one another. For example, is the scheme of antithesis reinforced by metaphors of confrontation or personification? Does the speaker portray abstract entities going "head to head"? Moreover, a critic might go beyond figures of speech to explore how the figures work within the overall structure and form of the text. Is a text, containing several antitheses and metaphors of confrontation, divided into two contrasting sections, sending and reaffirming the message that the truth is only one of two choices? There are many tools and techniques that a critic may use, including a growing body of social science study into how we use metaphor, other figures of speech and linguistic forms.[31] These studies cannot replace a sensitive critic in arguing about the meaning of a piece of judicial rhetoric, but they provide additional material for the critic's argument.

Bosmajian has made a sound contribution to the ongoing discussion about the role of language in legal discourse. His book does reveal several methodological problems with which all critics of legal discourse must contend. These problems provide additional opportunities for investigation and argument. They are not reasons for rejecting Bosmajian's central message: Law is language-based. As judges, academics, legislators, and lawyers—even tax lawyers—we should watch our language.

NATURAL LAW THEORY: CONTEMPORARY ESSAYS.

Edited by Robert P. George.[1] New York: Clarendon Press, Oxford. 1992. Pp. 371. $39.95.

Steven D. Smith[2]

I

A little over a decade ago, John Ely explained that natural law is, for purposes of constitutional adjudication at least, "uselessly vague." This defect is also, Ely suggested, the source of natural law's persistent appeal: "The advantage, one gathers, is that you can invoke natural law to support anything you want. The disadvan-

31. Although we still have a great deal to learn. See Calvin Morrill and Peter C. Faccíola, *The Power of Language in Adjudication and Mediation: Institutional Contexts as Predictors of Social Evaluation*, 17 Law & Social Inquiry 191 (1992); Richard D. Rieke and Randall K. Stutman, *Communication in Legal Advocacy* 210-11, 216-18 (U. of S. Carolina Press, 1990) (collecting research and applying it to closing arguments).

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tage is that everybody understands that."[3]

At the time Ely wrote, natural law in the legal academy was little more than a slogan—a ghostly vestige of the full-blooded legal philosophy it once had been. In the same year, however, John Finnis's *Natural Law and Natural Rights* gave new vigor to academic thinking on this subject. Today, as this volume attests, natural law refers to a body of scholarly work more serious, more developed and richer than it was when Ely wrote so dismissively.

The volume offers an impressive array of essays by contemporary natural law theorists and their critics. For those who may wonder what natural law is (beyond a slogan), the contributions by John Finnis and Michael Moore provide careful and lucid expositions. Neil MacCormick helpfully discusses the common ground between natural law and legal positivism, concluding that the traditional opposition between these views is now "closed and unfruitful." Joseph Boyle and Russell Hittinger compare natural law with tradition- and virtue-oriented ethics, while Robert George explains how the supposed disagreement between "ontological" and "epistemological" versions of natural law is misconceived. Joseph Raz and Ernest Weinrib engage in a spirited discussion of Weinrib's distinctive views about the formal or "imminent" rationality of law. I cannot mention here all of the essays in the volume, but it is fair to say that the essays are, without exception, thoughtful contributions to the understanding of natural law—even when the positions they take are (as, for example, either Raz's or Weinrib's *must be*) seriously flawed.

But these laudatory comments may still leave readers of a journal called *Constitutional Commentary* with professional questions. What does natural law scholarship have to contribute to constitutional law? And have developments in natural law theory rendered Ely's dismissive observations obsolete? The state-of-the-art answers to these questions, I think, are "Not much" and "Probably not." I offer these answers tentatively, though, and with one major qualification. There may be a way in which natural law is helpful—even necessary—to constitutional law. But natural law is not helpful, I think, in the way that contemporary constitutional lawyers have hoped it might be.

