

Constitutional Justice

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Preface

Western culture has embraced a vision which is considered by many to be as valuable as life itself. In the United States, this sentiment is memorialized in the saying of Patrick Henry, "give me liberty or give me death." But the ideal is not reducible to any single word or phrase, but rather, is composed of a collection of ideas, reverberating in the collective conscience. We fight not only for our lives and freedom, but for freedom itself, for democracy, for equality, and for fundamental human rights. Legitimacy is seen to flow from the consent of the governed. We cherish the pursuit of happiness and laud the blessings of capitalism and free enterprise. We live under the rule of law. Our Constitution was designed to promote the general welfare, otherwise known as the public weal, or common good. These ideas provide the cornerstones for a conception of justice, a theory of right and wrong, implying a way of living, which we believe that not only ourselves, but all people, should enjoy.

It may seem strange, then, that western philosophy is commonly regarded as having reached a state of confusion, a crisis, if you will, in its attempts to provide a satisfactory ethical theory. We are willing to die for our ideals, for our way of life; but ask us to justify our values and conduct, and we will only squabble amongst ourselves. The battle is not merely with each other; the conflict arises from the very ideals we hold dear. We believe in equality; and as a consequence, tolerance has at long last become recognized as a virtue. We do not want to say that another system of belief is wrong. We do not want to pass judgment. We want to say that both our neighbors and ourselves are correct. Many personal and cultural peculiarities are thus accommodated. But then there is slavery. There is genocide. There is torture and cruelty. There are those who deny others their rights and freedoms. Then we judge. And we are plagued by what seems an inconsistency.

The resolution can be found, lingering, in tradition, in our own current values, and in the Constitution itself. For the ancient Greeks, progenitors of western culture, political and ethical philosophy were regarded as virtually identical pursuits.¹ Following this tradition, the vision of the Founding Fathers was to establish a government resulting from reflection and choice, having purpose and aim, and justified by objective standards of right and wrong.² Our Constitution is founded upon a conception of justice which provides a standard of measurement for our laws and institutions, our ideals, and even our private conduct.³ What has been passed down to us, however, is not a systematic and fully elaborated theory of justice, but rather, so many pieces to a puzzle. These pieces can be found not only in the writings of the Founding Fathers themselves, but also in the

¹ HAINES, CHARLES, *THE REVIVAL OF NATURAL LAW CONCEPTS*, 4-12 (1930).

² Hamilton, Alexander, *The Federalist*, No. 1.

³ Wood, S. Gordon, *The Creation of the American Republic 1776-1787*, 303 (1998).

writings of the authors who influenced them.

The common thread passing throughout the various writings, including the Constitution, is that they were all profoundly influenced by what may be called the natural law tradition. Indeed, natural law theory was one of the most invoked doctrines of the revolutionary period.⁴ It provided the philosophical link between the classical republicanism of the ancient Greek and Romans and modern liberalism with its emphasis on fundamental rights and social progress.⁵ Importantly for our purposes, however, it provided a vital link between ethical theory and political theory. It should be little surprise, then, that the theory of justice underlying both the Constitution and the natural law tradition bear fundamental similarities.

The aim of this paper will be to interpret the purpose of the Constitution. This will require, as we shall see, the development of a theory of justice consistent with the letter and spirit of the Constitution. To provide context, the paper will begin, in Part I, with an examination of the natural law tradition, as exemplified in the writings of Cicero. Interpretive analysis will then be used, in Part II, showing that the ultimate aim of the Constitution is justice, which is to say, the promotion of the common good. In Part III, a constitutional theory of justice, or the common good, will be constructed. It will be argued, in conclusion, that the theory elaborated provides both certainty and a degree of flexibility in evaluating the merit of particular laws and actions.

I

The natural law tradition is best understood through the writings of Cicero. It was from Cicero, more than any other, that the founders derived their views on natural law.⁶ Indeed, Cicero's writings provide the only systematic account of natural law lasting from antiquity.⁷ Cicero's writings, however, show evidence of an intellectual struggle. While embracing many of the ideas, and much of the terminology, of the Stoics, Cicero seems to be progressing toward a deeper truth. And yet, as far as his writings suggest, Cicero never had an epiphany in which he realized the full meaning and significance of his ideas. He was driven, instead, by a recognition of the obscurities and inconsistencies of popular doctrines of the time.⁸ Rather than reject Stoicism, Cicero sought to reconcile it with the views of the Academicians and Peripatetics.⁹ What emerges from these efforts is a fundamentally different conception of justice. While justice retains its place of prominence, it is transformed from a transcendent ideal into something of earthly substance.

⁴ GUMMERE, RICHARD M., *THE COLONIAL MIND AND THE CLASSICAL TRADITION*, 3-4 (1963).

⁵ Richard, Carl J., *The Founders and the Classics*, 169 (1994).

⁶ Richard, Carl J., *The Founders and the Classics*, 175 (1994).

⁷ De Finibus, Introduction, xi.

⁸ De Finibus, Book III, iv (231).

⁹ De Finibus, Book III, iii; Book IV, ix.

Cicero, like Aristotle, regarded natural justice as both objectively discoverable and universally applicable.¹⁰ In the *Republic*, Cicero describes true law as being “of universal application, unchanging and everlasting.”¹¹ Nevertheless, in *De Officiis*, Cicero writes:

But occasions often arise, when those duties which seem most becoming to the just man and to the “good man,” as we call him, undergo a change and take on a contrary aspect. It may, for example, not be a duty to restore a trust or to fulfill a promise, and it may become right and proper sometimes to evade and not to observe what truth and honor would usually demand. For we may well be guided by those fundamental principles of justice which I laid down at the outset; first, that no harm be done to anyone; second, that the common interest be conserved. When these are modified under changed circumstances, moral duty also undergoes a change, and it does not always remain the same.¹²

It should be observed that a literal reading of the above passages creates an apparent inconsistency in Cicero’s thought. How can fundamental principles be at the same time unchanging and modifiable? The conflict easily fades away, however, once duties are distinguished from fundamental principles. What is “modifiable” are not fundamental principles themselves, but the likelihood that those principles will be promoted *under the circumstances*. This interpretation is supported by another passage, in which Cicero writes: “this, then, may be regarded as settled: in choosing between conflicting duties, that class takes precedence which is demanded by the interest of society.”¹³ It is fair to say, then, that Cicero believed true law, or natural law, to require the observance of different duties at different times, according to the circumstances, in furtherance of unchanging and everlasting fundamental principles. The fundamental principles of natural law, in turn, can be summarized, or generalized, as the promotion of the common good. As Cicero himself councils: “We should, therefore, adopt these principles and always be contributing something to the common weal.”¹⁴

Throughout his writings, Cicero repeats the dictum that we ought to live in accordance with nature. To the modern ear, this phrase invokes thoughts of primal instincts. It might be thought, therefore, that Cicero endorsed the proposition that we ought always to follow those inclinations to which we are predisposed by nature. The seeming implication, more generally, is that “whatever is, is right.” What Cicero actually does say, however, is not only different, but much more complex.

The major philosophical schools of ancient Greece and Rome, including Stoic, Academic, Peripatetic, and even Epicurean, all sought to discover the nature of right and wrong by asking the same set of interrelated (if not interchangeable) questions. One formulation, referred to by Cicero as the “keystone of philosophy,” is the question “what is the Chief Good?”¹⁵ To the ancients, this was synonymous with the question “what is

¹⁰ ARISTOTLE, *NICOMACHEAN ETHICS* (Ed. RICHARD McKEON, INTRODUCTION TO ARISTOTLE, 413 (1947)).

¹¹ CICERO, *THE REPUBLIC* (Trans. KEYES, LOEB CLASSICAL LIBRARY, 211 (2000)).

¹² CICERO, *ON DUTY* (Trans. MILLER, LOEB CLASSICAL LIBRARY, 32-33 (1997)).

¹³ CICERO, *ON DUTY* (Trans. MILLER, LOEB CLASSICAL LIBRARY, 163 (1997)).

¹⁴ *De Officiis*, Book I, xvi, 57.

¹⁵ Cicero, *De Finibus*, Book IV, vi, 315; Book I, ix(33).

the ultimate end and aim of all things?”¹⁶ The supreme end, in turn, was understood to be that which is desirable for its own sake and not for the sake of anything else.¹⁷ Thus, to discover the nature and foundation of justice, the ancients would also ask the question “what is desirable?”¹⁸ By a subtle transformation, this question became “what is *naturally* desirable?”¹⁹ In other words, the good, or desirable, was understood to be that which is in accordance with nature. But to discover that which is *desirable* by nature, the ancients asked a question much more practical and verifiable, namely, “what is actually *desired*?” The answer, universally acknowledged, then as well as now, is happiness.²⁰ The difficulty, as recognized by Aristotle, is that there is little agreement as to what happiness actually is.²¹ Happiness, as it turns out, is no answer at all, but merely a rephrasing of the question.²² ²³ In answering the question “what is happiness?” the ancients thus returned to the preceding question, in modified form, “what is actually desired *by nature*?”²⁴

This is the point at which disagreement arose.²⁵ The Epicureans believed that what people naturally desire is pleasure and the avoidance of pain.²⁶ The Stoics, for their part, regarded virtue alone as desirable.²⁷ The Academicians agreed with the Stoics that virtue is desired by nature, but recognized, too, that external goods are both desired and desirable.²⁸ Cicero’s view, as we will see, was a compromise between the Stoic and Academician positions. All of these positions, however, (excluding the Epicureans) were

¹⁶ Cicero, *De Finibus*, Book IV, x, 329; Book I, iv (15); Book I, ix(33).

¹⁷ *De Finibus* Book IV, vii 319; Book II, ix(33).

¹⁸ Cicero, *De Finibus*, Book I, iv (15); Book I, ix(33).

¹⁹ Cicero, *De Finibus*, Book I, iv (15); Book I, ix(33).

²⁰ *De Finibus*, Book IV, xx, (363).

²¹ ARISTOTLE, *NICOMACHEAN ETHICS* (Ed. RICHARD McKEON, INTRODUCTION TO ARISTOTLE, 311 (1947)).

²² ARISTOTLE, *NICOMACHEAN ETHICS* (Ed. RICHARD McKEON, INTRODUCTION TO ARISTOTLE, 318 (1947)).

²³ Consider the following thought experiment: “Imagine a person (let’s call him “Jones”) who is, first of all, devoid of all intellectual curiosity. He has no desire to acquire any kind of knowledge for its own sake, and thus is utterly indifferent to questions of science, mathematics, and philosophy. Imagine further that the beauties of nature leave Jones cold: he is unimpressed by the autumn foliage, the snow capped mountains, and the rolling oceans. Long walks in the country on spring mornings and skiing forays in the winter are to him equally a bore. Moreover, let us suppose that Jones can find no appeal in art. Novels are dull, poetry a pain, paintings nonsense and music just noise... What, then is Jones interested? He must desire something. To be sure, he does. Jones has an overwhelming passion for, a complete preoccupation with, his own happiness. The one exclusive desire of his life is to be happy. It takes little imagination at this point to see that Jones one desire is bound to be frustrated. People who – like Jones – most hotly pursue their own happiness are the least likely to find it. Happy people are those who successfully pursue such things as aesthetic or religious experience, self-expression, service to others, victory in competitions, knowledge, power, and so on. If none of these things in themselves and for their own sakes mean anything to a person, if they are valued at all only as a means to one’s own pleasant states of mind – then that pleasure will never come. The way to achieve happiness is to pursue something else.” JOEL FEINBERG, *PSYCHOLOGICAL EGOISM (MORAL PHILOSOPHY SELECTED READINGS, 11-12 (1987))*.

²⁴ Find a reference for Cicero and Academics; Book I, ix(33).

²⁵ Cicero, *De Finibus*, Book I, iv (15).

²⁶ Cicero, *De Finibus*, Book I, vii (25).

²⁷ Cato, *De Finibus*, Book III, vi (241).

²⁸ Cicero, *De Finibus*, Book II, xi (121).

remarkably similar. Cicero, like the Stoics, Academicians and Peripatetics, began with a story involving a series of observations. This story provided the basis for Cicero's understanding of what it means to say that an action is, or is not, in accordance with nature. It is the story of how we come to know good and evil. It is the story of every man and woman; and it begins where all good stories begin, with the birth of an infant. The story, as told by Cicero, ran roughly as follows:

We are all born with certain natural instincts and inclinations.²⁹ The first of these, common to all creatures, is an impulse toward safety and self-preservation.³⁰ From the earliest age, following conception, we seek health³¹ and avoid harm to our bodies.³² It is natural for all creatures, more particularly, to seek such primary goods as food and shelter.³³ We seek, moreover, the avoidance of pain.³⁴ Love of self, therefore, is the primary instinct of human nature.³⁵ Far more important, however, are the instincts relating to soul and intellect.³⁶ These are the instincts, peculiar to man, by which we are distinguished from the animals.³⁷ By those inclinations relating to the soul, we are moved from an exclusive concern for self to a more embracing concern for objects beyond, yet including, our own personal interests.³⁸ All creatures, granted, are driven by an instinct to reproduce; and many types of animals are inclined by nature to care for their young.³⁹ As found within the hearts of humankind, however, the familial instincts are unique in aspect and form, being exaggerated in strength, as well as aided and transformed by reason.⁴⁰ The foundations of society thus begin with the natural inclinations which serve as the foundations for marriage.⁴¹ Humans are unique, too, in having a “strangely tender love” for their offspring.⁴² We are thus driven, by Nature, to provide for the wants and comforts our spouse and children.⁴³ But our concern for others is not limited to family affection.

