, a similar problem exists in determining whether a given business decision actually furthers the financial interests of the shareholders. As reasonable minds may well disagree as to the propriety of many business actions, the common law affords corporate officers the benefit of the business judgment rule, which "presumes that directors (and officers) carry out their functions in good faith, after sufficient investigation, and for acceptable reasons." Thus, corporate officers are afforded great discretion in making business decisions, and we could expect even greater discretion in the governmental context because the best interest of the populace is not as easily defined as in the case of shareholders. Given the fact that public policy questions are most always subject to reasonable debate, and that analogous fiduciary relationship (the corporation) affords tremendous discretion for the fiduciary to exercise judgment,

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150 As James Madison explained, "You must first enable the government to countreuel the governed; and in the next place oblige it to controul itself." Supra FN 24 at 3 (citing Federalist No. 51).
152 See Supra FN 90 at § 11.2.1.
153 The business judgment rule has been adopted in the business context in order to encourage risk-taking, to avoid judicial meddling in business, and to encourage directors to serve; however, these rationales may not apply outside the business context. Id. at § 12.2.2.
there is little reason to believe that a constitutional requirement to act in the best interest of the subject, and the public on the whole, would reign in governmental discretion.

c. Reliance on Kantian Ethics

Fox-Decent's fiduciary theory of governance lacks a grounded conception of what the public interest entails, and therefore fails to help us conceptualize the scope of our rights. I contend that this weakness is principally due to Fox-Decent's reliance on Kantian ethics. While he maintains that the sovereign must, at the least, respect basic human rights, he does not purport to spell out what those rights are beyond the vague moral imperative that the law must respect the dignity of the human person, in its formulation and its substance. It is not clear what respect for the dignity of the person entails, nor is it clear what government policies may violate this precept. One might ask, would military conscription for the defense of the nation violate the dignity of the individual? Would a law requiring mandatory community service violate the dignity of the individual? What about a tax on capital gains, or a cap on net personal wealth, or the equal redistribution of all property?

In answering such questions we might turn to Emmanuel Kant's categorical imperative. The categorical imperative “requires that all human beings be treated with the respect due to entities that are inherently valuable - that is, as ends in themselves and never merely as means to treat them as ends of others.” But even if we are to accept the premise that human beings are autonomous beings which the sovereign must respect, we are only marginally closer to answering the questions posed above. The aforementioned principle, that we should never treat an individual merely as a means to an end, is helpful in narrowing down the possible realm of actions to be taken in any given instance; however, it does not entirely foreclose the possibility of acting in a way that may be adverse to the interests of others. For example, a decision to enact a land use restriction will always be viewed as adverse to the interests of the individual landowner, but the categorical imperative would not hold such a restriction to be immoral unless it was so onerous that it deprived the landowner his very livelihood. Thus, most any government action, which may generally benefit the community (short of actions which actually threaten the livelihood of the individual), would fulfill this principle requirement.

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154 Even if we accept that humans have an intrinsic dignity to their person, critics will undoubtedly raise an objection to basing a legal theory upon such an abstract concept. It is indeed difficult to define what human dignity means and, therefore, it is difficult to determine how the rule of law should operate to protect this moral precept. Here, our conception of autonomy may help shape the contours of what respect for dignity require. Inextricably bound up with the notion of human dignity is another moral principle, which by definition entails a view of man as having certain natural liberties. See Supra FN 84 at 553, 550-51. This view of autonomy holds that, “individuals should have an equal opportunity to choose, pursue and revise their own conception of the good.” Id. at 554. Yet Fox-Decent suggests that our autonomy arises from our dignity: he appears to rest this premise upon Kant’s categorical imperative. Id.


156 Id. at 95-96.
Kant offers yet another principle in his categorical imperative; he states that we must, "Act only according to that maxim whereby you can at the same time will that it should become a universal law."\(^{157}\) Here again, his categorical imperative tells us nothing concrete whatsoever. This principle essentially boils down to the notion that we must act rationally in whatever manner we think we ought to act.\(^{158}\) Kant suggests that the end of our action is morally neutral and that what matters morally is whether we have lived up to our own conception of duty.\(^{159}\) Thus, Kant's categorical imperative would hold most any action to be moral if the actor believed that he had a duty to carry out the action. It is then the reason behind the action that makes it moral, and not the end.

In the context of the sovereign-subject relationship, we might then say that most any government action could comply with this principle, so long as the action was carried out by a government actor on the basis of her rationale belief that the action serves the best interest of the public. Therefore, Kantian ethics could hold any law, thought to serve the public interest to be moral. Thus, with its grounding in Kantian ethics, Fox-Decent's fiduciary theory of governance may actually suggest that our rights are relatively dependent upon what the lawmaker believes our rights to be.