II

Perhaps the most familiar and attractive use for natural law in constitutional debates—and the use that Ely was criticizing—is in

3. John Hart Ely, *Democracy and Distrust* 48-54 (Harv. U. Press, 1980).

justifying rights that have little or no basis in the constitutional text. Judges and scholars have agonized over the rationale, or lack thereof, for such judicial constructions as the right to abortion or the right to use contraceptives. A common criticism asserts that because these and similar rights are not grounded in the Constitution, the Supreme Court was improperly "legislating" when it recognized them. To some, natural law has seemed to offer an answer to this criticism because it may suggest the existence of what Michael Moore describes as "pre-existing moral rights all persons possess."

But *can* natural law plausibly be called into service in support of unenumerated constitutional rights? Two essays in this volume are especially relevant to the question. Jeremy Waldron asks whether natural law, or moral realism, can help deflect criticisms of judicial "arbitrariness"—that is, of unpredictability, irrationality and illegitimacy in judicial decisions. Waldron's negative response focuses on the prevalence of moral disagreement and on the absence of any procedure or methodology for resolving such disagreement. Although natural lawyers assert that there is an objective moral reality and that moral statements are true or false by virtue of their agreement or disagreement with that reality, the sad fact is that "moral realists can produce no epistemology to match their ontological commitments." Thus, "even if there *are* moral facts . . ., still the best a judge can do is to impose her *opinion* about such facts on the 'hapless litigants' who come before her."

Consequently, moral realism does nothing to reduce judicial arbitrariness in any sense. More specifically, Waldron argues that without a procedure for resolving moral disagreements, natural law does not enhance the predictability of judicial decisions. Nor does it make judicial decisions more rational, because judges "simply announce [their views] flatly, saying that though they cannot argue about virtue or vice, they know it when they see it." Most importantly, Waldron contends that moral realism does nothing to make judicial decisions more legitimate:

> [C]onsider again how little difference the recasting of the judges', legislators', and voters' moral views in *realist* terms would make. If realism is true then what the judge is imposing on her fellow citizens is not something which is merely a subjective preference of hers, but something which is a belief of hers about the moral facts. That looks reassuring until we remember that what the judge's view is opposed to is, equally, not the subjective preferences of legislators and voters, but *their* beliefs about the moral facts. As before, in the absence of any account of how one could tell which of two conflicting beliefs about the moral facts is more

> accurate, the imposition of one person's or a few people's beliefs over those of the population at large still seems arbitrary and undemocratic.[4]

Michael Moore responds by arguing that moral disagreement does not negate the possibility of a moral reality; people disagree about lots of things that concededly exist. Moreover, if there *is* an objective moral reality, then at least "there is something (in the nature of equality or of liberty) about which the judge *could be* right." For the anti-realist, by contrast, any justification of unenumerated rights is foreclosed from the start; the anti-realist's ontological assumptions *ensure* that the judge who strikes down a law is merely imposing his preferences on a democratic majority. "The short of it is that the justification of judicial review is a wild and unseemly scramble for any but a moral realist."

Moore's point seems correct as far as it goes. Still, if the argument ends here, then we are back to Ely: The proposition that there is a moral reality, or a natural law, is "uselessly vague" indeed if we have no way of determining whether a claimed but controversial right is part of that law.

Perhaps this is where the argument *does* most plausibly end. One leading natural lawyer, John Finnis, concedes that for most practical issues there are many wrong answers and many right answers. "Reason" cannot finally settle such issues, and we must instead look to "authoritative" sources—that is, to the positive law. In short, natural law is of little help in resolving concrete and controversial legal questions. Another essayist, Lloyd Weinreb, reaches a similar conclusion: "Natural law may not matter a great deal 'functionally'; it is not likely to affect how one's obligations are established, the weight one gives them, or the consequences of meeting or failing to meet them."

Moore is not oblivious to this problem. He recognizes that he must argue not only for the existence of a moral reality, but also for the greater capacity of judges (as opposed to legislators) to discern that reality; and he tries to sketch out the case for superior moral competence on the part of judges. Waldron, conversely, anticipates this tactic and tries to preempt it by suggesting that "[w]ithout an epistemology . . . there cannot be a theory of expertise."

