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Steven D. Smith  
*Notre Dame Law School*

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# The Constitution in The Cave

Steven D. Smith\*

## I. THE PERENNIAL CONTROVERSY

There is an old story<sup>1</sup> about a community of people who live in a cave. Fires burn behind them, throwing shadows of various shapes onto the cave wall; and never having seen real objects in the sunlight, the cave people think these shadows are the only, complete reality. One day, though, one of the cave dwellers happens to find a passageway to the outside world. He heroically struggles up the passageway and emerges into the world. At first the sunlight blinds his eyes, but after his vision adapts he sees, for the first time, a world far more real and rich than any he and his community ever imagined. Out of a sense of duty, the enlightened one then returns to the cave, hoping to guide his fellows to a similar illumination.

The storyteller suggests that if it were wise, the cave community would submit to the governance of this enlightened person, since he alone understands the higher truths and more complete realities. The political system associated with this story is often described as one of rule by “philosopher-kings,” or Platonic guardians.<sup>2</sup>

Historically, this system has had a mixed reception. On the one hand, the program can seem almost self-evidently correct. Suppose the alternatives are these: rule by the “best and the brightest,” rule by the “worst and the dullest,” or rule by the “thoroughly mediocre.” Isn’t it obvious which alternative is preferable? On the other hand, in a political community devoted to democracy, or government “of the people, by the people, and for the people,” the rule of philosopher-kings is bound to offend. This objection is captured in one of Learned Hand’s most famous statements: “For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”<sup>3</sup> So in this democratic climate of opinion it is not surprising that critics of a particular legal regime, such as the regime of modern constitutional law enforced by judicial review, will often accuse the regime of being, in effect, a sort of Platonic guardianship, and defenders of the regime will typically and emphatically deny the charge.

The question posed to this panel today is a peculiar twist on this age-old controversy. But in thinking about the question, I ran into a problem that the other

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\* Robert E. & Marion D. Short Professor, Notre Dame Law School. This essay was given as an oral presentation at the Constitutional Law section of the AALS conference in San Francisco in January 1998 as part of a panel addressing the topic “Constitutional Law: Dogma of an Educated Elite?” I have mostly resisted the temptation to expand or formalize the presentation.

1. See PLATO, THE REPUBLIC, bk. VII.
2. See generally *id.*
3. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

panelists may have noticed also. Let me explain the problem in this way. At first glance, the proposition that constitutional law is the dogma of an educated elite seems calculated to be provocative. It is the sort of charge usually associated with people like Robert Bork and Justice Scalia, and probably only a minority of law professors consider themselves to be devotees of Bork and Scalia. But on reflection it may seem that except for its tone, which *does* seem a bit feisty, the question is not really controversial after all. In preparing for this panel, I happened to mention the topic to several people of different jurisprudential leanings, and their reactions were similar: "So what is there to argue about?"

Faced with the prospect of an unexpected and undesired consensus, I want to try to figure out what makes the topic of this panel interesting and controversial. I will approach the question in this way. First, we can treat the topic as a proposition for debate. *Resolved: that constitutional law is the dogma of an educated elite.* The case for the proposition is obvious enough I suppose. Speakers for the affirmative will emphasize decisions like those protecting the speech rights of unpopular dissidents<sup>4</sup> and Communists,<sup>5</sup> the abortion decisions,<sup>6</sup> the flag desecration cases,<sup>7</sup> the school prayer decisions,<sup>8</sup> *Romer v. Evans*,<sup>9</sup> and so forth. But how should the position or case for the negative be crafted? I want to discuss three possible negative cases, which we might call the "flat denial" position, the "interpretation" position, and the "constitutional law-as-reason" position. I will discuss the first two negative positions only briefly, and the third at greater length.

## II. DENYING THE CHARGE

Perhaps the most straightforward negative case would simply deny the proposition outright by asserting that the content of modern constitutional doctrines and decisions is no closer to the views and values of more educated classes of citizens than to those of citizens generally. Although I have not devised any empirical way to test this contention, it seems on the whole not very plausible.<sup>10</sup>

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4. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

5. See, e.g., *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957), *overruled by Burks v. United States*, 437 U.S. 1 (1978).

6. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Roe v. Wade*, 410 U.S. 113 (1973).

7. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989);

8. See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

9. 517 U.S. 620 (1996).