C. Understanding Government's Fiduciary Duties and Natural Rights Through Application of Reason and Consideration of Basic Human Inclinations

Whereas Fox-Decent's Kantian based fiduciary theory of governance does little to shed light upon the question of what our rights are, the theory may offer a more helpful paradigm for defining the scope of our rights if viewed through the lens of classical natural law theory as outlined by John Finnis. Finnis offers us a theory which may help us understand both what is good for individuals and the community on the whole. Like Kant, Finnis argues that our reason can lead us to make good decisions; however, Finnis suggests that Kant's categorical imperative cannot be the only rule by which we should form our rational judgments.\(^{160}\) In *Natural Law and Natural Rights*, Finnis outlines what he calls the requirements of practical reasoning.\(^{161}\) In applying these nine principles, we may determine what the sovereign's fiduciary duties entail toward the individual and the community on the whole, and we may define the scope of the individual's natural rights.

1. The Classical Conception of the Common Good

Finnis falls within the philosophical tradition of classical thomism, a school of natural law theory rooted in the works of Aristotle and Thomas Aquinas.\(^{162}\) "Natural law" had traditionally been defined as a natural order of the universe, "expressed by man's basic

\(^{157}\) *Id.* at 70.
\(^{158}\) *Id.* at 62-71.
\(^{159}\) *Id.*
\(^{161}\) *Id.*
\(^{162}\) This is not to say that Finnis and Aquinas see eye to eye on everything; and it is beyond the scope of this work to contemplate how true Finnis is to Aquinas. See Anthony J. Lisska, *Aquinas's Theory of Natural Law*, 38-40 (Clarendon Press, 1996) (discussing the connection between Finnis and Aquinas).
drives or inclinations," which entails moral obligations on both sovereign and subject. These moral obligations both restrain and justify the sovereign's authority to promulgate the positive law.

Historically, the study of natural law was a general study of the proper functions of the State including its constitutional and civil law. One might then say that the very concept of the rule of law is derived from the natural law tradition, which holds that the sovereign is bound in some capacity, by the laws of nature. In thomastic terms, it is said that there is an eternal law which constrains the authority of the sovereign to govern in accordance with the common good. The common good may be defined as the ideal state, in which society flourishes and prospers, whereby all members of the community benefit; it defines both the limits of legitimate sovereign power and the rights of the individual. We can comprehend the common good only through application of reason in consideration of the basic goods that promote human flourishing.

2. Defining the Good

The common good is not a meaningless, empty, or free-floating concept; nor is it a blank canvas upon which we project our subjective vision of a utopian society. In natural law theory, the idea of the common good has a grounded meaning, which is based in reason. To begin with, the good is defined as, "that with inherent value, which is to be pursued." Finnis makes clear that the determination of what is good is not a moral judgment, but is rather a truth understood by reason.

Critics may argue that our judgments as to what is good are merely subjective expressions of our feelings and desires. Yet, as Finnis argues, it is only by virtue of our ability to reason that we may rise above our own feelings and self-inclinations, to understand the truth or falsity of a proposition that X is good and to be pursued, or that Y is not good and to be avoided. Thus, though goodness gives rise to certain desires, a

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164 Id.
166 Supra FN 67 at viii.
168 See supra FN 67 at 36, 40.
169 See supra FN 67 at 134-156.
170 Id. at 85.
171 Id.
172 Id. at 71 ("...we project our desires onto objects, and objectify our feelings about objects by mistakenly ascribing to those objects such 'qualities' of goodness, value, desirability, perfection, etc.").
173 Id. at 70 (Finnis warns us not to be confused by the Aristolean axiom, 'the good is what all things desire.' Aristotle was not asserting that goodness is determined by our desires, 'But as it applies to human good and human desire, this tag was intended to affirm simply that (i) our primary use of the term 'good' is to express our practical thinking, in terms of reasons for action, toward decision and action; and that (ii) we would not bother with such thinking, or such action, unless we were in fact interested in (desirous of...) whatever it is we are calling good).
thing is not good simply because we desire it.\textsuperscript{174} Finnis acknowledges that our desires may reflect some aspect of the good, but explains that this is so because it is in our nature to desire and seek that which is good for us.\textsuperscript{175} Yet he denies that all of our inclinations and urges necessarily will, 'correspond to or support any basic value.'\textsuperscript{176} For example, Finnis suggests that, "selfishness, cruelty, and the like, simply do not stand to something self-evidently good as the urge to self-preservation stands to the self-evident good of human life.\textsuperscript{177}

3. The Pursuit of Knowledge as a Starting Point

While it may be said that we have natural inclinations or desires to do that which may not be good, our ability to reason allows us to make intelligent judgments as to the propriety of an action or the value of a proposition.\textsuperscript{178} It is our reason that allows us to act rationally, whereas our feelings and primal urges may lead us to act irrationally.\textsuperscript{179} This is why Finnis argues that our value for the pursuit of knowledge (i.e. the pursuit of truth) is the beginning of our reasoning process as what to do, and thus is a principle of practical reasonableness.\textsuperscript{180} As such, he concludes that knowledge is a basic form of good to be pursued.