²⁹ In *De Finibus*, Cicero has Piso say: “Of the whole inquiry into the Ends of Goods and Evils and the question which among them is ultimate and final, the **fountain-head** is to be found in the **earliest instincts** of nature; discover these and you have the source of the stream, the starting-point of the debate as to the Chief Good and Evil.” [emphasis added]

³⁰ Cicero, *De Finibus*, Book IV, vii (319-321).

³¹ Cicero, *De Finibus*, Book II, xi (121); Book V, xvii, (447-449).

³² Cicero, *De Finibus*, Book IV, viii (323).

³³ “Nature has endowed every species of living creature with the instinct of self-preservation, of avoiding what seems likely to cause injury to life or limb, and of procuring and providing everything needful to life – food, shelter, and the like.”

³⁴ Cicero, *De Finibus*, Book IV, viii (323); Book IV, xi (331); Book V, xvii, (447-449).

³⁵ Cicero writes in *De Finibus*: “But let it be granted to begin with, that we have an affection for ourselves, and that the earliest impulse bestowed upon us by nature is a desire for self-preservation.” Book IV, x, 329

³⁶ Cicero, *De Finibus*, Book IV, vii (319-321).

³⁷ Cicero, *De Officiis*, Book I, iv (13); Book I, xxx, (109).

³⁸ Cicero, *De Finibus*, Book IV, vii (319-321).

³⁹ *De Officiis*, Book I, iv, (13).

⁴⁰ *De Officiis*, Book I, iv.

⁴¹ Cicero, *De Finibus*, Book IV, vii (319-321).

⁴² *De Officiis*, Book I, iv, (15).

⁴³ *De Officiis*, Book I, iv, (15).

We are imbued, also, with a love for social intercourse and a relish for our kind.⁴⁴ We desire to form friendships,⁴⁵ to meet in assemblies,⁴⁶ and to work in the company of others.⁴⁷ Our interests are then extended, by the aid of reason, to a concern for our fellow-citizens,⁴⁸ and afterwards, to a proper regard for the safety and well-being of all of mankind.⁴⁹ Reason, especially, is a part, and the best part, of human nature.⁵⁰ Social interaction, as developed in mankind, is assisted and made possible by the capacity to speak and understand language.⁵¹ The benefits of society are facilitated, further, by our ability to plan for the future.⁵² We are possessed, moreover, of a natural inclination to know the truth.⁵³ We are impelled by instinct to acquire knowledge and information.⁵⁴ We hunger for intellectual freedom⁵⁵ and desire to contemplate the truth.⁵⁶ We seek to understand the relationships between objects and events.⁵⁷ We connect ideas and draw inferences through analogy.⁵⁸ And we are drawn by nature, and compelled by reason, to seek consistency in thought, word and deed.⁵⁹

It is from these, the primary instincts of nature, that the classical virtues of wisdom, justice, courage and temperance, and indeed all of the virtues, were understood to arise.⁶⁰ *Wisdom*, according to Cicero, is “the full perception and intelligent development of the true.”⁶¹ *Justice* is “the conservation of organized society, with rendering to every man his due, and with the faithful discharge of obligations assumed.”⁶² *Courage* is “the greatness and strength of a noble and invincible spirit.” And *temperance* is an “orderliness and moderation of everything that is said and done.”⁶³

What, then, does it mean to say that we ought to act in accordance with nature? Cicero writes, in *De Finibus*, that “when reason has been superadded, this is placed in such a position of dominance that all those primary gifts of nature are placed under its

⁴⁴ Cicero, *De Finibus*, Book IV, vii (319-321); Cicero, *De Finibus*, Book II, xiv (133).

⁴⁵ Cicero, *De Finibus*, Book II, xiv (133).

⁴⁶ *De Officiis*, Book I, iv, (15).

⁴⁷ *De Officiis*, Book I, xliv, (161).

⁴⁸ Cicero, *De Finibus*, Book II, xiv (133).

⁴⁹ Cicero, *De Finibus*, Book II, xiv (133).

⁵⁰ Cicero, *De Officiis*, Book I, iv (13).

⁵¹ Cicero, *De Finibus*, Book II, xiv (133); *De Officiis*, Book I, xvi, (55).

⁵² Cicero, *De Officiis*, Book I, iv (13).

⁵³ Cicero, *De Officiis*, Book I, iv (15).

⁵⁴ Cicero, *De Finibus* Book IV, vii (321).

⁵⁵ Cicero, *De Officiis*, Book I, iv (15).

⁵⁶ Cicero, *De Finibus*, Book II, xiv (135).

⁵⁷ Cicero, *De Officiis*, Book I, iv (13).

⁵⁸ Cicero, *De Officiis*, Book I, iv (15).

⁵⁹ Cicero, *De Officiis*, Book I, iv; Book I, xxviii (101); Book III, ii.

⁶⁰ Cicero, *De Finibus*, Book IV, vii (319-321).

⁶¹ Cicero, *De Officiis*, Book I, v.

⁶² Cicero, *De Officiis*, Book I, v.

⁶³ Cicero, *De Officiis*, Book I, v.

protection. Accordingly Reason never abandons its task of safeguarding the earlier elements; its business is by controlling these to steer the whole course of life...⁶⁴ To say that we ought to act in accordance with nature, therefore, is, for Cicero, but another way of saying that we ought to act in accordance with reason. The question then becomes: what does it mean to say that we ought to act in accordance with reason?

The Stoic position, as endorsed through the mouth of Cato, in *De Finibus*, was that Reason dictates that virtue is the only good; that virtue alone is desired by the wise man; and that only virtue is desirable in and for itself. The story told by the Stoics was nearly identical to the story told above: human instincts were regarded as the foundation of right and wrong, and virtue was regarded as “subsequent in development.”⁶⁵ Yet, from this story, the Stoics drew conclusions much different from those drawn by Cicero. Cicero has Cato say, in *De Finibus*: “Man’s first attraction is towards the things in accordance with nature; but as soon as he has understanding...and has discerned the order and so to speak the harmony that governs conduct, he thereupon esteems this harmony that governs conduct more highly than all the things for which he originally felt an affection, and by exercise of reason infers the conclusion that herein resides the Chief Good of man, the thing that is praiseworthy and *desirable* for its own sake...”⁶⁶ The Stoics thus understood virtue to arise from, and yet transcend, human instincts and inclinations. Those things naturally desired from the first instance, such as health, were regarded as worthy of selection, but not as things desirable in and for themselves. To put it another way, the Stoics believed that virtue alone is the path to happiness. Under this view, the enjoyment of such primary goods as health and prosperity do nothing to contribute to happiness. The Stoic understanding of morality began with an explanation of human instincts and of goods naturally sought, but ended with the rejection and denial of both inclinations and consequences. Severed from the reality from which it sprung, Virtue, for the Stoics, became an airy and ethereal conception, lacking form, and without substance.

Cicero, in *De Finibus*, rejects Cato’s assertion that virtue and happiness can be separated from the primary goods of nature.⁶⁷ Cicero argues that the Stoics, having “no other standard in view but abstract right and morality,” can have no “source and starting point for duty and for conduct.”⁶⁸ Duties, instead, for Cicero, must be founded upon reality, upon those things naturally desirable.⁶⁹ It is not considerations of conduct or duty that “supply the impulse to desire the things that are in accordance with nature; it is these things which excite desire and give motives for conduct.”⁷⁰ It is from the primary goods of nature, therefore, that the Chief Good, or Supreme Good, is to be constructed.⁷¹ The

⁶⁴ Cicero, Book IV, xv, (343).

⁶⁵ Cicero, *De Finibus*, Book III, vi (241).

⁶⁶ Cicero, *De Finibus*, Book III, vi (239) .

⁶⁷ Cicero, *De Finibus*, Book IV, x-xi.

⁶⁸ Cicero, *De Officiis*, Book IV, xvii, (351-353).

⁶⁹ Cicero, *De Officiis*, Book IV, xvii, (351-353).

⁷⁰ Cicero, *De Officiis*, Book IV, xvii, (353).

⁷¹ Cicero, *De Finibus*, Book IV, x.

Chief Good, accordingly, is “the largest number of the most important of the things in accordance with nature.”⁷² Cicero writes, moreover, that “it is impossible to find a place for virtue, unless all the things that she chooses and rejects are reckoned towards one sum-total of good.”⁷³ The “sum of Goods,” in turn, includes “everything worth adopting, choosing or desiring, so that he who has attained it may not want anything more...”⁷⁴ Thus, virtue, according to Cicero, is best understood as the application of reason in the furtherance, or satisfaction, of desires in accordance with nature.

It should be noted, at this point, that Cicero struggles, throughout his writings, with the question of whether happiness includes virtue only, or whether happiness includes virtue in combination with other goods. Cicero struggles, similarly, with the question of whether freedom from pain is a part of happiness. Where Cicero writes of the nature of happiness, he seems, at times, to distinguish moral worth, or virtue, from the primary goods of nature – the very position he argues against in *De Finibus*. Even in *De Finibus*, Cicero invites confusion by arguing that happiness includes the possession and enjoyment of *both* Moral Worth and the primary goods of nature, such as health (after arguing that virtue cannot be disembodied from tangible goods).⁷⁵ In *Tusculan Disputations*, written shortly after *De Finibus*, Cicero presents an even stronger view, seemingly at odds with his former position, arguing that virtue alone is essential to happiness. Cicero appears, in this work, to have shifted toward the Stoicism of Cato, but it is difficult to ascertain his position at this time, as his discussion on the matter is much less systematic, and much less complete, than that found in *De Finibus*. In his last and most influential book, *De Officiis*, Cicero appears to still waiver on the connection between happiness and virtue.⁷⁶ Nevertheless, Cicero’s final position is, in substance, the same as that found in *De Finibus*; for, in *De Officiis*, Cicero equates expediency (personal advantage) with virtue. Cicero writes, in *De Officiis*: “there are times when one course is likely to appear expedient and another morally right. The appearance is deceptive; for our standard is the same for expediency and for moral rectitude.”⁷⁷ Elsewhere in *De Officiis*, Cicero writes: “Expediency, therefore, must be measured by the standard of moral rectitude, and in such a way, too, that these two words shall seem in sound only to be different but in real meaning to be one and the same.”⁷⁸ Thus, though, in *De Officiis*, Cicero does treat virtue as the only good, virtue itself is redefined to include both personal welfare and the good of others.

The confusion exhibited by Cicero can be understood to arise, in part, from the meaning of words. In common language, then as now, happiness was understood to relate to the good of the individual. In the Aristotelian sense, on the other hand, happiness, as

⁷² Cicero, *De Finibus*, Book IV, x, (329).

⁷³ Cicero, *De Finibus*, Book IV, xv (345).

⁷⁴ Cicero, *De Officiis*, Book IV, xvii, (351-353).

⁷⁵ Cicero, *De Finibus*, Book IV, xxi, (363-365).

⁷⁶ Cicero, *De Officiis*, Book III, iii.

⁷⁷ Cicero, *De Officiis*, Book III, xviii, (345).

⁷⁸ Cicero, *De Officiis*, Book III, xxi, (357).

Supreme End of all action, becomes synonymous with the Ultimate Good, which is to say, Virtue.⁷⁹ Virtue, for its part, was often understood, then as now, to involve the sacrifice of personal interest in the furtherance of a greater good. This creates an apparent conflict, inherent to the tension between the interests of self and the interests of others. The resolution adopted by the Stoics was to redefine happiness by denying the desirability of personal advantage. Cicero's final position, on the other hand, as found in *De Officiis*, is much different. He redefined the meaning of both virtue and happiness. True happiness, in his hands, becomes the promotion of the good of others as well as the good of oneself; and virtue becomes the promotion of the good of oneself as well as the good of others.

Another potential source of confusion, for the modern reader, is that Cicero seems to have recognized the solution without ever fully appreciating, or drawing out, the implications. The theory of justice adopted by Cicero, such as it was, is best described in modern terms as a form of altruistic consequentialism. Cicero, in both *De Finibus* and *De Officiis*, is concerned with the promotion of primary goods in accordance with reason (consequences). At the same time, Cicero regards virtue to be the promotion of the common good (altruism). A possible solution is to adopt the principle of "the greatest good for the greatest number." In this way, the concept of virtue may, with greater clarity, be connected to the satisfaction of desires in accordance with reason. In this way, too, self-interested conduct, as well as altruism, may be understood as contributing to the common good; for the good of each individual, even oneself, contributes to the common good. In Cicero's day, however, the principle of "the greatest happiness for the greatest number" was simply not an idea endorsed by any popular school of thought.⁸⁰ Neither classical utilitarianism, nor any of its various reformulations, had yet been postulated.⁸¹ None of Cicero's arguments, therefore, can be viewed as a direct response, favorable or otherwise, to the principle of maximizing collective consequences.