10. I don't want to overstate the point. In talking about constitutional "culture wars," we shouldn't forget that constitutional interference with majoritarian political decision-making is the exception more than the norm. Most legislative decisions do not generate serious constitutional challenges, and enactments that are challenged are usually upheld. So it's surely not true that constitutional law perfectly reflects and implements the political agendas of educated classes. My modest claim is only that when decisions of the political branches are invalidated, the constitutional decision will typically deviate from dominant opinion in a direction favored by the educated classes—not in a direction favored by less educated citizens.

Admittedly, cases like the recent affirmative action decisions<sup>11</sup> or last term's assisted suicide decisions<sup>12</sup> make the matter more complicated than we might sometimes suppose. Still, I think most people would agree that in the aggregate, constitutional law pulls at our politics more from the educated side of the culture.

Let me mention one instance from the area of law I focus on—the religion clauses.<sup>13</sup> The law, long-settled on the issue, is that teacher-led prayers in the public schools are unconstitutional.<sup>14</sup> Questions still exist at the margins—moment of silence laws, student-initiated graduation prayers, and so forth—but the basic proposition seems well settled, and I honestly do not remember hearing any law professor (or anyone else in an academic setting) dissent from that basic proposition. However, for decades after the school prayer decisions, and I believe even today, surveys have consistently shown that sizable majorities of citizens favor school prayer. So it seems pretty clear whose dogma is reflected, and whose is rejected, in constitutional law.

A second negative case might deny that constitutional law is the dogma of an educated elite by insisting that, in making decisions and developing constitutional doctrine, judges are not enacting the values of an educated elite in which they participate; rather, they are *interpreting* the Constitution. I do not think we need to spend much time on this claim, though, because, although the “interpretation” claim may be important for many purposes, it is not really responsive to the concern expressed in the proposition at issue here. That is because the people who will defend modern constitutional law as an “interpretation” of the Constitution will also advocate—typically and, I think necessarily—a creative kind of interpretation in which the interpreter's perspectives and values figure directly and prominently in the process and the results of interpretation.

In Ronald Dworkin's well-known account,<sup>15</sup> for example, constitutional interpretation must satisfy two requirements: fit and justification. The interpreter cannot do or say just anything she likes; her interpretation must achieve an adequate fit with the legal materials, such as text and precedent. But once that threshold has been passed—and especially with quite amorphous provisions like the Fourteenth Amendment, the “fit” requirement is not very stringent—the interpreter may, and indeed must, make the provision “the best it can be” by choosing the construction most in accordance with sound political and moral philosophy. In this way, the interpreter's own substantive views directly determine the result. And if the

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11. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (subjecting affirmative action plans to strict sentencing); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down a racial quota on constitutional grounds).

12. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that a law prohibiting assisted suicide did not violate the Fourteenth Amendment of the Constitution).

13. See U.S. CONST. amend. I (prohibiting any law “respecting an establishment of religion,” and banning any law “prohibiting the free exercise” of religion).

14. *Engel v. Vitale*, 370 U.S. 421 (1962).

15. RONALD DWORGIN, *LAW'S EMPIRE* (1986).

interpreter is then charged with cultural elitism, or with imposing her own views, it would be inaccurate and disingenuous to respond by saying, in essence, "It wasn't me; it was the Constitution," or, "The Constitution made me do it."

To be sure, the interpreter *can* still deny that in creatively interpreting the Constitution she is imposing her own political *preferences*, or perhaps her own values, on the law. By reducing all the relevant concerns to subjective preferences, this familiar criticism makes it seem that the interpreters—or the judges—are simply promoting their own political agendas under the guise of interpreting the Constitution. But, the proponent of creative interpretation maintains that there is a vast difference between promoting one's own interests and following the dictates of the best available moral and political philosophy. The first is an activity devoted to political self-interest; the latter is dedicated to pursuing and then following something called "reason."

### III. THE RULE OF "REASON?"

This observation leads us to the third negative position, which is centered around a claim familiar both to the founding generation and to our own (and which is where the interesting disagreement ultimately lies). The claim is that the Constitution, or constitutional discourse, is a way of letting human affairs be governed by reason rather than by force or fortuity.<sup>16</sup> Framers like Alexander Hamilton and James Wilson argued that the Constitution would create a government—perhaps the first in history—based on discussion, deliberation and a science of politics, not just on accident, force and fraud.<sup>17</sup> Modern constitutional scholars often make a similar claim. According to Cass Sunstein, for instance, our Constitution established "for the first time, a republic of reasons."<sup>18</sup>

This claim might cause us to see the proposition at issue today in a new light. It may be true, in other words, that the substantive content of constitutional law correlates with the views and values of more educated classes of citizens. But that correlation might not show that the judiciary is being oppressive or elitist; it might merely reflect the fact that educated citizens are on the whole more prepared, or perhaps more willing, to understand and respect the teachings of reason in the realm of politics. So in this view, even though constitutional law *does* coincide with or in a sense reflect the views and values of an educated elite, it would still be as misleading to accuse the constitutional regime of being "elitist" as it would be to make the same charge against a university if it emphasized in its science classes the views of the best astronomers with the best telescopes over popular folklore about the stars.