Finnis argues that it is self-evident that knowledge is a basic good, necessary for human flourishing, because the pursuit of knowledge offers an intelligent reason for a course of action.\textsuperscript{181} He asserts that, where all else is equal, it is obvious that a well informed man is in a better position than a man who is ignorant, for rather than restricting human activity, knowledge suggests new horizons.\textsuperscript{182} Consider, for example, a boy charged with the task of starting a campfire; if he is ignorant of the fact that he will need kindling before he may expect to burn larger branches, his success in the task will be completely contingent upon the chance that he uses kindling. Yet if the same boy is charged with this task, having learned (by experience or instruction) that the use of kindling is necessary for a successful fire, he is undoubtedly in a better position to carry out that task.

\textsuperscript{174} Id.
\textsuperscript{175} Id. at 90.
\textsuperscript{176} Id.
\textsuperscript{177} Yet one may argue that even these inclinations reflect some aspect of the good, in so far as it may be said that they arise from our desire for self-preservation, which Finnis says "stands to the self-evident good of human life." \textit{Id.} But, this would not go to say that such inclinations are good in themselves, for they cannot be supported by the principles of practical reasoning, and thereby undermine those basic values which Finnis argues one should never act against.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 63.
\textsuperscript{181} Finnis points out that if you are asked what you are up to when engaged in the pursuit of knowledge, you find yourself, "ready to refer to finding out, knowledge, truth, as sufficient explanations of the point of… [your] activity, project or commitment." \textit{Id.} at 64.
\textsuperscript{182} Yet he notes that, "The principle that truth (and knowledge) is worth pursuing is not somehow innate, inscribed on the mind at birth. On the contrary, the value of truth becomes obvious only to one who has experienced the urge to question, who has grasped the connection between question and answer, who understands that knowledge is constituted by correct answers to particular questions, and who is aware of the possibility of further questions and of other questioners who like himself could enjoy the advantage of attaining correct answers." \textit{Id.} at 63, 65.
Of course Finnis was aware that an assertion of the self-evidence of any principle will raise criticisms; he was, therefore, careful to defend his assertion. In discussing the rules of logic he demonstrates the self-evidence of the good of knowledge. He notes first that we would disqualify ourselves from the pursuit of knowledge if we were to deny the rules of logic, and we would act patently unreasonably if we were to deny them. Thus, if it is self-evident that we should not pursue that which is irrational, and that we should pursue that which is rationale, it follows that we should not ignore the rules of logic, and thus the application of the rules of logic is self-evidently good. Therefore, the pursuit of knowledge, being the application of the rules of logic to a particular question, is self-evidently good in itself.

4. **Defining other Basic Goods**

Finnis suggests that we may begin to understand that which is good for human flourishing by observing anthropological trends throughout the many and diverse cultures in the history of the world. For example, all human societies value human life, view acts of self-preservation as a generally acceptable, and prohibit the taking of human life absent a compelling justification. He notes that all societies know friendship, and encourage cooperation, valuing the common good over the individual good. Moreover, he observes that in every society certain behaviors are discouraged; for example, sexual activity is restricted in all human societies.

While it is to be acknowledged that every society has evolved differently, Finnis argues that, this diversity results from the fact that there are many basic values, and that we all differ in all modalities of responses to the basic values. As such, he suggests that there are many ways of pursuing the seven basic forms of good. He identifies the value of life as being the first of the seven basic forms of good. This includes all aspects of physical and mental health. He suggests that recognition of this basic human good exhibits itself in a society in the creation of medical schools, road safety laws, agricultural industries, etc.
Finnis posits knowledge to be the second form of good. The third basic aspect of human well-being is play. He refers to aesthetic experience, as the fourth basic good. The fifth is, sociability and friendship. The sixth basic good is what Finnis calls practical reasonableness, which allows an individual to engage in problem solving, and to bring an intelligent and reasonable order to life. He identifies religion as the seventh basic good. Finnis argues that each of these seven basic goods is equally a basic component of human flourishing.

5. The Common Good and the Public Interest

In outlining the seven basic goods necessary for human flourishing, Finnis has identified the basic ends toward which he says mankind should strive towards. Governance in the common good would encourage and foster these goods throughout society, and may thus be viewed as a grounding conception for defining the government's fiduciary duties. In viewing Fox-Decent's theory through the lens of the common good, as explained by Finnis, the question of what is in the public interest is defined, as is the scope of individual rights, by that which is good for mankind. Under this framework, the concepts of the public interest and individual rights may no longer be viewed as subjective statements of what society should be.