Be that as it may, there can be little doubt that Cicero, in *De Officiis*, understood expediency, and therefore virtue, to include both self-interested and sacrificial conduct, grounded in tangible consequences. Cicero writes, in *De Officiis*, that the virtues of courage, temperance and justice have to deal with the "task of providing and maintaining those things upon which the practical business of life depends, so that the relation of man to man in human society may be conserved."⁸² In writing of expediency, moreover, Cicero discusses the many benefits achieved through cooperation.⁸³ Cicero writes: "without man's industry there could have been no provisions for health, no navigation, no agriculture, no ingathering or storing of the fruits of the field or other kinds of produce. Then, too, there would surely be no exportation of our superfluous commodities or

⁷⁹ Aristotle, *Ethics*, Book I, Ch. 2 (309); Book I Ch. 4; Book I, Ch. 7 (319).

⁸⁰ *De Officiis*, Rackham, Introduction, xxii.

⁸¹ *De Officiis*, Rackham, Introduction, xxii.

⁸² Cicero, *De Officiis*, Book I, v, (19).

⁸³ Cicero, *De Officiis*, Book II, iv, (179-181).

importation of those we lack, did not men perform these services.”⁸⁴ Of those things acquired out of expediency, Cicero also includes horses, oxen, bees and other beasts “whose labour contributes more or less to the service and subsistence of man.”⁸⁵ Even gold and silver are recognized as objects expedient to possess.⁸⁶ Listing many of the advantages of mutual assistance, Cicero ends by asking: “Why should I recount the multitude of arts without which life would not be worth living at all? For how would the sick be healed? What pleasure would the hale enjoy? What comforts should we have, if there were not so many arts to minister to our wants?”⁸⁷ Thus, cooperation is an unavoidable means to the satisfaction of desires; and cooperation, for its part, can only be secured through the exercise of virtue, which is to say, wisdom, temperance and justice.⁸⁸

Regarding expediency, Cicero allows that we may, in all fairness, seek to obtain that which is needful for our own advantage.⁸⁹ Cicero declares, similarly, that it is not contrary to Nature that one should prefer to secure for oneself, rather than for others, the necessities of life.⁹⁰ Cicero writes, even more strongly, that “we are not required to sacrifice our own interests and surrender to others what we need for ourselves.”⁹¹⁹² The qualification, to all of these statements, is that we should further our own interest only insofar as we may do so without injury and injustice to our neighbor.⁹³ Cicero writes, accordingly, that he finds no fault with the accumulation of property, so long as its acquisition harms nobody and involves no injustice.⁹⁴ It is clear, then, that Cicero’s theory of justice condones, and even requires, the pursuit of personal advantage. And yet, it is clear, from a reading of Cicero’s works, that virtue requires personal interests to be sacrificed whenever contrary to the common good.⁹⁵⁹⁶ Virtue, as well as honor, according to Cicero, is revealed “not only in increasing one’s resources and acquiring advantages for one’s self and one’s family but far more in rising superior to these very things.”⁹⁷

What is needed, then, is a theory capable of uniting expediency (the furtherance of personal advantage) and virtue (the supremacy of the common good) into a single

⁸⁴ Cicero, *De Officiis*, Book II, iv, (179-181).

⁸⁵ Cicero, *De Officiis*, Book II, iii, (179).

⁸⁶ Cicero, *De Officiis*, Book II, iii, (179); *De Officiis*, Book II, iv, (179-181).

⁸⁷ Cicero, *De Officiis*, Book II, iv, (181-183).

⁸⁸ Cicero, *De Officiis*, Book II, v, (185-187).

⁸⁹ Cicero, *De Officiis*, Book III, v, (291).

⁹⁰ Cicero, *De Officiis*, Book III, v, (291).

⁹¹ Cicero, *De Officiis*, Book III, v, (291).

⁹² “Others” is best understood as referring to competition between individuals. Cicero is consistent, throughout his writings, in his belief that the interest of the individual ought always to give way to the interest of society.

⁹³ Cicero, *De Officiis*, Book III, v, (291).

⁹⁴ Cicero, *De Officiis*, Book I, vi, (21).

⁹⁵ Cicero, *De Officiis*, Book I, xxiv, (85).

⁹⁶ Cicero writes: “It is our duty, then, to be more ready to endanger our own than the public welfare and to hazard honour and glory more readily than other advantages.” *De Officiis*, Book I, xxiv, (85).

⁹⁷ Cicero, *De Officiis*, Book I, v, (19).

framework of thought consistent with the underlying foundation of justice, namely, the satisfaction of desires in accordance with reason. The solution, as recognized by Cicero in *De Officiis*, is to align personal interest with the interests of others. Cicero writes: “the chief end of all men” ought to be “to make the interest of each individual and of the whole body politic identical.”⁹⁸ Cicero is not here advocating, as it might seem, that everyone ought to desire exactly the same thing; for he immediately goes on to write: “if the individual appropriates to selfish ends what should be devoted to the common good, all human fellowship will be destroyed. And further, if Nature ordains that one man shall desire to promote the interests of a fellow-man, then it follows, in accordance with that same Nature, that there are interests that all men have in common.”⁹⁹ What Cicero is endorsing, then, is that we ought to modify our desires in such a way that we are duly concerned for the desires of others as well as ourselves.

For all that has been said, we have still not answer the question of what it means to say that an action (or desire) is, or is not, in accordance with reason. It will be useful, in this endeavor, to be clear about what Cicero did *not* mean. Cicero was not saying, in any of his writings, that we ought to observe and follow the secret ways of animals. Cicero writes, in *De Officiis*: “it is essential to every inquiry about duty that we keep before our eyes how far superior man is by nature to cattle and other beast.”¹⁰⁰ Similarly, in *De Finibus*, Cicero states explicitly that he derives no guidance from the instincts of the lower animals, which “may be wrong, although we cannot say they are perverted.”¹⁰¹ What we are exhorted to follow, instead, is *human* nature.¹⁰² But to say that we ought to follow human nature, does not mean, for Cicero, that we ought to follow our strongest and most persistent human instincts. Indeed, Cicero, like the Stoics, repeatedly emphasized that a happy and virtuous life is impossible without the exercise of temperance, requiring the subjugation and control of inclinations, passions and desires.¹⁰³ Particularly dangerous, in the view of Cicero, are not only anger and the lust for sensuality, which we share in common with the animals, but also the uniquely human passions of avarice, ambition and the thirst for power.¹⁰⁴

On the other hand, Cicero was equally fond of emphasizing our natural propensities toward virtue. Cicero observes in his dialogue, *De Re Publica*, through the mouth of Scipio, that people are often encouraged to obey laws by the “shame which Nature has given to man in the form of a certain fear of justified censure.”¹⁰⁵ Likewise, in his preface to that same work, referring to the heroic bravery of defenders of the Roman republic,

⁹⁸ CICERO, ON DUTIES (Trans. MILLER, LOEB CLASSICAL LIBRARY, 293 (1997)).

⁹⁹ CICERO, ON DUTIES (Trans. MILLER, LOEB CLASSICAL LIBRARY, 293 (1997)).

¹⁰⁰ Cicero, *De Officiis*, Book I, xxx, (107).

¹⁰¹ Cicero, *De Finibus*, Book II, xi, (119).

¹⁰² Cicero, *De Officiis*, Book I, iv (13); Book I, xxx, (109); See also Piso, *De Finibus*, Book V, ix, 419-421.

¹⁰³ Cicero, *De Officiis*, Book I, xx, 71; xxvii, (97).

¹⁰⁴ Cicero, *De Officiis*, Book I, viii, (27).

¹⁰⁵ CICERO, THE REPUBLIC (Trans. KEYES, LOEB CLASSICAL LIBRARY, 251 (2000)).

Cicero states that “Nature has implanted in the human race so great a need of virtue and so great a desire to defend the common safety that the strength thereof has conquered all the allurements of pleasure and pain.”¹⁰⁶ Similarly, in his dialogue, *De Legibus*, Cicero says, through the mouth of Atticus, “that all men are bound together by a certain natural feeling of kindness and good-will, and also by a partnership in Justice.”¹⁰⁷ It will be recalled, also, that, according to the story told by Cicero, all of the virtues are founded upon the instincts that bind man to woman, parent to child, friend to friend, citizen to nation, and finally, each enlightened individual to all of humankind.¹⁰⁸ Such natural inclinations are the basis of what Cicero recognized as a moral sense, or conscience.¹⁰⁹

What, then, is the relevance of human instinct? Two answers can be found in the writings of Cicero. One answer is that human instinct, if interpreted properly, provides us with guidance.¹¹⁰ That is to say, human instinct provides us with guidance, but only if interpreted through the lens of reason.¹¹¹ It is reason that tells us which inclinations to follow, and at which times. More particularly, our instincts, if understood properly, direct toward the promotion of the common good.¹¹² Cicero writes, accordingly, that “we ought to follow **Nature as our guide**, to contribute to the **general good** by an interchange of acts of kindness, by giving and receiving, and thus by our skill, our industry, and our talents to cement human society more closely together...”¹¹³ [emphasis added]

The second answer is that, as a statement of fact, all action, including virtuous action, has its source in instinct and inclination. Cicero writes, in *De Finibus*, that “it is not right that the standard of Happiness should be sought elsewhere while the springs of conduct are derived from herself;” for “there is a single principle which must cover both the springs of action and the ultimate Goods.”¹¹⁴ The unifying principle is that all conduct, good or bad, is a reaction to the promptings of human instinct.¹¹⁵

That is not to say, however, that Cicero failed to recognize that conduct is also the product of choice; Cicero certainly did not believe that every action is predetermined by instinct.¹¹⁶ It may easily be inferred from Cicero’s writings that we are all free to choose between good and evil. The more subtle question is whether Cicero thought that the “wise man” has any choice. The question, in other words, is whether we are free to *choose* our own desires. Are we required to satisfy those desires we *do* have? Or are we required to satisfy only those desires we *should* have?

¹⁰⁶ Id. at 15.

¹⁰⁷ CICERO, LAWS (Trans. KEYES, LOEB CLASSICAL LIBRARY, 337 (2000)).

¹⁰⁸ Cicero, *De Finibus*, Book II, xiv (133).

¹⁰⁹ Cicero, *De Officiis*, Book III, x, (313).

¹¹⁰ CICERO, ON DUTIES (Trans. MILLER, LOEB CLASSICAL LIBRARY, 23-24 (1997)).

¹¹¹ Cicero, *De Officiis*, Book I, iv.

¹¹² CICERO, ON DUTIES (Trans. MILLER, LOEB CLASSICAL LIBRARY, 23-24 (1997)).

¹¹³ CICERO, ON DUTIES (Trans. MILLER, LOEB CLASSICAL LIBRARY, 23-24 (1997)).

¹¹⁴ Cicero, *De Finibus*, Book IV, xvii, (351-353).

¹¹⁵ Cicero, *De Finibus*, Book IV, xvii, (351-353).

¹¹⁶ Cicero, *De Finibus*, Book V, xiii, (433).

There can be little doubt that Cicero had a restricted view of acceptable human behavior. In *De Finibus*, Cicero specifically denounced the contention, espoused by Aristo, that the “wise man” will desire “whatever chanced to enter his mind” or “whatever struck him.”¹¹⁷ ¹¹⁸ Thus, Cicero rejected the idea that all desires are equal and may be chosen indiscriminately, without praise or blame.

And yet, Cicero did allow for a substantial degree of choice. In *De Officiis*, writing to his son, Cicero allows that a son may, without blame, choose a “vocation of his own.”¹¹⁹ This statement is qualified by the understanding that a “gentleman” will choose a profession worthy of his position; but such biases are more properly regarded as class preferences than as moral sentiments. Cicero also discusses, more generally, the selection of aims and activities. The pursuit of knowledge, in particular, is classed among the virtues. And yet, the accumulation of knowledge is only one of a collection of aims “to be desired.” Cicero writes: “...suppose that a wise man should be vouchsafed such a life that, with an abundance of everything pouring in upon him, he might in perfect peace study and ponder over everything that is worth knowing, still, if the solitude were so complete that he could never see a human being, he would die.”¹²⁰ Cicero writes, furthermore, that “to be drawn by study away from active life is contrary to moral duty.”¹²¹ Accordingly, friendship and social interaction are included, along with knowledge, among those things which a person *should* desire. To this list can be added the remaining “primary goods of Nature,” including, among other things, goods naturally conducive to life and health, such as food and shelter.¹²² In short, the path of virtue contains many acceptable alternatives. Even the “wise man,” therefore, has much from which to choose.

Still, Cicero regarded self-control, restraint, and even denial as essential to a moral life. This is perhaps best exemplified in Cicero’s critique of the Epicureans. The Epicureans maintained that all living creatures, including humans, naturally seek pleasure and avoid pain.¹²³ Thus, according to Epicurus, the aim and goal of all individuals is, and ought to be, the greatest balance of pleasure over pain.¹²⁴ Epicurus insisted, moreover, that virtue can only be achieved through the rational pursuit of pleasure. This conclusion was arrived at through a series of qualifications. Epicurus sought to soften his position by claiming that freedom from pain is the greatest and most significant of all pleasures; and that once pain has been eliminated, pleasure may be varied, but not increased.¹²⁵ Epicurus further argued that some desires and emotions ought to be disregarded, and if possible discarded,

¹¹⁷ Cicero, *De Finibus*, Book IV, xvi.

¹¹⁸ Aristo believed that virtue is the only good and that all else is entirely indifferent and may be chosen without justification. *De Finibus*, Book IV, xvi

¹¹⁹ Cicero, *De Officiis*, Book I, xxxii, (119).