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16. Much of the following discussion is a greatly abbreviated version of the argument in STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* (1998).

17. M. FARRAND, *THE FRAMING OF THE CONSTITUTION* 79 (1913).

18. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 24 (1993).

So the real response to the original proposition would be neither a flat denial nor the claim that “the Constitution made us do it.” The real rebuttal asserts that “the best available political and moral philosophy—or, for short, Reason—made us do it.”

This depiction of constitutional law as the expression of reason provides a connection between modern constitutional law (and constitutional law scholarship) and the constitutional project initiated two centuries ago. As I mentioned already, the framers self-consciously understood their project as one of freeing human affairs from the tyranny of force and chance and bringing them under the governance of reason. Modern constitutional discourse is, in an important sense, a continuation of that project.

### A. Reasoning Without Nature

In another important sense, though, modern constitutional thinking departs radically from the constitutional project as understood in the founding era. As described by historians like Henry May and Daniel Boorstin,<sup>19</sup> the enlightened world in which the founders worked understood Nature not as a collection of particles in aimless motion that had over the eons combined and evolved to produce a complicated set of creatures, including human beings, but rather as a kind of providential scheme or design in which human beings had a preassigned part. The founders’ view of politics was tied directly to their understanding of Nature. As Henry May points out: “A benign God, a purposeful universe, and a universal moral sense are absolutely necessary at all points to Jefferson’s political system.”<sup>20</sup> More generally, for the founding generation an essential part of politics was to protect natural rights, and the very existence and meaning of rights was bound up in founding era commitments to “Nature and Nature’s God.”<sup>21</sup>

In this view of things, the function of “reason” was to discern the shape of Nature, or of the providential design in which ethics and politics, among other things, were grounded. And the claim of “reason” to a role in governance was much the same as it had been in Plato’s thinking: “Reason” was the human faculty that allowed us to perceive truths and realities that transcend merely human constructions.

Today, no doubt, many people still hold some version of this view. That is, they may still believe there is some kind of providential design in nature. But if there is any class which does *not* hold this world-view, it is the educated elite—at least when it is behaving *as* an educated elite. John Searle describes the modern world-view (which, he stresses, is “not an option”) as containing two propositions that are

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19. See, e.g., DANIEL J. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* (1948); HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976).

20. MAY, *supra* note 19, at 302.

21. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

beyond serious doubt: first, that everything that exists is composed of and reducible to atomic particles in motion, and second, that higher life forms are the product of unguided Darwinian evolution.<sup>22</sup> With reference to older, more theistic beliefs, Searle suggests that today “in our deepest reflections we cannot take such opinions seriously.”<sup>23</sup>

It is likely, of course, that there are educated people who would dissent from Searle’s views. (Indeed, if having a J.D. is enough to qualify a person as “educated,” then I am *certain* there is at least one). Even so, Searle’s description tells us a lot about the climate of opinion that prevails in academic contexts. Not surprisingly, this drastically changed world-view powerfully affects the kinds of arguments that are permissible in academic settings. Suppose, for example, that in a scientific conference the question is raised whether some species (the coelacanth, maybe) has become extinct. I suspect that no self-respecting scientist is likely to make the kind of argument that Jefferson blithely offered when the same question was raised in his day regarding the mammoth—that even without empirical evidence it is certain that the creature still exists because “[s]uch is the economy of nature, that no instance can be produced, of her having permitted any one race of her animals to become extinct; of her having formed any link in her great work so weak as to be broken.”<sup>24</sup> Similarly, a contemporary constitutional scholar and legal philosopher may urge us to “take rights seriously,” but if challenged to explain what these rights are or how we come to have them, the scholar is not likely to reply that it is self-evident that these rights were conferred on us by our Creator.