In addition to the general rule that the common good requires the promotion of the seven basic goods, Finnis makes clear that in defining the common good we must also use our practical reasoning skills. He outlines what he calls the requirements of practical reasoning: (1) We must seek, what John Rawls referred to as a rational plan of life; (2) we should have no arbitrary preferences among values; (3) we must be impartial between human subjects; (4) we must remain somewhat detached from our projects and endeavors, such that we will not make any one endeavor or project 'everything;' (5) we should not abandon our general commitments lightly; (6) we should act with efficiency, within reason; (7) we should never choose directly against a basic value; (8) we should favor and foster the common good; and (9) we should not do what we have judged should not be done. Bearing in mind these requirements for practical reasoning, and the seven

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195 Id. at 87.
196 Id.
197 Id. at 88.
198 Id.
199 Finnis draws this conclusion from the observation that all cultures, “display a concern for powers or principles which are to be respected as superhuman; in one form or another, religion is universal.” Id. at 83-84, 89.
200 Id. at 92-93 (“None is more fundamental than any others, for each, when focused upon, claims priority of value.” He argues that our reason for choosing a particular ranking may be explained by our, “temperament, upbringing, capacities, and opportunities,” but that our basic preferences are not based upon differences in the rank of intrinsic value between the seven basic goods.).
201 Id. at 81-97.
202 See Id. at 134-56.
203 Id.
204 See Id. at 100-27.
205 Id. at 103-25.
basic goods for human flourishing, we may begin to evaluate claims as to what may serve the public interest.\textsuperscript{206}

For example, Rawls said that the public good is best served where it promotes liberty, opportunity, wealth, and self-respect, but Finnis argues that his articulation of the public good violates the second requirement of practical reasonableness; he has arbitrarily chosen those goods as the most important.\textsuperscript{207} The only justification for choosing the values he advocates is his subjective preference for those values.\textsuperscript{208} This is not to say that these values are bad, but Finnis suggests, it is unreasonable to base one's decision on a devaluation of any one of the basic forms of human good, or an overvaluation of a mere derivative or instrumental good, such as wealth or opportunity.\textsuperscript{209}

The requirements of practical reasoning would also rule out utilitarian consequentialist claims as to what may serve the public interest.\textsuperscript{210} Utilitarians and consequentialists claim that the ethical act is that which yields the greatest net good.\textsuperscript{211} Finnis asserts that such reasoning violates, once more, the requirement that we must recognize each of the basic aspects of human well-being as equal in value; goods cannot be measured in that manner because humans do not have some singular well-defined goal or function, and because there is no common factor amongst the various goals men choose to pursue.\textsuperscript{212} It is therefore unreasonable to speak in terms of ‘the good,’ as if there was a reasonable calculus for such an imperative.\textsuperscript{213}

Likewise, communism may be ruled out for the same reason, as communism values equality to the detriment of other basic goods.\textsuperscript{214} Moreover, a communistic system may also be said to violate the requirement of efficiency, as free market systems have proven to be a more efficient means for distributing goods and services to those who desire them, and for promoting the livelihood of individuals within the community.\textsuperscript{215}

6. The Common Good and Freedom of the Individual

It is beyond the scope of this discussion to thoroughly evaluate any of the competing political theories, or to offer an analysis of what policies may best serve the common good, and respect the rights of individuals. Not only would it be impractical for me to attempt to outline a set of policies that would promote the common good, but Finnis suggests that there is no one rational plan for ordering society; there are only rules for

\textsuperscript{206} Id.
\textsuperscript{207} Id. at 106.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 105.
\textsuperscript{210} Id. at 106-09, 111-24.
\textsuperscript{211} Id. at 112.
\textsuperscript{212} Id. at 113.
\textsuperscript{213} Finnis asserts that “any principle containing a term such as ‘the greatest good of the greatest number’ is as logically senseless as offering a prize for ‘writing the most essays in the shortest time’ (Who wins? – the person who turns up tomorrow with three essays, or the person who turns up in a week with twelve, or…?).” Id. at 116.
\textsuperscript{214} See Id. at 106-09.
\textsuperscript{215} See Id. at 111-18.
practical reasoning and truths as to what is good for human flourishing. In the same way that we may say that there is no one rational life plan for which individuals should strive, Finnis says that there is no one rational plan, which the state should impose upon its citizens. He suggests only that, "there is a 'common good' for human beings, in as much as life, knowledge, and freedom and practical reasonableness are good for any and every person." Here Finnis makes clear that the common good is best described as a set of conditions which enable the individuals within the community to find their self-fulfillment through their own rational life plans.

Finnis' entire theory of the good is based upon that which is good for the individual; however, like Aquinas and earlier natural law theorists, he concludes that the individual is better enabled to reach personal fulfillment within a community. Here the concept of the common good begins to take form when we consider the nature of our relationships and our everyday interactions with others. Finnis suggests that friendship is a basic form of good, and that between friends there is a common good which is, self-fulfillment through mutual sharing of experiences, affections and material goods. He suggests that friendship entails mutual caring for the well being of another. In this, Finnis has asserted that the individual finds his own self-interests are furthered through voluntarily participating in the good of friendship.