¹²⁰ Cicero, *De Officiis*, Book I, xliii (157).

¹²¹ Cicero, *De Officiis*, Book I, vi, (21).

¹²² Cicero, *De Finibus*, Book IV, viii (323).

¹²³ Cicero, *De Finibus*, Book I, vii (25).

¹²⁴ Rackham, H., *De Finibus*, Introduction, xxi.

¹²⁵ Rackham, H., *De Finibus*, Introduction, xxi; Book II, iii (89).

as unnatural and unnecessary.¹²⁶ Most significantly, Epicurus maintained that pleasure, as the ultimate goal, is best arrived at by following the path of virtue; for in this way, one can avoid punishment, disgrace, the continual dread of detection, and the torture of a guilty conscience.¹²⁷ It should be observed that all of the reasons provided by Epicurus were egoistic (referring to private good) rather than altruistic (referring to the good of others).

Cicero vehemently rejected the Epicurean system. Cicero's reasoning, however, invites confusion. Many of Cicero's arguments begin, in form, as an attack against pleasure and end, in substance, as attack against egoism. It is important to bear in mind, therefore, that there are two primary defects addressed by Cicero: the first is the selfish foundation upon which Epicureanism is based; the second is the identification of pleasure as the only good (otherwise known as hedonism). The difficulty is that Cicero makes no attempt to distinguish between egoism and hedonism. The failure to separate these two issues is better understood once it is recognized that, in Cicero's day, no system of ethics had been devised combining altruism with the pursuit of pleasure. That is to say, the idea that virtuous action can be based upon a concern for the pleasures of others was simply not at issue.

In his refutation to Epicureanism, found in *De Finibus*, Cicero characterizes the debate as a duel between Virtue and Pleasure.¹²⁸ In response to Triarius, Cicero writes: "My own view is that, if I can succeed in proving the existence of Moral Worth as a thing essentially and for itself desirable, your entire system will at once collapse."¹²⁹ It might be thought that Cicero is here endorsing the pursuit of transcendental good, separate from all considerations of practical consequences. Such an interpretation, however, would be a mistake. In his critique of Stoicism, and later in his discussion on the connection between virtue and expediency, as we have seen, Cicero explicitly rejects the position that virtue can ever be independent of external consequences. What, then, does Cicero mean?

In support of his contention that moral worth is "essentially and for itself desirable," Cicero provides first a definition, and then an explanation. Moral worth is defined, or rather described, as having "such a nature that, though devoid of all utility, it can justly be commended in and for itself, apart from any profit or reward."¹³⁰ Once again, Cicero seems to treat virtue as an entity entirely distinct from consequences. In the second to next sentence, however, Cicero writes that moral worth is most clearly explained, not through "formal definition," but through a consideration of the "aims and actions of all persons of high character."¹³¹ Persons of high character, in turn, are described as individuals who "do a great many things from which they anticipate no advantage, solely

¹²⁶ Rackham, H., *De Finibus*, Introduction, xxi.

¹²⁷ Cicero, *De Finibus*, Book II, xvi (141); Book II, xxii (163).

¹²⁸ Cicero, *De Finibus*, Book II, xiv (131).

¹²⁹ Cicero, *De Finibus*, Book II, xiv (131).

¹³⁰ Cicero, *De Finibus*, Book II, xiv (133) .

¹³¹ Cicero, *De Finibus*, Book II, xiv (133) .

from the motive of propriety, morality and right.”¹³² From this description we learn the intended meaning of utility, personal reward and profit. The term “utility” has a different meaning than that which is commonly used in our own day. Specifically, Cicero is not arguing against an understanding of virtue as the greatest happiness (pleasure) for the greatest number. What Cicero is arguing against, instead, is the adequacy of *private* profit as the sole basis for virtuous action. In other words, the definition of moral worth provided by Cicero is best understood as the conclusion of an argument directed against egoism.

Cicero writes, moreover, that the doctrine of Epicureanism conveys the impression that “there is no action so base but that [the sensualist] would be ready to commit it for the sake of pleasure, provided he were guaranteed against detection.”¹³³ Cicero writes of the sensualist, in a similar vein, that “as long as his motive is fear, he is not just, and assuredly as soon as he ceases to fear, he will not be just...”¹³⁴ What Cicero requires, then, is some motive, some desirable aim, other than personal interest. If it can be shown that moral worth, or virtue, is desirable without reference to *personal* profit or reward, then Epicureanism will have failed. The solution, according to Cicero, is provided by the reasons for which virtue is properly chosen. Persons of high character chose what is right and good through the guidance of reason.¹³⁵ Reason, in turn, “has inspired man with a relish for his kind.”¹³⁶ That is to say, Reason prompts us to care not only for ourselves, but also for family and friends, fellow-citizens, and all of humanity.¹³⁷ Thus, for Cicero, virtue is grounded upon a concern for others (and to a lesser extent, oneself).

Cicero ends his explanation by providing a description of the four virtues of classical antiquity: wisdom, justice, courage and temperance.¹³⁸ All of these virtues are directed toward the promotion some practical and identifiable good, such as knowledge in the case of wisdom, or fairness in the case of justice, the benefits of which are to be enjoyed by *someone*. To say that moral worth is intrinsically desirable, therefore, is, for Cicero, to say that the good of individuals, all individuals, is something to be sought and cherished.

There is another passage in *De Finibus* requiring special attention. Cicero writes: “Is it possible for desire to be kept within bounds? It ought to be destroyed, uprooted altogether.”¹³⁹ This statement would seem, if read in isolation, contrary to the contention that happiness is the satisfaction of desires in accordance with reason. However, the statement is directly preceded by a discussion on the classification of desire, made by Epicurus, into three types, namely, natural and necessary, natural but not necessary, and

¹³² Cicero, *De Finibus*, Book II, xiv (133) .

¹³³ Cicero, *De Finibus*, Book II, ix (115) .

¹³⁴ Cicero, *De Finibus*, Book II, xxii (161).

¹³⁵ Cicero, *De Finibus*, Book II, xiv (133).

¹³⁶ Cicero, *De Finibus*, Book II, xiv (133).

¹³⁷ Cicero, *De Finibus*, Book II, xiv (133).

¹³⁸ Cicero, *De Finibus*, Book II, xiv (133).

¹³⁹ Cicero, *De Finibus*, Book II, ix (113).

neither natural nor necessary.¹⁴⁰ It is clear, from context, that Cicero is here referring to desires that are “neither natural nor necessary.” The type of desire being referred to, therefore, is excess and vice. Cicero ridicules the possibility of moderating desires that are by definition immoderate, writing that the sensualist, acting with moderation, “will be a miser – within limits; an adulterer – in moderation...”¹⁴¹ Following this discussion, Cicero suggests that truly moderate desires, desires that are natural and necessary, be termed “the needs of nature,” though he later departs from this convention.¹⁴²

Regarding hedonism, Cicero is entirely clear that he does not approve of the pursuit of pleasure for its own sake. Pleasure, for Cicero, is “a sensation actively stimulating the percipient sense and diffusing over it a certain agreeable feeling.”¹⁴³ In attacking the system of Epicurus, therefore, Cicero is arguing only against the pursuit of physical, or bodily, pleasures; such as those derived from “food and drink, the delight of the ears, and the grosser forms of gratification.” By way of contrast, Cicero is specifically not referring to such types of enjoyment as are derived from intellectual activities.¹⁴⁴ It is also important to bear in mind that Cicero is not condemning pleasure itself; nor is he advocating the avoidance of pleasure.¹⁴⁵ Cicero acknowledges that pleasure proceeds even from the exercise of virtue.¹⁴⁶ What Cicero is opposed to is the *pursuit* of pleasure as a direct and conscious aim, pleasure sought for the sake of pleasure.

Even the pursuit of pleasure *in moderation* is regarded by Cicero as inappropriate.¹⁴⁷ In one passage, for instance, Cicero declaims a life dedicated to the pursuit of culinary pleasures. Cicero admits that a gourmet, eating in moderation, consumes pleasantly, but denies that he also eats “well.” To dine well and happily, according to Cicero, is to dine “rightly, respectably, worthily.”¹⁴⁸ Thus, when eating, one ought to have health and hunger, rather than pleasure, as one’s aim.¹⁴⁹

Admittedly, this is a very strong position. Why is one thing to be preferred to another? Cicero argues, by way of support, that the pursuit of pleasure is not the “proper function of man.”¹⁵⁰ The question then becomes: what is the function of a person? Cicero, like Aristotle, believed that the peculiar function of humans is to exercise reason.¹⁵¹ That is to

¹⁴⁰ Cicero, *De Finibus*, Book II, ix (113).

¹⁴¹ Cicero, *De Finibus*, Book II, ix (113).

¹⁴² Cicero, *De Finibus*, Book II, ix (113).

¹⁴³ Cicero, *De Finibus*, Book II, iii (85); Book III, iv (93).

¹⁴⁴ Cicero, *De Finibus*, Book I, vii (25).

¹⁴⁵ Cicero, *De Finibus*, Book II, viii (109-111).

¹⁴⁶ Cicero, *De Finibus*, Book II, viii (109-111).

¹⁴⁷ Cicero, *De Finibus*, Book II, viii(107-111).

¹⁴⁸ Cicero, *De Finibus*, Book II, viii(107-111).

¹⁴⁹ Cicero, *De Finibus*, Book II, viii(107-111).

¹⁵⁰ Cicero, *De Finibus*, Book I, vii (25); Book II, xiv, (133).

¹⁵¹ Cicero writes: “...just as the horse is designed by nature for running, the ox for ploughing, and the dog for hunting, so man, as Aristotle observes, is born for two purposes, thought and action: he is as it were a mortal God.” *De Finibus*, Book II, xiii, (127).

say, it is the capacity for reason (at a higher level) that distinguishes humans from animals.¹⁵² But how does uniqueness create moral obligation? In what sense can we be said to have a defining function? In what sense, in other words, do we have a purpose? Neither Cicero nor Aristotle provided an answer this question. The temptation, nonetheless, is to say that our purpose, according to Cicero and Aristotle, is defined by God. Indeed, Cicero, like Aristotle, did believe that the universe originated from a first cause, divine in nature. We are therefore tempted to conclude that Cicero regarded the will of God to be the ultimate foundation of justice. It is fair to say, at the very least, that Cicero did believe the will of God to *coincide* with that which is “in accordance with nature.” Cicero believed, for instance, that we derive our moral conscience from God.¹⁵³ Support can even be found in Cicero’s writings for the proposition that divine will is the ultimate foundation of right and wrong. Cicero writes, for instance, in *De Legibus*, that law “is the primal and ultimate mind of God, whose reason directs all things either by compulsion or restraint.”¹⁵⁴

Be that as it may, there appears to be a conscious effort, on the part of both Cicero and the Stoics, to provide a justification for moral duty separate from theology. In Cicero’s two most important works on the subject, *De Finibus* and *De Officiis*, in which the foundations of ethics are systematically elaborated, very few references are made to God or the will of God; and those references that are made are remarks of tangential importance. There is, in these writings, no direct attempt to discover divine will. The emphasis is upon *conformance* with Reason, rather than *obedience* to God. It is significant, too, that the emphasis is placed upon *function* rather than *purpose*. The function of an object, unlike its purpose, can be separated from conscious intention. The function of the sun, for example, is to provide light; of the moon to create tides; and of the magnetosphere to shield the earth from radiation. All of these may be viewed as providing benefits to the human race; and yet, even if the entire universe were devoid of life, each would continue to fulfill its function. Only conscious and intelligent beings, on the other hand, are capable of forming a purpose. A tree, for example, may be planted (or created) *by someone* for the purpose of providing shade; and in such cases, the purpose and function of the tree will be the same. But if a tree happens to exist at a particular location (purely as a matter of accident), it will have only the function of casting a shadow – it will not have a purpose. The significance is that function is ambiguous with regard to purpose: function may, or may not, imply agency (in this case divine agency). Thus, it may be said that the function of man is to act in accordance with reason without implying, as a necessary consequence, that this must also be the purpose (of God) for man.

Natural law, then, as set forth by Cicero, appears to be laid atop a theistic world-view, rather than directly grounded in theology. Confusion is avoided by realizing that Cicero never directly addressed the question of whether virtue is right because God wills it, or

¹⁵² Cicero, *De Finibus*, Book II, xiii, (127).

¹⁵³ Cicero, *De Officiis*, Book IV, x.

¹⁵⁴ Cicero, *Laws*, II, iv.

whether God wills virtue because it is right.¹⁵⁵ Similarly, Cicero never asked the question whether moral duty would remain in force, or remain the same, if God does not exist. These questions were simply not at issue. Even the Epicureans admitted the existence of the gods. It is not surprising, therefore, that Cicero mentions God throughout his works. The existence of God is, as it were, the background assumption of all of Cicero's writings. Cicero's emphasis, however, when discussing natural law and justice, is upon Nature and Reason, rather than God and the will of God. Perhaps the best interpretation is that Cicero provides two separate justifications for doing what is right: the first, the will of God, is the foundation of theology; while the second, Reason, is the foundation of natural law. Cicero's conception of natural law is thus entirely compatible with a theistic world-view; and yet, it rests upon foundations that may just as easily be separated, and even divorced, from theology.