Although constitutional scholars and judges rarely pay attention to this change in world-views, the change complicates and, I believe, seriously threatens the familiar claim that constitutional law or discourse is somehow a way for reason to direct the governance of human affairs. Let me note, very quickly, just two aspects of this problem.

### *B. Reason’s Forfeited Claim*

First, if “reason” is no longer a faculty enabling us to discern some cosmic design, then it is no longer clear what claim reason has upon us, or upon our politics. On the contrary, the sorts of habits that we associate with “reasoning”—that is, reflecting, discussing and trying to achieve some kind of coherence among our various opinions—can come to seem like nothing more than the mental preferences (or prejudices) of a particular class of people. “Reason” comes to describe the dogmatic intellectual proceduralism of an educated elite.

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22. JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 88-90 (1992).

23. *Id.* at 90.

24. THOMAS JEFFERSON, *NOTES ON VIRGINIA*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 187, 208 (Adrienne Koch & William Peden eds., 1944).

Take what is probably the most fundamental commitment of reason—the commitment to intellectual consistency or non-contradiction. Aristotle’s classic treatment derives the principle of non-contradiction from an assumption about the nature of reality—that it is impossible for the same thing to be and not to be at the same time.<sup>25</sup> On that assumption, and within the classic world-view embraced in different forms by Plato and Aristotle (and also by our own founding generation), contradictions in ethical and political thought are unacceptable because if two propositions are contradictory, then at least one of them must misrepresent the ordered, objective reality that they seek to describe.

Eliminate the assumption that ethical thought is about some objective reality, though, and the aversion to contradiction loses much of its warrant. If someone sincerely reports that she believes abortion is wrong but capital punishment is right, then that is just how she feels, and there is nothing more to examine. Perhaps we *could* try to inquire into the consistency or inconsistency of these views. But, this inquiry would be as pointless as asking whether someone who likes “sweet and sour pork” has an incoherent taste because “sweet” and “sour” are contradictory qualities.

In short, within this world-view, Walt Whitman had it right when he said, (in behalf of the people):

Do I contradict myself?

Very well then. . . . I contradict myself.<sup>26</sup>

And if some scholar finds this position offensive on logical grounds, or if he insists on trying to see his own beliefs (or the law in general) as a single coherent whole, we can only regard this compulsive soul as indulging a peculiar personal taste or prejudice—perhaps the product of some misfortune in his early upbringing.

### C. *Turning Reason Upside Down*

A second problem (or at least interesting feature) generated by the change in world-views is that in one sense the educated elite now serves a function just opposite to the one it served in the classical view. *Then* reason (and the classes of people trained to exercise reason) served to guide the masses in accordance with a higher truth or reality of which the people in general were not fully aware—a higher truth or reality discernible through “reason” by a select class of exquisitely trained guardians. *Now*, on the contrary, it is more likely the people in general who retain some kind of belief in a higher truth and reality; and it is the educated elite who, as Searle said, cannot in their deepest reflections take that possibility seriously.

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25. ARISTOTLE, METAPHYSICS IV.4.

26. WALT WHITMAN, SONG OF MYSELF, verse 51.



So the function of reason now, as understood by many contemporary constitutional scholars or political philosophers, is not to direct human affairs in accordance with a vision of transcendent truth, but rather to prevent such a vision from entering into political decision-making.<sup>27</sup> Reason does not infuse higher truths into public deliberations, but rather insulates those deliberations from the influence of residual belief in those truths.

#### IV. CONCLUSION: THE NEW OLD STORY

So it seems we should end with a revised version of the classic story. In the contemporary rendition, there is a group of people who live in a cave and who mostly see only shadows passing on the walls. But many of these people also believe in a myth about an outside world in which the light is more pure and bright, and objects are more solid and real than the shadows in the cave. And their acceptance of this myth, it seems, affects how these people live in a variety of ways; some of them go so far as to treat the myth as somehow regulative with respect to public policies and decisions.

A small group of more educated cave dwellers comes to understand, though (or at least it thinks it does) that this myth is mere wishful thinking, and that the cave is all there is. This group then sets about to develop a discourse for making group decisions in which all vestiges of the myth are eliminated, so that public affairs can be conducted in accordance with what the educated elite is pleased to call "public reason."

In sum, modern constitutional law and theory in effect manage to revive Plato's story while in a sense standing the story on its head. That peculiar achievement is our contemporary contribution, for what it is worth, to the age-old controversy of the cave.

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27. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1993); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).