We may look to any sort of relationship in community in the same way; it is only through the participation in the relationship that individuals may further their own interests. Consider for example contractual relationships whereby different parties secure their own interests in consideration of the other's interests. Similar relationships arise routinely without the formal process of contract; for example, a professor may agree to provide a review session for her pupils on the condition that the students coordinate with each other to find a time that works for all of them. Here the students would have a common

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216 See Id. at 155.
217 Id.
218 Id.
219 See Id. at 155-56 (This definition of the common good "neither asserts nor entails that the members of a community must all have the same values or objectives; it implies only that there be some set (or sets); of conditions which needs to be obtained if each of the members is to attain his own objectives.").
220 Finnis believes that the common good ultimately benefits individual members of the community in a way, despite the fact that the common good may, at times, require that the individual’s interests yield to those of the greater community. In this he suggests that within a community, an individual can flourish in a way that he cannot alone, for our ‘human potential’ is only fully realized in this context. See Id. at 134-56.
221 Id.
222 Id. at 154.
223 Id. at 143 ("For A to be B's friend, A must act (at least in substantial part) for the sake of B's well-being as an aspect of his (A's) own well-being.").
224 It should be noted that other natural law philosophers have rejected Finnis’ conclusion that the natural law must promote the common good. The objectivist tradition, rooted in the works of Ayn Rand, holds that there is no such thing as “the common good.” Instead, objectivism holds that there are only individual goods, and that the good of friendship which Finnis speaks of, is merely an objective good for the individual participants.
225 Id. at 139-40.
226 See Id. at 139-41.
227 Id.
interest in working with each other to find a time that works for all.\textsuperscript{228} In all such relationships there is some common (coordinated) action, but the individuals are each pursuing their own private objectives.\textsuperscript{229}

Finnis thus argues that relationships exist for the benefit of the individual participants, and the same is true of the relationship between sovereign and subject.\textsuperscript{230} As such, governance should promote "the common good of mutual self-constitution, self-fulfillment, [and] self-realization."\textsuperscript{231} In all of this, Finnis suggests that the common good is best fostered where individuals remain free to carry out their lives in accordance with their own rational life plans.\textsuperscript{232} Given that every individual will have different interests and rational life plans, governance in the common good requires that government must fundamentally respect the individual's freedom to pursue his or her own good.\textsuperscript{233} This counsels against paternalism, and, instead, encourages governance which promotes rational decision making. Thus, by incorporating Finnis' definition of the common good into Fox-Decent's theory, we make clear that the sovereign's duty to act in the public interest will most often amount to a duty to forebear on actions which would interfere with the individual's basic freedom to pursue his or her own good.\textsuperscript{234}

7. The Common Good and Property Rights

In the same way that governance in the interest of the common good requires the sovereign to forebear on actions which would interfere with the individual's freedom to pursue his or her own good, the common good also requires the sovereign to respect the individual's right of to attain and possess property.\textsuperscript{235}

Finnis does not presuppose the right of private property; instead he aptly notes that the natural resources of the earth are held in common stock.\textsuperscript{236} That is to say that in a state of nature we would all have an equal claim to the earth's resources. Yet, those resources are of little use to any one person unless he or she has an individual right to use them.\textsuperscript{237} Therefore Finnis reasons that property should be distributed amongst individuals because individuals are better enabled to pursue their own goods, and to promote the common good when they have a right to own, use and enjoy private property.\textsuperscript{238}

\textsuperscript{228} See Id. at 139.
\textsuperscript{229} Id. at 140.
\textsuperscript{230} See Id. at 134-56.
\textsuperscript{231} Id. at 141.
\textsuperscript{232} See Id.
\textsuperscript{233} Id.
\textsuperscript{234} See Id.
\textsuperscript{235} Id. at 169-73.
\textsuperscript{236} Id. at 171-72. ("What I mean is summed up in the apparent paradox which Aristotle uses to sum up his rather similar discussion: 'property ought to be common in a sense, but private speaking generally... possessions should be privately owned, but common in use...').
\textsuperscript{237} Id. at 170 ("natural resources, and the capital resources and consumer durables derivable therefrom, are more productively exploited and more carefully maintained by private enterprise, management, husbandry, and housekeeping than by the 'officials' (including all employees) of public enterprises.").
\textsuperscript{238} Id. at 169-73.
He posits that the individual has a right to acquire property, to exclude others from using it, to transfer that property to others freely, and to be generally free from divestment. The rights of exclusion, transmission and immunity from divestment allow individuals to retain the freedom to expend their own energy, creativity, and attention upon the property and ensure that individuals may use the property to pursue their own rational life plans.

Yet, Finnis holds that the property holder has a duty to put his property to a productive use because the right of property is based in the common good. He argues that there is a duty to act as a trustee of sorts for the resources one holds, and thus a duty to put them toward a socially beneficial purpose such as providing jobs. Thus he reasons that property, though commonly available in nature, was justly privatized for the common good. That is to say that property should be managed and controlled by individuals for the benefit of the common good. As a general matter, the individual should be free from divestment of private property, yet redistribution may be just where the individual holder has failed in the duty to put the property to a productive use.

Thus, in the same way that the sovereign must generally forbear on acts interfering with the rights of individuals to pursue their own good, the common good in most cases requires the sovereign to refrain from interfering with the individual's right to attain and to securely hold property. If we then apply these principles within the construct of the fiduciary theory of governance, we may more clearly articulate the requirements of justice as related to the distribution of property. Being as that respect for the individual's autonomy mandate's a respect for their ability to satisfy their own needs through the acquisition and holding of property, the fiduciary theory of governance holds that the government must safeguard the individual's property interests. While the sovereign as a fiduciary must act in the best interest of the entire political community, its obligation is fundamentally to protect the individual. Thus, while governance in the interest of the common good may allow for certain limited redistributive policies, the sovereign's obligation to respect the individual's autonomy militates strongly against such policies.