Why, then, should reason be followed? Fundamental to Cicero's entire structure of thought is a deep appreciation for the order and harmony found in nature. Cicero writes:

it is no mean manifestation of Nature and Reason that man is the only animal that has a feeling for **order**, for propriety, for **moderation** in word and deed. And so no other animal has a sense of **beauty, loveliness, harmony** in the visible world; and Nature and Reason, extending the analogy of this from the world of sense to the world of spirit, find that beauty, **consistency**, order are far more to be maintained in thought and deed, and the same Nature and Reason are careful to do nothing in an improper or unmanly fashion, and in every thought and deed to do or think nothing capriciously. **It is from these elements that is forged and fashioned that moral goodness** which is the subject of this inquiry.¹⁵⁶ [emphasis added]

Cicero thus exhorts us to follow Nature, our capacity for reason and rational thought, out of an appreciation for order and harmony. Order and harmony, in turn, are regarded as the very essence of reason. Thus, reason is treated as an ultimate, and independently sufficient, foundation of justice.

What, then, to return to our original question, does it mean to act in accordance with reason? To follow reason, for Cicero, means to act rationally.¹⁵⁷ Reason dictates, accordingly, that we think and act consistently.¹⁵⁸ Reason requires, furthermore, that the greatest amount of relevant information be taken into account.¹⁵⁹ And using the information available to us, reason directs that we infer relationships between objects and events.¹⁶⁰ Thus, for example, we are to “discern the causes and effects of things, to draw analogies, combine things separate, connect future with the present, and survey the entire field of the subsequent course of life.”¹⁶¹ These are the criteria by which one thing may be

¹⁵⁵ In *De Officiis*, Cicero refers to “Reason which is in Nature” as “the law of gods and men.” Book III, v

¹⁵⁶ Cicero, *De Officiis*, Book I, iv.

¹⁵⁷ Cicero, *De Officiis*, Book I, xxvii, 97.

¹⁵⁸ Cicero, *De Officiis*, Book I, iv; Book I, xxviii (101); Book III, ii.

¹⁵⁹ Cicero, *De Officiis*, Book I, xxvii, 97.

¹⁶⁰ Cicero, *De Finibus*, Book II, xiv (133).

¹⁶¹ Cicero, *De Finibus*, Book II, xiv (133).

said to be preferable to another.

This leads us back to the question of what it means to say that something is desirable. The ancients never truly appreciated the distinction between “desired” and “desirable.” Nothing, in fact, is desirable for its own sake in an absolute sense. Something is only desirable for its own sake if it is desired *by someone* as an end, rather than as a means. To say that anything *deserves* to be desired, for reasons inherent to itself, is a statement without meaning. Still, the ancients, including Cicero, were very close to an answer; they recognized the fundamental importance of desire.

Cicero, it will be recalled, explicitly rejected the position that all things are equally worthy of preference. And yet, when attempting to determine what is desirable, Cicero, like the Stoics, asked the question: what do people actually desire? How is Cicero’s position to be reconciled with his approach? In other words, if what matters is actual desires, in what sense can it be said that this or that *should* be desired? The solution, never fully appreciated by Cicero, is nevertheless implied by his repeated emphasis upon reason. The key is to apply the “rules of reason” to those desires people actually do have. In such a manner, justification can be provided for many of Cicero’s assertions.

Throughout his writings, Cicero emphasizes the importance, and desirability, of the primary goods of nature, including, among other things, knowledge, life, health and even property.¹⁶² What is significant about all of these is that they are, to one degree or another, essential to the satisfaction of desires. Without life, there is no will or purpose, no desire. Without health, one’s desires cannot be attended to, or even properly formed. Without at least a modicum of material goods, life itself cannot be maintained; and some degree of prosperity is necessary for satisfaction of desires. Knowledge, too, is necessary if one is to discover the means of attaining one’s goals. It may be said, then, that all of these, life, health, knowledge and property (including food and shelter), ought to be desired. More generally, it may be said that one *ought* to desire that which promotes the greatest overall satisfaction of one’s desires. Not to desire the primary goods of nature, while desiring anything else, necessarily involves an inconsistency, and incoherency, of thought. It will be remembered that one of the rules of reason, endorsed by Cicero, is that consistency ought to be maintained.¹⁶³ The implication, therefore, is that the primary goods of nature are *desirable*, at least in part, as perquisites to the satisfaction of those desires people actually do have.

Even more essentially, knowledge is part of the very foundation upon which desires are built. Another rule of reason, endorsed by Cicero, is that relevant information ought to be collected and taken into consideration.¹⁶⁴ The implication, therefore, is that we *ought* to desire that which we *would* desire if fully and adequately informed. In this sense, too,

¹⁶² Cicero, *De Finibus* Book IV, vii 321; Cicero, *De Finibus*, Book IV, viii (323); Cicero, *Laws*, II, xxiv.

¹⁶³ Cicero, *De Officiis*, Book I, iv; Book I, xxviii (101); Book III, ii.

¹⁶⁴ Cicero, *De Officiis*, Book I, xxvii, 97.

knowledge is desirable and should be desired.

Of all that is desirable according to reason, virtue was regarded by Cicero as the most important.¹⁶⁵ Virtue, for Cicero, as we have seen, involves a concern for the desires of others, as well as ourselves. But why should we care for other people? Following the example of the Stoics, Cicero emphasized the equality of all individuals, regardless of race or nationality.¹⁶⁶ For Cicero, the “universal brotherhood of mankind” is the basis of all “kindness, generosity, goodness, and justice.”¹⁶⁷ Once it is recognized that all individuals are substantially the same, having wants and desires just as ourselves, there is no reason for regarding the desires of one person as more important than another. The implication, therefore, is that, once fully informed, it will appear inconsistent, and therefore contrary to reason, to fail to properly regard the equal importance of each and every person.¹⁶⁸ In this sense, then, it may be said that we *ought* to desire the furtherance of virtue, which is to say, the promotion of the common good.

The recognition of the importance of equality offers a solution to potential difficulties, inherent to utilitarianism, which Cicero did not foresee. Thus, recognition of the principle of equality provides protection against the principle of the greatest happiness for the greatest number. In situations where a majority’s interest would trample the rights of a minority, it may be observed that such actions would violate the equal importance of each individual. That is to say, in an ideal world, the desires of each individual would be satisfied to an equal and equivalent extent. What is needed to complete this picture is a recognition of the principle of balance, such that happiness and equality alike are taken into consideration in proper fashion. In this way, through constructive interpretation, coherency and consistency may be obtained.

To continue with our analysis, a more difficult question is how to account for Cicero’s condemnation of pleasure for the sake of pleasure.¹⁶⁹ Certainly, pleasure, like anything else, can be harmful if pursued to excess.¹⁷⁰ But Cicero, as we have seen, rejected even the pursuit of pleasure in moderation (though not pleasure as the byproduct of other aims).¹⁷¹ This position, in the final analysis, must be interpreted as a bias, or prejudice, rather than as a conclusion derived from principle. There is nothing inconsistent to be found with desiring to partake in pleasurable activities, in part, for the (physical) pleasure they produce. The gourmet, eating in moderation, does not (of necessity) undermine his or her greatest overall satisfaction of desires. Nor is there any reason to think that a fully

¹⁶⁵ Cicero, *De Officiis*, Book III, iii.

¹⁶⁶ Haines, Grove, *The Revival of Natural Law Concepts* (1930).

¹⁶⁷ *De Officiis*, Book III, vi, (295).

¹⁶⁸ This statement, to accord with the views of the Framers of the Constitution, must be qualified with the understanding, endorsed by modern economic theory, that everyone is better off by allowing each to pursue his or her own private aims (within limits).

¹⁶⁹ Cicero, *De Finibus*, Book II, viii(107-111).

¹⁷⁰ Cicero, *De Finibus*, Book II, viii(107-111).

¹⁷¹ Cicero, *De Finibus*, Book II, viii(107-111).

informed individual would be entirely indifferent to the allures of pleasure. Cicero admits as much, when, through the mouth of Piso, he writes:

if however anyone thinks that our enumeration of bodily advantages is incomplete owing to the omission of pleasure, let us postpone this question to another time. For whether pleasure is or is not one of the objects we have called the primary things in accordance with nature makes no difference for our present inquiry. If, as I hold pleasure adds nothing to the sum-total of nature's goods, it has rightly been omitted. If on the contrary pleasure does possess the property that some assign to it, this fact does not impair the general outline we have just given of the Chief Good; since if to the primary objects of nature as we have explained them, pleasure be added, this only adds one more to the list of bodily advantages, and does not alter the interpretation of the Chief Good which has been propounded.¹⁷²

Thus, an acceptance of the underlying premises of natural law, as set forth by Cicero, does not, as a logical necessity, require an indifference to pleasure.

In summary, though the question can be asked in different ways, the answer is the same. What is the Chief Good? What is Justice? What is Virtue?¹⁷³ What is Right? The answer to all of these questions, as understood by Cicero, is the promotion of the common good. But what is the common good? We see in Cicero's writings a concern for three fundamental principles. By recognizing the importance of the body and primary goods, Cicero can be viewed as supporting the principle that life is valuable and ought to be promoted (*the principle of life*). By his understanding of both happiness and virtue, Cicero can be viewed as supporting the principle that the desires of *all people* ought to be promoted and maximized in accordance with reason (*the principle of happiness*). And by recognizing the brotherhood of all peoples, Cicero can be viewed as supporting the principle that all individuals are equally important (*the principle of equality*). All that remains is to supply the principle of balance. That is to say, justice, or the common good, is best understood as a proper balance of the principles of life, happiness and equality.

This leads us to a method for discerning particular rules of conduct, which is to say, the laws of nature. As we saw above, Cicero was of the opinion that what is right depends upon the circumstances. For the sake of consistency, it was necessary to interpret Cicero to mean, at least implicitly, that conduct is appropriate only to the extent that it promotes fundamental principles. In this line of reasoning, Cicero very nearly approached a recognition of the principle of balance. He also very nearly approached what could be offered as an explanation for the laws of nature. That is to say, a natural law, consistent with Cicero, can be understood as a particular course of conduct that has an overwhelming tendency, under most circumstances, to promote the common good. More modern concepts of natural rights, or fundamental human rights, which have their foundations in natural law, can accordingly be understood to flow from the same source; they are best understood, in this context, as arising from the tendency of certain types of

¹⁷² Cicero, (Piso), *De Finibus*, Book V, xvi (445).

¹⁷³ Virtue in an Aristotelian sense, to be more precise, is a habit of doing what is right.

conduct to promote, or hinder, a proper balance of the principles of life, happiness and equality.

II

The Constitution of the United States invites and demands a purposeful approach to interpretation. This, in part, is what Chief Justice Marshall meant when, in *McCulloch v. Maryland*, he wrote, “we must never forget that it is a Constitution we are expounding.”¹⁷⁴ The essence and form of the Constitution is, according to Marshall, something other than the mere expression of official determination: it is, instead, a manifestation of reason itself. Reason dictates, first and foremost, that government ought to proceed directly from the people.¹⁷⁵ This “original right” of the people is “the basis on which the whole American fabric has been erected.”¹⁷⁶ It follows, therefore, that the Constitution, being the supreme text of a constitutional republic, ought not to partake of the “prolixity of a legal code;” but should, instead, be designed in such a manner as to be easily understood by the public.¹⁷⁷ The Constitution should be short, and being short, it should be general; for it is by means of generality that a text of few words is made equal to the concerns of a nation.¹⁷⁸ Consequently, it is inherently appropriate that the wording of the Constitution is, to a large extent, both sparing and broad. But the utilization of general language is, by itself, insufficient to provide the necessary guidance. General laws, in order to provide meaningful instruction, require the inclusion of a statement of purpose. In this way, the interpretive process is guarded from the dangers of arbitrary selection and personal preference and placed securely within the province of rationality. Such is the significance of the Preamble to the Constitution.

In *McCulloch v. Maryland*, considerations of purpose were put to practical use. In that case, Marshall ruled that the power to establish a national bank was implied as a means necessary and proper for the exercise of various express powers of government, including, among others, the power to tax and spend.¹⁷⁹ In support, Marshall wrote the famous line, “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.”¹⁸⁰ It is essential, in order to understand this case, to recognize that the powers of government may be characterized as either ends or means. Though implied powers must be derived from express powers, express powers themselves are, in an ultimate sense, a means to an end.

¹⁷⁴ *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

¹⁷⁵ *McCulloch v. Maryland*, 17 U.S. 316, 403 (1819).

¹⁷⁶ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁷⁷ *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

¹⁷⁸ *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

¹⁷⁹ *McCulloch v. Maryland*, 17 U.S. 316, 408 (1819).

¹⁸⁰ *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

Consider the following passage taken from *McCulloch v. Maryland*:

It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a Government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be intrusted with ample means for their execution. . . . Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when **granting these powers for the public good**, the intention of impeding their exercise, by withholding a choice of means?¹⁸¹ [emphasis added]

What is important to notice is that implied powers are not inferred merely as an extension of those powers explicitly granted; they are inferred, instead, as a rational necessity, as means necessary and proper for the execution of express powers in the furtherance of constitutional goals. To state the matter more precisely, implied powers are not regarded merely as means necessary for the execution of stated powers viewed as ends; the force of the argument is derived by characterizing those powers as themselves being means necessary for the promotion of the public good.¹⁸²

This view of Marshall's opinion, and of the Constitution, was set forth early in American history by Justice Stone. In the *Legal Tender Cases*, after citing relevant sections of *McCulloch v. Maryland*, Justice Stone writes:

If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose.¹⁸³

The nature and design of the Constitution, therefore, necessitates that its ultimate purpose be taken into account. Though the Constitution contains a number of secondary, or subordinate, objectives, all of these must be understood in reference to the supreme end of the Constitution. This, in essence, is Madison's first rule of construction, found in *Federalist #40*, that "every part of the expression ought, if possible, be made to conspire to some common end."