On this point, Waldron seems to have the edge. Judges *might* be especially good at discerning and following moral truth, but there are hardly compelling reasons to suppose so. The eagerness of many legal academics to indulge this dubious assumption may

4. Pp. 180-81.

merely reflect the cultural affinity between judges and law professors; the assumption by academics can thus be seen as a kind of thinly veiled self-congratulation. ("Judges *must* be especially astute in moral matters. After all, they think a lot like *we* do.") And, of course, even if Moore *could* demonstrate that judges are better at discerning moral reality, it would not follow that they have authority to impose their vision on society. The faculty of the Harvard Philosophy Department might be better moral reasoners than ordinary citizens (a purely hypothetical supposition, of course), but even if they were, it would not follow that the U.S. Marshals ought henceforth to enforce the professors' prescriptions against the rest of us.

In short, Moore's efforts notwithstanding, natural law theory still has not been made serviceable to shore up decisions like *Griswold* and *Roe*. However, if one extends Moore's valid criticism of Waldron and of anti-realism, another possibility emerges. Perhaps natural law *is* necessary to shore up the authority of law in general—and hence (insofar as it is not, as some suspect, an oxymoron) of constitutional law.

III

As noted, Moore argues that if an objective moral reality exists, then there is at least something about which judges *could be* right. Conversely, if there is no moral reality, the judge's decision cannot even claim to be more legitimate than that of a legislature; it is all just a matter of one subjective preference against another.

This observation seems cogent, and it need not be limited to the problem of judges in conflict with legislators. What about the problems of legislative majorities in conflict with legislative minorities, or of legislators (or other government officials) in conflict with dissenting citizens? Extending Moore's point just slightly, can we not say that if there is no moral reality, then legislative majorities cannot even claim that their decisions are more legitimate, or more "just," than the contrary desires or opinions of dissenters? How then can law (whether it comes from judges, legislators or bureaucrats) ever claim any moral authority? Why should citizens have any "obligation" to respect or obey it? Lloyd Weinreb asks the basic question in its most general form: "In the absence of moral order, why *ought* anything at all?"

The question is underscored by an essay that seeks, in fact, to banish that question. Jeffrey Stout begins by noting the invocation of natural law in noble causes by figures as diverse as Sophocles, Thomas Jefferson and Martin Luther King, Jr. Stout likes this use

of natural law; he wants to preserve a place for it in political discourse. At the same time, he is troubled by natural law's "dubious metaphysical trappings." Stout notes that natural law would make sense on Thomistic assumptions, but of course . . . . So he quickly passes on to what he seems to regard as more viable alternatives—that is, to potential nontheistic accounts of a higher moral law. But upon examination, all of these accounts prove unsatisfying, and even "demoralizing"; quoting Annette Baier, Stout observes that studying ethical theory can be "a very effective way to produce a moral skeptic." How then are we to preserve the efficacious uses of natural law rhetoric when we can give no plausible account of the moral reality that this rhetoric seems to presuppose?

Stout's answer is that we should quit asking troublesome questions. More specifically, we should stop asking metaphysical questions about whether there is a moral reality: "[S]hun the quest. Avoid the bog. Stop the cycle. Give up the idea that truth must be a substantial something." Adopting this position, which Stout characterizes as neither realism nor anti-realism but rather as a " 'silence is golden' policy," would cost us next to nothing: We would still have "descriptive anthropology" and "ordinary moral deliberation," and these are all we need. Indeed, Stout goes so far as to suggest that his question-proscribing silence would "restore moral discourse to respectability" and "restore one's confidence in moral truth."

We are entitled, I think, to be skeptical. "Descriptive anthropology" is fine for studying the moral beliefs and practices of a culture, but it does not presume to *answer* moral questions. "Ordinary moral deliberation" *does* address such questions—and perhaps more helpfully, as Stout suggests, than ethical theory does. But as scholars like Moore have argued elsewhere, ordinary moral discourse is not agnostic towards, but rather *presupposes*, moral reality.[5] Hence, Stout's prescription threatens to poison the very practice that he wants to heal.