Section IV. The Role of the Judiciary in Defining the Scope of Our Rights

Thus far, this discussion has focused upon the basic question of whether we have rights and how we can begin to comprehend them. I have suggested that we may demarcate the rights of the individual against the legitimate powers of the sovereign in consideration of the individual's autonomy, which includes both their liberty and proprietary interests in

239 Id. at 171-72.
240 Id.
241 Id. at 172-73.
242 Id.
243 Id. at 173.
244 Id. (“The point, in justice, of private property is to give the owner first use and enjoyment of it and its fruits (including rents and profits), for it is this availability that enhances his reasonable autonomy and stimulates his productivity and care. But beyond a reasonable measure and degree of such use for his and his dependants’ or co-workers’ needs, he holds the remainder of his property and its fruits as part (in justice if not in law) of the common stock.”).
245 Id. at 171-72.
pursuing their own conception of the good life. Yet, questions still remain as to the scope
of our rights; such questions are presented with each controversy that arises between the
individual and State. It is naturally the role of the judiciary to resolve these controversies,
and to therein define the scope of our rights on a case by case basis. 246

A. The Judiciary’s Natural Charter

1. Resolution of Disputes and the Need for Definitive Decisions

We can imagine a society in which there was no authoritative body (i.e. government), and
where individuals were free to carry out their lives as they saw fit. Yet even where
individuals are well meaning, there will be disputes as to their relative rights. Perhaps
some of these disputes could be settled through negotiations, but many disputes do not
lend themselves to diplomatic resolution. It is possible that individuals might resolve
those disputes through contracted arbitrators, but some parties to a dispute may not wish
to consent to be bound in arbitration. What then? 247

If the parties to the dispute will not freely consent to arbitration, and cannot resolve the
dispute through negotiations, then the dispute will remain unresolved, and an injustice
may perpetuate indefinitely. Thus, without a judicial system offering a default venue for
dispute resolution, the occurrence of justice will be spuriously contingent upon the
temperance of individuals acting as judges in their own cases. Therefore, justice requires
the existence of a system of jurisprudence, whether privately arranged or established
authoritatively by necessity.

Moreover, without an authoritative body resolving such disputes, and establishing a body
of precedent, individuals would be without benefit of precedential authority in conducting
their own affairs. That is to say, individuals are placed in a better position for making
decisions, in the course of human interactions, when they can base their decisions upon a
body of precedential law. If individuals know how past disputes have been resolved, they
can order their affairs accordingly, but in the absence of an authoritative body of
precedential law, individuals act with uncertainty, and are less capable of making good
decisions for themselves.

For these reasons we can say that it is in the best interest of each individual, and the
community on the whole, to have a system for resolution of disputes, which will then
define the scope of our rights. Therefore, government acts within its authority as a

246 This in no way suggests that our rights are determined by judges. On the contrary, this theory of rights is
consistent with the notion that rights are universal and rooted in an objective natural law. Thus a judge is
called upon to determine the scope of our rights, but where a judgment departs from the objective natural
law, the judge has failed to apply the principles of practicable reasonableness and has thus failed in this
endeavor.

247 Some scholars suggest that in a vacuum of power (“a state of nature”) individuals could freely contract
for services, and that judicial services would be something individuals naturally would naturally seek out.
Yet it is difficult to conceive of how a commercial judiciary would facilitate justice when certain
individuals would retain different services or without service at all. For further discussion, see Robert
fiduciary of the people when it acts in a judicial capacity. Moreover, since the administration of justice is ultimately in the interest of every individual, government is duty bound to act as an arbitrator between individuals. Yet, as a fiduciary of the people, the government must also act as judge in its own case where the government is a party to the dispute.

2. Defining Rights and their Scope

As discussed above, the concept of rights is more aptly understood as the entitlement of due respect owed toward individuals in a just state of affairs. Thus, when someone speaks of a right to do X, or a right to be free from Y, they are stating what they perceive justice demands with respect to particular individuals. While we can make generalized statements about what our rights entail, based on general observations of our human nature, it is impossible to spell out an exhaustive list of individual rights, because this would require us to contemplate what justice requires in every instance. Moreover, if justice recognizes that the individual should have liberty within her own sphere of autonomy to choose her own rational life plan, then the individual’s rights cannot be numbered, for they entail every possible choice that the individual might make within that realm. Thus, rights cannot be determined legislatively, or spelled out by any one philosopher. At best, we can only comprehend the dictates of justice, through application of the principles of practical reasonableness on a case by case basis.

3. Justice Requires Respect for Individuals Rights

Disputes involve individuals (or associations representing individual interests), and therefore the judicial inquiry has traditionally focuses upon what justice requires with regard to the individual parties. While we could conceive of a judicial system that would consider hypothetical questions without true disputes between interested parties, such a judicial proceeding would run the risk of emphasizing public policy over individual interests, and may henceforth fail to adequately weigh the interests of individuals. For similar reasons, the U.S. Constitution grants jurisdiction to its federal courts only to hear “actual cases or controversies,” between interested parties on the theory that cases should not be litigated where no party to the dispute has a concrete interest in its resolution.