¹⁸¹ *McCulloch v. Maryland*, 17 U.S. 407-408 (1819).

¹⁸² Marshall wrote: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." *McCulloch v. Maryland*, 17 U.S. 316, 424 (1819).

¹⁸³ *LEGAL TENDER CASES*, 79 U.S. 457, 532 (1870).

Be that as it may, the purpose of the Constitution itself must be the subject of interpretation. This might, at first, appear an easy task; for the written Constitution contains a statement of purpose, a preamble, setting forth the aims and goals for which it was “ordained and established.” According to its own words, the Constitution was promulgated “in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.” Any attempt to understand these words in isolation, however, relying upon the plain meaning of the text, soon reveals a perplexing absence of both precision and clarity; for the aims of the Preamble, not surprisingly, are expressed in terms of general concepts and abstract principles. And no elucidation or example is provided in the Preamble itself. We must thus have recourse to those methods of interpretation commonly appropriate whenever the express terms of the Constitution are unclear.

There is, however, one important respect in which interpretation of the purpose of the Constitution differs from ordinary interpretation. This difference involves the relevance and application of Madison's first rule of construction that “every part of the expression ought, if possible, be made to conspire to some common end.”¹⁸⁴ How is an expression of purpose made to conspire to a common end? How are we to determine the purpose of a purpose? The solution, in part, may be found by reflecting upon Madison's second rule of construction, also provided in *Federalist #40*, that “where the several parts cannot be made to coincide, the less important should give way to the more important part; the means should be sacrificed to the end, rather than the end to the mean.” Elsewhere in the *Federalist Papers*, Madison refers to what he calls the “supreme object” of government.¹⁸⁵ If there is a supreme object of government, then there must also be subordinate objectives, which, as means, can only be understood in reference to the supreme end. In other words, some purposes, or ends, or goals, can be restated as means for achieving an even higher objective (or set of objectives). In this sense, one can meaningfully seek the purpose of a purpose. The supreme end, on the other hand, although it can be discovered, elucidated, and understood, can never be expressed as a means to anything else. Thus, any attempt to determine the purpose of the Constitution must clearly distinguish primary from secondary objectives.

It should also be observed that some concepts are more general than others, and more particularly, that concepts may be embedded within other concepts, the less general within the more general. Thus, sparrows, hawks and owls are types of birds, which are types of animals, which are types of living organisms. The question for our purposes, then, is whether there are any differences regarding the generality of the concepts found within the Preamble, and if so, whether any of these concepts may properly be embedded within another.

¹⁸⁴ Madison, *Federalist* No. 40.

¹⁸⁵ Madison, James, *The Federalist*, No. 45.

That being said, of the aims mentioned explicitly in the Preamble, two may reasonably be construed as substantially more general than the rest. The first of these is the establishment of justice; the second is the promotion of the general welfare. Justice, broadly speaking, in its ancient and traditional sense, refers to all that is good and right. Samuel Johnson, in his influential dictionary, defined justice as, among other things, “Right” or the “Assertion of Right.” Similarly, Cicero, in his most general formulation, speaks of justice as the “safeguarding of human interests” and the “maintenance of human society.”¹⁸⁶ Cicero further understood justice to be the preeminent virtue, and in a sense, the only virtue; for without justice, wisdom is “isolated and barren of results”; courage is “but a sort of brutality and savagery”; and temperance can never be incompatible with justice.¹⁸⁷ Following this tradition, Madison, in *Federalist #43*, equates “moral relations” with the “claims of justice.”

But justice has also been traditionally divided into a number of more narrow concepts, including legal justice and natural justice, and even more narrowly, criminal justice, distributive justice, contributive justice, and commutative justice. Cicero writes that “the first office of justice is to keep one man from doing harm to another, unless provoked by wrong; and the next is to lead men to use common possessions for the common interests, private property for their own.”¹⁸⁸ Cicero also understood justice to include good faith, which is to say, “truth and fidelity to promises and agreements.”¹⁸⁹ The question, then, is in what sense ought the term “justice” to be interpreted?

In *McCulloch v. Maryland*, Chief Justice Marshall was called upon to determine whether the term “necessary,” as found in the Necessary and Proper Clause, should be broadly or narrowly construed. In support of a broad construction of the word, Marshall writes that the character of human language is such “that no word conveys to the mind in all situations one single definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended.”¹⁹⁰ Similarly, Justice Brewer writes that words in a constitution ordinarily “do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies.”¹⁹¹ And the Supreme Court has repeatedly announced adherence to the rule that “constitutional provisions for the security of person and property should be liberally construed.”¹⁹² The term “justice,” then, as found in the Preamble to the Constitution, ought to be interpreted according to its broadest and most general meaning.

¹⁸⁶ Cicero, *De Officiis*, Book I, xlv.

¹⁸⁷ Cicero, *De Officiis*, Book I, xlv-xlv.

¹⁸⁸ Cicero, *De Officiis*, Book I, vii.

¹⁸⁹ Cicero, *De Officiis*, Book I, vii.

¹⁹⁰ *McCulloch v. Maryland*, 17 U.S. 414 (1819).

¹⁹¹ *In the Matter of Strauss*, 197 US 324, 330 (1905).

¹⁹² Chester James Antiea, *Constitutional Construction*, 35 (1982), citing, *Boyd v. U.S.*, 116 U.S. 616, 635 (1886).

The “general welfare” was understood by the founding generation to be but another term for the public, or common, good. The common good, in turn, like justice, was a term generally understood to embrace all of ethics; it was both the measure and standard of private conduct and the supreme end of government. According to the historian Gordon Wood: “to make the peoples welfare - the common good - the exclusive end of government became for the Americans, as one general put it, their ‘Polar Star,’ the central tenet of the Whig faith, shared not only by Hamilton and Paine at opposite ends of the Whig spectrum, but by any American bitterly opposed to a system which held ‘that a Part is greater than its Whole.’”¹⁹³ Wood goes on to write: “no phrase except ‘liberty’ was invoked more often by the Revolutionaries than ‘the public good.’”¹⁹⁴ This common understanding is further revealed by Madison’s statement, in *Federalist #45*, that “it is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued...” But Madison also writes, in *Federalist #51*, that “Justice is the end of government” and that “it ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”

What we have, then, are two terms so exceedingly general that they may be regarded, interchangeably, as encompassing all of public and private morality. Each concept is too general to be embedded within the other. Both are synonyms for what is right and good. Neither concept includes more or less than the other. Nothing can promote justice that does not also promote the common good, or the common good that does not also promote justice. In short, both justice and the common good, being one and the same, may be regarded as the supreme end of the Constitution.

This broad and liberal interpretation of justice and the general welfare is, I suggest, the best among alternatives. Nevertheless, there is a possible objection, however ill-founded, that ought to be addressed. There is a canon of construction, recognized by the Supreme Court, that “in expounding the Constitution of the United States every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”¹⁹⁵ How, then, can justice and the general welfare be understood as essentially equivalent? Would not such an interpretation make one or the other word unnecessary? One option would be to interpret either or both words restrictively. It might be said, for example, that justice refers only to equality, or that the general welfare refers only to economic well-being. To construct either word in such a manner, however, would be directly contrary to those rules of construction requiring broad and liberal interpretation. This creates a quandary as to which rule, or rules, of construction to follow, and which to abandon or discard. But just as one ought to avoid killing an assailant, by first seeking an avenue of escape; so too, it is far better to avoid an inconsistency altogether, by first attempting to reveal it for only an illusion.

¹⁹³ Wood, Gordon S., *The Creation of the American Republic 1775-1787*, 55 (1998).

¹⁹⁴ Wood, Gordon S., *The Creation of the American Republic 1775-1787*, 55 (1998).

¹⁹⁵ *Holmes v. Jennison*, 39 U.S. 540, 570-571 (1840).

Accordingly, it is possible for different words, referring to the same general concept, to each convey a special meaning of its own. Neither word, according to this understanding, would be “unnecessarily used, or needlessly added.” The solution is found by realizing that one idea may commonly be associated with another. More particularly, a word denoting a general concept will commonly be associated with various instances, or ideas, that form part of the popular understanding of that concept. Thus, two words may, according to common usage, have the same general meaning and yet both be expressed for the sake emphasis. This difference in emphasis, far from being a redundancy, allows the general concept to be elucidated, by the incorporation of the associated ideas. In relation to the two most general words of the Preamble, justice and the general welfare, the need for incorporation is particularly important. Not only does this approach allow for a liberal construction without redundancy, but, even more importantly, it is absolutely necessary if the Preamble is to be understood within the context of history and tradition.

When interpreting the Preamble to the Constitution, it should never be forgotten that the Preamble embodies the rhetorical and ideological aims of a revolution. These ideals may be found enshrined within the second paragraph of the Declaration of Independence, where it is written: “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.” What should be apparent, upon comparison, is that neither equality nor the pursuit of happiness is explicitly mentioned in the Preamble. Does this mean that the Constitution was originally designed to promote justice, tranquility, the common defense, the general welfare, and the blessings of liberty - but not equality and happiness? Or did the framers of the Constitution simply forget to include two of the most cherished ideals of the American Revolution? Neither alternative seems credible. A far more likely possibility is that these ideals were originally understood to be embedded within the Preamble as part of the very meaning of the words.

Let us first examine the concept of justice. Any conception of justice must be understood to include the concept of fairness, otherwise known as equity, at the heart of which is the principle of equality. Consider the classical personification of justice, found in so many statues and paintings, in which justice is depicted as a maiden, blindfolded, and holding scales in hand. The blind must view everyone the same; just as justice requires equality before the law. In short, the principle of equality was, and is, so commonly associated with the concept of justice, that it must be implied, or incorporated, wherever the term “justice” may be found.

In the same way, the concept of the general welfare, or common good, was understood by the founding generation to be inseparably associated with the general happiness. After writing, in *Federalist #45*, that the “public good” is the “supreme object to be pursued,” Madison proceeds to use the phrase “public happiness” in a manner synonymous with the “public good”:

It is too early for politicians to presume on our forgetting that the **public good**, the real **welfare** of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it

may be fitted for the attainment of this object. Were the plan of the convention adverse to the **public happiness**, my voice would be, Reject the plan. Were the Union itself inconsistent with the **public happiness**, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the **happiness of the people**, the voice of every good citizen must be, let the former be sacrificed to the latter. [emphasis added]

The association made between happiness and the common good was not limited to Madison. In his *Thoughts on Government*, John Adams writes that “all speculative politicians will agree, that the happiness of society is the end of government, as all divines and moral philosophers will agree that the happiness of the individual is the end of man.”¹⁹⁶ Similarly, in this second inaugural address, Thomas Jefferson expressed his sincere wish that all “public efforts may be directed honestly to the public good.” And in a letter to letter to Monsieur Coray, Jefferson writes that “the equal rights of man, and the happiness of every individual, are now acknowledged to be the only legitimate object of government.”¹⁹⁷

Thus, while both justice and the common good equally embrace the entire province of ethics, it may still be said that equality is more commonly associated with justice, and that happiness is more commonly associated with the common good. The result is that each illuminates an aspect of the other. If equality is a part of justice, then it must also be a part of the common good; just as the promotion of happiness must be a part of justice. Both words add to our understanding of the supreme end of government; and consequently, each has its own peculiar “due force” and “appropriate meaning.” In this way, too, the Preamble may be harmonized with the principles and ideals of the Declaration of Independence. In short, the inclusion of both justice and the general welfare, even if both are broadly construed, is far from a redundancy.

We are thus presented with two exceedingly general ends of government, both broad enough to encompass all other stated aims of government as expressed both in the Preamble and the Declaration of Independence. To form a more perfect union, to insure domestic tranquility, to provide for the common defense, to secure the blessings of liberty, all of these can be said to promote, and in this sense to be a part of, both justice and the common good. The same is true of equality and the pursuit of happiness. It may thus be said that the supreme end and purpose of government is justice, which is to say, the promotion of the common good.

This leads us to the fundamental challenge of constitution interpretation. The supreme act of constitutional interpretation, of interpreting the supreme end of the Constitution, entails nothing less than the development of a theory of justice. The framers of the Constitution, despite their erudition and the prolificacy of their pens, never provided us with a systematic explanation of the nature of justice, either in the Constitution or elsewhere. Nor can it be assumed that the Founding Fathers comprehended, and even less

¹⁹⁶ John Adams, *Thoughts on Government*.

¹⁹⁷ TO MONSIEUR A. CORAY, MONTICELLO, October 31, 1823.

agreed upon, the full implications of the principles they collectively put in force; for the Constitution was a result of compromise. Madison, Hamilton, Adams, and indeed each of the signers, had very different visions of what form, and later, what direction, the new government should take. Furthermore, there never has been, and conceivably never will be, universal consensus regarding the nature and basis of morality. People simply do disagree. Complete reliance upon personal conceptions of justice and morality, therefore, can hardly be the underlying basis for coordinated action. Law must be the practical substitute for unanimity, providing pragmatic consensus where true consensus is lacking.