The flaw in Stout's treatment, I think, is that it obscures and ignores the subtle but crucial difference between an innocent silence that results from taking something for granted and a contrived silence imposed when what was previously taken for granted is called into question. Perhaps ordinary moral discourse *is* innocent and unself-conscious regarding its metaphysical assumptions. Such in-

5. See, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277, 377-78 (1985). Waldron disputes this point, noting that many people affirm that morality is purely subjective, etc. The observation may be accurate, but it also elides the distinction between what people say about the nature of morality and what they say (and presuppose) when they are actually engaged in first-order moral discourse.

nocence may be conducive to moral discourse. Still, unself-conscious innocence is not the same as consciously self-imposed agnosticism. Nor can innocence, once lost, be regained simply by ruling bothersome questions out of bounds.

Both the distinction that separates Stout's position from real moral deliberation and Stout's suppression of that distinction are reflected in his treatment of Edmund Burke. At the end of his essay, Stout invokes Burke in support of his "neither realist nor anti-realist" position; indeed, he describes his recommendation of metaphysical agnosticism as "the Burkean prescription." But Stout's own essay undermines this description. Earlier, he presents Burke in these terms:

> Burke used a concept of higher law. *He believed that such a law exists and that its author is divine.* Yet he wanted no part of the associated ethical theories. The example of Burke shows that you can believe in something, and be willing to use the concepts that refer to it when the time seems right, without holding that theorizing about its structure and content is an essential or desirable activity.[6]

In Stout's presentation, in short, Burke begins as a believing metaphysical realist who is skeptical about the efficacy of theory; he ends up as a mere skeptic—but one who nonetheless thinks he can go on just as before. The latter Burke is a pitiable figure. He is like the erstwhile religious believer who thinks that she can enjoy all the advantages of her former faith while refusing to take a position on whether there is a God.

The first Burke, by contrast, is a more promising character; he is also a personification, perhaps, of the way in which natural law may be relevant to law generally. It may be, as both its critics and some of its supporters argue, that natural law theory provides scant help in answering concrete questions, whether moral or legal. Other practices—the invocation of tradition, or the appeal to moral or legal "authorities," or "ordinary deliberation"—may be more helpful on that level. But these other practices rest upon assumptions that, although not usually examined or even acknowledged, are nonetheless essential; without them, such practices would lose their meaning. One such assumption is that there is a moral reality. And natural law theory may provide valuable support for and illumination of that assumption.

In sum, natural law remains "uselessly vague," as Ely said, if one is trying to answer specific constitutional questions. At the

6. P. 83 (emphasis added).

same time, natural law may be a necessary (if typically unnoticed) premise for the possibility of any law, including constitutional law, that claims to exert moral authority.

MONEY, POLITICS AND LAW: A STUDY OF ELECTORAL CAMPAIGN FINANCE REFORM IN CANADA. By K.D. Ewing.[1] New York and Oxford: Oxford University Press/Clarendon Press. 1992. Pp. xvii, 254. Cloth, $59.00.

Frank J. Sorauf[2]

There are three nouns in Ewing's title, but only two of them merit the mention. His book is indeed about money and law. It is a traditional, legal-historical analysis of Canadian attempts to legislate about the funding of its political parties. But there is not much of Canadian politics in it, even the politics of reforming Canadian campaign finance.

After some stage-setting, the author launches early into a detailed history of attempts, both failed and successful, to legislate on campaign finance. The history culminates in a full chapter on the Election Expenses Act of 1974, the major definition of today's status quo in Canadian law. All this legal history consumes a quarter of the book's pages. There then follows an extensive review of the finances of the Progressive Conservative, Liberal and New Democratic parties, employing only data through 1984. (On the vintage of the data, more later.)

What may seem a random stroll through Canadian party finance does, however, have a purpose. Professor Ewing makes it very clear early on that this is to be an evaluation as well as a history. His highest desideratum for the regulation of campaign finance is equality of financial resources—*complete* equality. It is a standard that only systems of total public funding have a chance of meeting, and Canada's, with only partial public funding, inevitably fails. Not even the astounding and virtual equality of the parties' expenditures in the 1988 elections (PC, $7.9 million; L, $6.8 million; NDP, $7.1 million) satisfies Ewing. The three parties, he points out, had greater disparities in the sums they spent outside of the campaign.

The source of the problem is clear and simple. Canada has,

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