As with the preliminary issue of judiciability, which courts consider before moving to the merits of a particular case, the substantive questions of a given dispute can be resolved only in consideration of the individual’s actions, which form the basis of that dispute. Thus with contract law, courts consider whether individuals acted to form agreements,

248 Id. at 206-207. (The concept of “rights” derived from the Latin word: “jus.” Originally understood, jus meant ‘that which is fair,’ but in later scholars (Francisco Suarez and Hugo Grotius) began using the term in a more modern sense to mean, “something someone has” or “a power or liberty.” Thus the modern view of rights has transformed the original meaning of jus by “relating it exclusively to the beneficiary.”).
249 See Supra FN 13.
250 See Supra FN at 160.
251 For example, the Canadian Supreme Court will offer advisory opinions. Frederick Lee Morton, Law, Politics, and the Judicial Process in Canada, 260-61 (University of Calgary Press, 2002).
and whether such agreements have been honored. Likewise, in tort law, the court considers whether an accused individual has acted, either through commission or omission to violate the rights of another individual, and similarly, in criminal law, the court considers whether the accused individual acted with the requisite *mens rea* to commit a crime. All of these inquiries are fact sensitive, as the Court recognizes that the administration of justice requires due respect to the individuals standing before the court.

**B. Access to the Courts**

As preliminary matter, we must consider the individual's ability to seek judicial redress before we consider the means by which the judiciary should resolve disputes between the individual and the State. Thus, the first issue in any judicial proceeding is whether the court should accept a case for review. As a practical matter, the court must at least be willing to hear the litigants arguments as to why a case is judiciable before determining whether or not the case should be heard and resolved in that court, for justice could not be served if litigants were never given the opportunity to make this initial presentation.

The individual's ability to raise a claim is limited in the American judicial system by constitutional requirements which may close the doors for litigants. In particular, American courts provide that claims may only be reviewed in court where the litigants have standing, and where their claims are ripe.\(^{253}\) They also will refrain from deciding political questions\(^{254}\) and, in some instances, will close the doors to the court house in a suit against the State on the theory of sovereign immunity.\(^{255}\)

The standing and ripeness requirements are said to arise from Article III of the U.S. Constitution, which provides that the federal courts only have jurisdiction to hear cases and controversies.\(^{256}\) That clause has been interpreted to require an actual and ongoing dispute between parties, and has been held to require a litigant to demonstrate that he or she has suffered an injury, which was caused by another party to the litigation, which can be redressed by the court.\(^{257}\) The standing requirement also provides that the claimed injury must be specific to the parties, and therefore, an individual may not assert an injury which he or she has suffered as a general member of a large class of peoples.\(^{258}\) Thus, for example, taxpayers do not have standing to challenge governmental expenditures simply by virtue of the fact that they have suffered an economic injury in being forced to pay for such expenditures.\(^{259}\) As a result of this standing requirement, there are certain cases which may cause injury to the citizens, but which no one citizen can raise a challenge to in court.

The fiduciary theory of governance, on the other hand, provides that the individual is the beneficiary of a fiduciary relationship, and is therein entitled, as a matter of right, to raise

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\(^{255}\) U.S. CONST. art. XI.

\(^{256}\) *Supra* FN 256.

\(^{257}\) *Id.*


\(^{259}\) *Id.*
claims against the government in court. The judiciary, also bound by the fiduciary obligation to the individual, must then resolve all claims that the state has breached its fiduciary obligations, which we have identified as entailing the obligation to respect the individual's liberty and proprietary interests. Thus, the injury requirement must, under the fiduciary theory of governance, be loosened so as to ensure that the individual has access to the courts to challenge government acts, even when the individual cannot prove that her injury is different than the injury suffered generally by other citizens, or even if the asserted injury is less than concrete.

As a beneficiary of the fiduciary relationship with the sovereign, the individual is entitled to raise a claim against the government whenever the government has breached its duty to act in the best interest of the individual. Thus, under the fiduciary theory of governance, the individual should be free to assert a claim against a government policy simply by virtue of the fact that the government limits the individual's liberties or expends money, which was collected (at least in part) from the individual in violation of the individual's proprietary interests.

Additionally, the fiduciary theory of governance would provide that an individual may assert a claim against the State whenever the State has breached its duties to the individual, which forecloses the doctrine of sovereign immunity. Sovereign immunity derives from the concept of the Divine right of kings, the idea that the king could do no wrong, and was therein exempt from suit; however, the fiduciary theory posits that the sovereign is held to a standard of conduct and where it breaches its duties, the citizens may challenge its actions. The state cannot be exempt from suit in justice.