In the end, of course, it is true justice, true principles of right and wrong, that determine the merit of both law and conduct. Whether the law *ought* to be altered, and whether the law *ought* to be obeyed, are both questions ultimately left for the individual to decide. But whenever one does chose to act contrary to the law on moral grounds, or to interpret the law according to a standard of justice contrary to the terms and spirit of the law, one must recognize that one is acting outside of the law, and where the Constitution is involved, unconstitutionally. To act in such a manner is in the highest degree presumptuous. When interpreting the law according to a personal standard of justice, one is not merely making an unjust or morally neutral law conform to justice; one is substituting one standard of justice for another, the standard of the interpreter for the standard of society. Such presumption is sometimes justified, to be sure, but it can never be a cooperative act of interpretation, founded upon a sincere recognition of the legitimacy of the law.

The dilemma, then, to restate the matter, is that any fully reasoned interpretation of the Constitution must set forth a conception of justice that is itself a product of interpretation. The central task of constitutional interpretation, then, is the *construction* of a conception of justice. But one is not free simply to substitute one's personal standards of morality; one is bound, legally speaking, to a conception of justice that is *constitutional*. In *Sturges v. Crowninshield*, Chief Justice Marshall writes: "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."¹⁹⁸¹⁹⁹ The body of the Constitution may thus be understood as the basis for a particular conception of justice. The various provisions of Constitution may be assumed, or presumed, to be fitted to the end of promoting the common good, and as a consequence, may be regarded as the official elucidation of a unique vision of the nature and content of justice. To be sure, some provisions may be ill adapted to the attainment of their end. Nevertheless, the various provisions found within the body of the Constitution, taken as a whole, define and limit what may be regarded as acceptable interpretation. There are certain features that must be present, and certain concepts that must be incorporated, for any theory of justice to be properly regarded as being in accordance with the Constitution.

¹⁹⁸ *Sturges v. Crowninshield*, (1819).

¹⁹⁹ Interpreting the purpose of the Constitution involves what is referred to in literature as a hermeneutic circle; the purpose of the text influences the interpretation of its words; while its words influence the interpretation of its purpose.

Any interpretive conception of justice will be further reinforced, as well as refined, by those principles and ideals embodied in the common understanding as it has developed through time, which is to say, tradition. It is tradition that transforms Supreme Court rulings into authoritative texts; this transformation finds support not in the explicit language of the Constitution itself, but in the recognition and acceptance, by all branches of government, as well as the people, of the practice and principle of judicial review and *stare decisis*. In the same way, the Declaration of Independence, and to a lesser degree, the *Federalist Papers*, are so interwoven into the fabric of our tradition as to be regarded as authoritative repositories of the aims and ideals of our system of government. All of these sources, therefore, the text of the Constitution itself, Supreme Court precedent, the Declaration of Independence, the *Federalist Papers*, and more generally, tradition, provide the foundation upon which to construct a particular conception of justice.

It should be observed, however, that while there may be one true conception of justice, there are conceivably numerous *constitutional* conceptions of justice. In other words, though there are certain identifiable features that any theory of justice must have in order to be regarded as constitutional, all of these features may be equally present in more than one conception of justice. Thus, the application of *reason* is essential to the interpretive process; for any rational theory of constitutional justice must be founded, at least implicitly, upon sound methodology, providing a basis upon which to distinguish amongst alternative theories. Nor is the application of reason merely an option. Since the earliest days of the Supreme Court, it has been acknowledged that “reasonable construction is rendered necessary.”²⁰⁰

Developing a constitutional theory of justice, therefore, is a constructive act of organization and synthesis. It requires that the various aims and principles of the Constitution not only be identified and explained, but that they be arranged into a single, systematic theory of right and wrong. This process, though creative, is far from arbitrary. The interpreter is bound and limited by the text itself, as well as by precedent, and valuable and persuasive guidance may be sought from the archives of tradition. Reason, too, has its own constraints. As a consequence, constitutional interpretation, at its deepest and most profound level, is a peculiar mixture of interpretive acquiescence and philosophical elaboration. If one is to understand the spirit and purpose of the Constitution, one must faithfully adhere to the tradition that is law, while interpreting that tradition in the light most favorable to reason and rationality. In short, one must develop a constitutional theory of justice.

III

What, then, are the aims of the Constitution which define and limit the very meaning of justice and the common good? That is to say, what are the fundamental elements of constitutional justice? The list of *potential* aims provided in the Preamble includes union, domestic tranquility, common defense and the blessings of liberty. To this list should be added, as we have seen, both equality and happiness. The question then becomes: does

²⁰⁰ *Cohens v. Virginia*, 19 US 264.

the Preamble contain any other implied aims? To answer this question, we will look at both the Declaration of Independence and the Federalist Papers.

The second paragraph of the Declaration of Independence states:

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... [emphasis added]

What we have here are a number of values, or principles, traditionally recognized as the proper foundations of government. Life, liberty, and happiness are here acknowledged as the ends for which governments are instituted, and as such, ought to be accorded a degree of primacy. That these ends are properly regarded as supreme, or foundational, is further supported by their recognition as being self-evident truths. In the words of Hamilton: “there are certain primary truths, or first principles, upon which all subsequent reasonings must depend.”²⁰¹ In other words, self-evident truths, by definition, can never be derivative, or secondary. Life, liberty and happiness, therefore, cannot, in accordance with the Declaration of Independence, be regarded as the means to anything else. The same, too, may be said of the equality of all individuals, which, like the value of life, liberty and happiness, is declared to be a self-evident truth. These supreme ends, therefore, cannot be regarded as the means to attaining justice; they are the very essence of justice.

Life

The value of life, like happiness and equality, is not explicitly mentioned in the Preamble. Nevertheless, the promotion of life is implicit not only as essential to the general welfare, but also as essential to the concept of a more perfect union. This connection can be found in the *Federalist Papers*. Although the *Federalist Papers* do not provide a full or systematic explanation of the supreme ends of the Constitution, they do provide guidance in two ways: first, by providing deeper reasons for the promotion of some constitutional aims; and secondly, by identifying a small number of aims as being of primary importance. The first of these provides indirect support for rejecting the primacy of certain constitutional objectives. Where a constitutional objective is reformulated as the means to achieving other ends, it may be said that the objective was not originally understood as being of primary significance. The second form of guidance, on the other hand, provides direct support for the selection of particular objectives as supreme ends.

That being said, union is regarded in the *Federalist Papers* as necessary for the prevention of war and promotion of economic prosperity.²⁰² In relation to war, more particularly, it is argued that union promotes safety, peace, tranquility, life, liberty and property.²⁰³ Hamilton writes, in *Federalist #8*, that “safety from external danger is the most powerful director of national conduct.” In *Federalist #9*, Hamilton writes that “a

²⁰¹ Hamilton, Alexander, *The Federalist*, No. 31.

²⁰² For a discussion on the economic consequences of union, see *Federalist #11-14*.

²⁰³ Hamilton, Alexander, *The Federalist*, No. 8.

FIRM Union will be of the utmost moment to the peace and liberty of the States, as a barrier against domestic faction and insurrection.”

The conclusion to be drawn from these considerations is that union, in and of itself, is not one of the supreme ends of the Constitution; for union is regarded solely as a means to other ends. This conclusion is further supported by Madison’s statement, previously quoted, that “were the Union itself inconsistent with the public happiness, [my voice] would be, Abolish the Union.”²⁰⁴ Nor is the avoidance of war, in and of itself, one of the supreme ends of the Constitution. The same may be said of the common defense. Both defense and the avoidance of war promote, as their ends, life, safety, peace, tranquility, liberty, and property. From this list, safety may be removed, as having the same ends, and being of a similar degree of generality, as defense and the avoidance of war. The effect of all of these, the promotion of defense, safety and the avoidance of war, is, first and foremost, the protection and furtherance of life. Peace, too, may be removed, as being but another word for tranquility. This leaves us with a revised and updated list of potential supreme ends, which is to say, fundamental elements of justice. These include domestic tranquility, the blessings of liberty, happiness, equality, life, and the protection of property and economic prosperity.

The authors of the *Federalist Papers* were in general agreement on the primary importance of life. In *Federalist #43*, Madison refers to “the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.” Hamilton, as we have seen, recognized that safety is “the most powerful director of national conduct.”²⁰⁵ And Jay recognized safety as the first object of a “wise and free people.”²⁰⁶ In the first passage, by Madison, safety and happiness are regarded as part of the great and transcendent principle of self-preservation. In all three passages, by obvious implication, we find support for the primary importance of the value of life.

Happiness

In his famous discussion on the problem of faction, found in *Federalist #10*, Madison writes:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

When read in isolation, this passage may seem to indicate, by implication, that Madison viewed the protection of the unequal possession of property as the first object of

²⁰⁴ Madison, James, *The Federalist*, No. 45.

²⁰⁵ Hamilton, Alexander, *The Federalist*, No. 8.

²⁰⁶ Jay, John, *The Federalist*, No. 3.

government. A more comprehensive reading, however, reveals that Madison was not endorsing unequal distribution as an ultimate aim. The accumulation of property was mentioned, instead, as one link in a chain of reasoning. To paraphrase Madison, individuality, and the pursuit of individual goals, leads to the unequal distribution of property, which leads to a diversity of interests, which leads, ultimately, to conflict. It is this conflict that Madison refers to as “faction.” In his own words, faction is defined as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”²⁰⁷ The regulation of conflict, in turn, is “the principal task of modern legislation.”²⁰⁸ Thus, the protection of the first object of government, in Madison’s view, inadvertently gives rise to all of the dangers inherent to faction.

What, then, is the first object of government? It is not, as a strict reading of the words might suggest, merely the protection, or promotion, of diverse faculties. This is made clear by a careful reading of Madison’s discussion, in *Federalist #10*, regarding the methods for removing faction:

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency. The second expedient is as impracticable as the first would be unwise.

Liberty is here regarded as essential to the first object of government; that is to say, liberty is essential to the *exercise* of our diverse talents and capacities. The freedom to exercise one’s faculties, in turn, entails the freedom to acquire property according to personal predilection; and this, in turn, entails the freedom to form and pursue goals and interests.

What should be conspicuous to the student of history is that Madison departs from John Locke by citing the protection of human faculties, as opposed to property, as the first object of government; for according to Locke, “the great and chief end... of men uniting into commonwealths, and putting themselves under government, is the preservation of their property.”²⁰⁹ A similar adaptation can be found in the Declaration of Independence, where Thomas Jefferson lists the unalienable rights of life, liberty and the pursuit of happiness, corresponding to John Locke’s list of natural rights as including life, liberty and estates.²¹⁰ The connection between these two concepts, between the “diversity in the

²⁰⁷ Madison, James, *The Federalist* No. 10.

²⁰⁸ Madison, James, *The Federalist* No. 10.

²⁰⁹ John Locke, *Second Treaties on Civil Government*, Chapter IX sec. 124.

²¹⁰ John Locke, *Second Treaties of Civil Government* Chapter VII sec. 87.

faculties of men” and the “pursuit of happiness,” each replacing a concept more directly identified with wealth, should not be missed. The emphasis, as argued above, should be taken off the unequal accumulation of property, and placed upon the freedom to exercise one’s faculties – and the freedom to exercise one’s faculties necessarily implies the freedom to develop one’s talents, to earn a living as one sees fit, to pursue one’s goals, to pursue happiness. Under this analysis, the accumulation of property, or economic prosperity, is best regarded as a means to promoting happiness.²¹¹

That the first object of government is the promotion of happiness is further supported by Madison’s discussion on the “supreme object” of government, found in *Federalist #45*. Though this passage has already been quoted, it will be useful to reconsider its words within a different context:

It is too early for politicians to presume on our forgetting that the **public good**, the real welfare of the great body of the people, is the **supreme object** to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the **public happiness**, my voice would be, Reject the plan. Were the Union itself inconsistent with the **public happiness**, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the **happiness** of the people, the voice of every good citizen must be, let the former be sacrificed to the latter. [emphasis added]

Not only is the public good clearly identified as the supreme object of government in this passage, but the concept of happiness is here regarded as in some way interchangeable with the concept of the good; and as the common good is the broader concept, it is fit to regard the promotion of happiness as a part of the common good. To place this within the context provided above, it may thus be said that the principle task of government is the resolution of conflict; that this conflict ought to be resolved in a manner conducive to the common good; that the promotion of the common good is the supreme object of government; and that the common good can be understood to include the pursuit of happiness as one of its foundational parts.

What, then, is happiness? We have already seen that an argument can be made for equating happiness with the pursuit of privately formed goals, which is to say, the satisfaction of desires. This interpretation makes sense of Madison’s claim that liberty is “essential to political life.”²¹² Freedom is not merely another end of government; it is an essential prerequisite to the pursuit of happiness. Without the freedom to make meaningful choices, to pursue goals, there can be little room for the satisfaction of desires, little room for happiness. Liberty, in this sense, can be said to promote many

²¹¹ According to historian Paul Rahe: “In framing and approving the Declaration of Independence, their predecessors in the Continental Congress merely shifted the focus from the possession of property to something less tangible but more fundamental – for, like Bacon, Hobbes, and Locke, they recognized three critical facts: that man’s “pursuit of happiness” nearly always includes a quest for “comfortable Preservation,” that the latter dictates and thereby justifies human acquisitiveness by means of labor, and that the protection of labor requires the protection of property as well.” RAHE, PAUL A., *REPUBLICS ANCIENT AND MODERN*, 559-560 (1996).