In applying the fiduciary theory of governance to cases and controversies arising between individuals and the government, the judiciary is bound by a duty to safeguard the individual's autonomy. This duty requires that individuals should be free to raise their complaints against the government, thus as a general matter, individuals should be free to raise a claim against the sovereign whenever their proprietary or liberty interests have been abridged by the State. Justice requires that individuals must have a remedy, and it is therein the natural role of the judiciary to provide that remedy where the State acts without respecting their rights.

C. Judicial Review

Respect for the autonomy of the individual mandates that the judiciary must truly scrutinize government actions which infringe upon the individual's liberty and proprietary interests. Such scrutiny places the burden on the government to justify its actions. Rather than presuming an infringement upon liberty or proprietary interests to be valid, the court's fiduciary duties to the individual and the common good mandate a prophylactic

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approach, which should error on the side of protecting the individual's autonomy and inherent dignity.\textsuperscript{261}

As detailed above, the American Founding Fathers originally intended that the U.S. Constitution should operate to protect the rights of individuals.\textsuperscript{262} They were particularly concerned with protecting the liberty and proprietary interests of individuals, and sought to do so by outlining specific rights of which the federal government could not violate, and in preserving all those rights not specifically spelled out in the Bill of Rights, in the ninth amendment.\textsuperscript{263} Constitutional scholars explain that the Founding Fathers intended that the Constitution should operate as a restraint on government, and therefore wanted the Constitution to be applied to achieve that end in the course of judicial review.\textsuperscript{264}

Indeed, their approach was tailored toward protecting the individual's autonomy; yet the original intentions of the Founding Fathers have been frustrated by progressive interpretations which have effectively disemboweled the Constitution's restraints on the government.\textsuperscript{265} Accordingly, most government actions are now reviewed under the rational basis standard, while select rights are considered fundamental and reviewed under the far more stringent strict scrutiny standard.\textsuperscript{266} Under the rational basis standard, a law or regulation will be upheld if it is supported by any conceivable basis in reason.\textsuperscript{267} This standard is extremely deferential to the government and does not operate as a significant restraint on sovereign power.\textsuperscript{268} Application of this standard of review often violates the fiduciary obligation to the individual beneficiaries of the sovereign-subject relationship, because the rational basis standard of review fails to adequately safeguard the individual's liberty and proprietary interests. The fiduciary theory of governance provides that the sovereign should be restrained from violating the individual's autonomy, and in the interest of safeguarding that autonomy, a more stringent means of review is required.

The courts have developed these standards for reviewing claims as a means of procedurally demarcating our rights. Such an approach is sufficient, only to the extent that it operates to facilitate justice; thus, the court must be sure to apply a heightened standard of review when evaluating individual claims of right against the sovereign, so as to ensure that liberty and proprietary interests are rarely infringed. While it may be proper to apply a more strict standard of review in evaluating government actions which infringe upon the most fundamental aspects of the individual's personal autonomy, all governmental actions must be justified under a more stringent standard than the rational basis standard. At a minimum it would seem that an intermediate level of scrutiny is necessary to insure that liberty and proprietary interests are not lightly infringed.

\textsuperscript{261} Randy Barnett offers a compelling argument for applying a presumption of liberty in Restoring the Lost Constitution. \textit{See Supra} FN 1.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} \textit{Id.}
\textsuperscript{265} \textit{See Supra} FN 37 at 1-5.
\textsuperscript{266} \textit{See Supra} FN 39.
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} \textit{Id.}
Section V. Conclusion

We have established that justice requires the sovereign to act as a fiduciary of the people, and that its fiduciary duties entail a respect for the dignity of the individuals over whom it governs. The fiduciary theory of governance, when grounded in a rationale understanding of what is good for the individual and the community on the whole, holds that government must be restrained from interfering with the individual's ability to pursue his or her own rational life plans. Individuals flourish best when they are secure in their right to pursue their own good. 269 Thus, the fiduciary's duty toward the individuals over whom it governs mandates a fundamental respect for their liberty and proprietary interests. Yet, in promulgating law, the sovereign may violate this duty, and it then falls to the judiciary to determine whether the promulgated law is legitimate. If the sovereign has indeed failed to abide by its fiduciary duties in promulgating the law, then it has not merely failed to make good law, but it has failed to make law at all.

The sovereign will often call upon individuals to sacrifice their own liberties or properties to promote an objective that it has determined to be important. Yet, individuals are entitled in justice to have security in their liberties and in their properties, so that they may better their lives. 270 It is therefore, unjust to require individuals to sacrifice their properties or their liberties in pursuit of a public enterprise. 271 As such, when the sovereign has made such a demand, it may be said that the sovereign has violated its fiduciary duties toward the individual beneficiary.

It is the role of the judiciary to resolve competing claims of autonomy between the individual's claim of right, and State's claim of power to act in the interest of the public. In resolving such disputes, the judicial body is chartered by a natural constitution, which sets forth a duty to safeguard the individual's autonomy. In accordance with its fiduciary obligations to the individual beneficiaries of the sovereign-subject relationship, the judiciary must stringently review government actions, without affording the deference to government actors.

269 Supra FN 160 at 165.
270 Id. at 169.
271 Id.