²¹² Madison, James, *The Federalist No. 10*.

“blessings;” but it does not do so a *means* to other ends, but as an *essential part* of happiness. This interpretation also makes sense of the special treatment accorded, by the Supreme Court, to the freedom of belief. Among the various rights protected by the Constitution, the freedom of belief alone is treated as absolute. This can be accounted for by recognizing that the satisfaction of desires is one of the supreme ends of the Constitution; for desires are based, in part, upon beliefs. Thus, when governments compel beliefs, they are not merely thwarting the satisfaction of desires; they are, instead, interfering with the very formation of desires themselves. To that extent, individuals, coerced or forcefully manipulated into particular beliefs, are stripped of their powers of agency and removed from meaningful participation within the political community.

This leads to an even stronger argument in favor of equating happiness with the satisfaction of desires. The Constitution of the United States is founded upon the principle that governmental legitimacy is derived from the consent of the people. In the Declaration of Independence, it is stated that governments derive “their just Powers from the Consent of the Governed...” Similarly, in *Federalist #22*, Hamilton writes: “the fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.” And indeed, the Constitution begins with the words “We the People.” Thus, if the supreme object of government is the promotion of the common good, and the source of all legitimate authority is consent, then there must be some connection between consent and the common good. This connection is provided by the only reason consent is ever voluntarily provided, namely, the satisfaction of desires. Whatever else consent as the source of legitimacy might mean, it necessarily implies that the desires and choices of all members of society ought to have a proper degree of meaningful influence. Meaningful influence, in turn, requires, at the very least, that each individual be allowed to form his or her beliefs and desires without compulsion.

Our constitutional conception of happiness can be further developed by consideration of another constitutional end, namely, domestic tranquility. Why, should tranquility be promoted? Samuel Johnson defined tranquility, among other things, as “freedom from perturbation.” Perturbation, in turn, may be regarded as an unwelcome disruption, which is itself a type of suffering. Domestic tranquility, more particularly, may be understood to include, among other things, freedom from the various harms and suffering incident to warfare and civil strife. This leads to an ancient debate. The Stoics regarded virtue as the entirety of happiness and suffering only as something “to be avoided.” Aristotle, on the other hand, maintained that freedom from suffering is an indispensable condition to happiness,²¹³ while Cicero maintained that freedom from suffering is a part of happiness.²¹⁴ It is this latter position that was adopted and transformed, through the influence of Bacon and Montaigne, by adherents to the liberal tradition,

²¹³ Introduction to *De Finibus Bonorum et Malorum* by Cicero, xxviii-xxix.

²¹⁴ *De Finibus* IV vi-xi (323, 331).

exemplified by Locke and Montesquieu.²¹⁵ Thus, the framers and ratifiers of the Constitution were most influenced by the view that happiness is promoted by the reduction of suffering. This accords well with the view of happiness as the satisfaction of desires; for if happiness is understood as the satisfaction of desires, then freedom from frustration, which is to say, tranquility, must necessarily be regarded as a part of happiness.

Moreover, in *Federalist #22*, Hamilton writes: “the fundamental maxim of republican government...requires that the sense of the majority should prevail.” Hamilton continues: “if a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good.”²¹⁶ Similarly, in *Federalist #58*, Madison writes:

It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences.²¹⁷

These passages confirm that the Constitution, by establishing a republican form of government, necessarily endorses and secures rule by the majority of those who vote. In other words, the Constitution, by its very nature, is designed to maximize the satisfaction of the desires and interests of the greatest number of individuals. It must be recognized, therefore, that the Constitution is designed, at least in part, to secure the greatest happiness for the greatest number. To this end, as expressed by Madison in the quote above, minorities are expected to make equitable sacrifices.²¹⁸ One of the underlying principles of the Constitution, then, is that, all else being equal, the satisfaction of the desires of all people ought to be promoted to the greatest extent possible. Government is to be subservient to the will of the people. Consent is given, and votes are made, in furtherance of wishes and desire, dreams and hopes.

Equality

²¹⁵ See Rahe.

²¹⁶ Hamilton, Alexander, *The Federalist*, No. 22.

²¹⁷ Madison, James, *The Federalist*, No. 58.

²¹⁸ Madison, James, *The Federalist*, No. 58.

Madison's discussion on the problem of faction demonstrates that majorities, too, are expected to make sacrifices. The problem of faction, for Madison, is how "to secure the public good and private rights" against the whims and injustices of the various factions found within society, while at the same time preserving "the spirit and the form of popular government."²¹⁹ Thus, while the Framers sought to establish a popular form of government, based upon the consent and will of the people, they were also keenly aware of the dangers and pitfalls associated with popular votes. The problem, in other words, is how to protect society as a whole, and minorities in particular, from the votes of majorities concerned only with their own interests. When a faction consists of a minority only, the problem of faction does not arise; for the pernicious votes of minorities are easily diluted and overcome by the votes of majorities.²²⁰ When, on the other hand, a faction consists of a majority, the form of popular government itself "enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."²²¹ Justice thus demands that majorities do not, in the furtherance of their own interests, unduly trample upon the rights and interests of minorities.

It for this reason, due to the dangers inherent to majority factions, that such a strong distrust of pure democracy as form of government is expressed in the *Federalist Papers*. In *Federalist #10*, Madison writes:

... a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.²²²

The problem of faction is thus the problem of democracy. The remedy, according to Madison, is provided by the republican principle, whereby governmental decisions are made not by citizens themselves, but by representatives elected by vote.²²³ The republican form of government provides protection, first, by the delegation of power, and secondly, by allowing for an extended and more numerous body of citizens.²²⁴

The effect of the delegation of government is, for Madison, "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose

²¹⁹ Madison, James, *The Federalist*, No. 10.

²²⁰ Madison, James, *The Federalist*, No. 10.

²²¹ Madison, James, *The Federalist*, No. 10.

²²² Madison, James, *The Federalist*, No. 10.

²²³ Madison, James, *The Federalist*, No. 10.

²²⁴ Madison, James, *The Federalist*, No. 10.

wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”²²⁵ This is not to say that Madison failed to recognize the danger of corruption and bribery. To the contrary, Madison writes: “men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people.”²²⁶ The corruption of leaders, too, was recognized by Madison as a potential danger, requiring its own unique remedies. Among these remedies, is the system of checks and balances discussed by Madison in *Federalist #51*.

The chief advantage of a republic for Madison, however, is that it allows for a greater number of citizens, and a larger extent of territory, than does a pure democracy.²²⁷ The anticipated result, strange as it might seem, is an increase in the number of factions and interests. The hope is that by increasing the number of citizens, and therefore the number of competing factions and interests, the power of any one faction to act contrary to the public good will become greatly diminished, due to fragmentation and diffusion. Thus, by extending the sphere of government, “you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”²²⁸ Similar protection is provided by the division of power between the national and state governments, which is to say, federalism.

There is another remedy to the problem of faction, not mentioned in *Federalist #10*, that has proven to be one of the greatest bulwarks against the oppression and persecution of minorities. This is the enumeration of rights protected by an independent judiciary. The original Constitution did not contain a bill of rights.²²⁹ Indeed, in *Federalist #84*, Hamilton specifically argued against the inclusion of a bill of rights. This should not be understood, however, as a rejection of rights in general, or the rights of minorities in particular. Hamilton’s reasoning, made prior to ratification, was that a bill of rights would be unnecessary, if not potentially dangerous. The power of government under the Constitution would arise from the people. Moreover, the government would have no more power than was specifically granted. The question for Hamilton was “why declare that things shall not be done which there is no power to do?”²³⁰ The danger, Hamilton feared, was that a bill of rights “would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.” What Hamilton feared here is not the inclusion of exceptions, in and of themselves, but the abusive interpretation of exceptions. Hamilton feared, and not

²²⁵ Madison, James, *The Federalist*, No. 10.

²²⁶ Madison, James, *The Federalist*, No. 10.

²²⁷ Madison, James, *The Federalist*, No. 10.

²²⁸ Madison, James, *The Federalist*, No. 10.

²²⁹ It should be mentioned that the main body of the Constitution does contain a number of scattered guarantees. Article I, section 9, for example, provides that the writ of Habeas Corpus shall not be suspended except in cases of rebellion or invasion.

²³⁰ Hamilton, Alexander, *The Federalist*, No. 84.

without justification, that exceptions would provide the legal vehicles for the corrosion and diminishment of rights. (It should be noted that the need to provide for exceptions to rights, if included, is simply taken for granted.) Hamilton concluded his argument by claiming that “the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” In other words, the Constitution is designed to protect rights by the structure and form of government it establishes, by providing certain immunities, and by specifying certain modes of procedure. Be that as it may, one of the first steps of the new government was to adopt, in 1791, the first ten amendments to the Constitution, otherwise known as the Bill of Rights.

That being said, the very recognition of the problem of faction is a rejection of the principle of the greatest happiness for the greatest number as the sole and complete standard of right and wrong. For strict utilitarians, the votes, or decisions, of a majority are always right when made in furtherance of the best interests of that majority; the conflicting interests of minorities are regarded as entirely outweighed, and therefore, insignificant. Hence, for the strict utilitarian, there is no problem of faction. The Constitution, on the other hand, is concerned with the rights and interests of both majorities and minorities.

It should be noted that the Constitution originally allowed for, and even created, certain inequalities. The most obvious and infamous example is the three-fifths compromise, whereby only three out of five “other persons” were to be counted for purposes of taxation and representation. Similarly, the original Constitution contained no protection for the right of women to vote. These were indeed imperfections. It must be remembered, however, that the Constitution was a product of compromise. In *Federalist* #85, Hamilton writes: “...the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit.” What is important, for our purposes, is to identify the ideals and aspirations upon which the Constitution is based. The ideal, in this case, as set forth in the Declaration of Independence, is that “all men are created equal.” And it is in accordance with this tradition that the principle of equality has been progressively realized and enforced: slavery has been abolished; civil rights have been extended and increased; the right of women to vote is recognized and protected; and every person is entitled to equal protection of the law.

Constitutional justice, then, must be understood as a concept encompassing the rights and interests of all individuals. This requires a balancing of interests. According to a strict theory of utilitarianism, the proper balance of competing interests will *always* favor the interests of majorities. The Constitution, on the other hand, endorses an alternative. By establishing a republican form of government, the Constitution does indeed *tend to* favor the interests of majorities; but the Constitution also places *limits* upon the furtherance of majority interests, thus tilting the balance, in some degree, in favor of minorities. To make sense of this, we must introduce a principle to compete with the principle of the greatest happiness for the greatest number - and this principle is equality. In an ideal world, the total amount of happiness would be as great as possible. This is our first

principle. The second principle is that, in an ideal world, everyone would be equally happy. The great tragedy is that these two principles can, and often do, conflict. The utilitarian solution is simply to ignore the principle of equality. The solution offered by the Constitution is to seek a balance between the promotion of equality and the promotion of happiness.

The concept of life is interconnected with happiness and equality in that, without life, there can be no justice; that is to say, life is a prerequisite to both happiness and equality. Be that as it may, unlike liberty and tranquility, life cannot be regarded as only a part of happiness; for the principle of life can be brought into *fundamental* conflict with both the principle of happiness and the principle of equality. There is, for example, an inherent tension between the growth of populations and the consumption of limited resources. For another example, in relation to the Constitution, Article 1, section 9 allows for the privilege of Habeas Corpus to be suspended in times of rebellion or invasion (when safety, and therefore, life, is most at risk). In other words, there is a potential conflict between *quality* of existence (happiness) and *quantity* of existence (the number of individuals actually alive). The common good can thus be regarded as including the concepts of life, happiness and equality; and as all three of these principles can, and often do, conflict, the addition of yet another constituent concept can be inferred, namely, the principle of balance. The essence of constitutional justice, accordingly, can be regarded as the promotion of a proper balance of the principles of life, happiness and equality.

Conclusion

There is something unsettling about the idea that right and wrong are founded upon the satisfaction of desires. Morality is supposed to require us to sacrifice our desires, not indulge them. Morality is supposed to appeal to eternal and transcendent principles, beautiful to contemplate, and impossible to comprehend. But it is we that are beautiful. We breathe meaning and value into everything we think about, and in doing so, we ourselves become valuable. Valuation, importance, is a psychological phenomenon – nothing is valuable unless someone actually values it. We are valuable because we value ourselves, and more importantly, each other. Morality does require us to sacrifice our desires, not because there is something more important, but because there are many different people with many different desires. Justice is not merely getting what we want; it is the application of wisdom, of rationality, in attaining a proper balance amongst competing interests.

By equating justice, in part, with the satisfaction of desires in accordance with reason, our most cherished beliefs and ideals are explained and made comprehensible. It is the link that binds our many otherwise disparate platitudes. Liberty is not merely an isolated good; it is absolutely necessary to the formation of desires and the pursuit of happiness. Without the freedom of belief, the very source of meaning, the equal importance of each individual, is denied and destroyed. Without the freedom of speech, desires go unnoticed and unrecognized, making it impossible for them to be given rational and due consideration within the community. Without the freedom of association, the power to

pursue and protect collective interests is effectually eliminated. Without the right to privacy, our ability to pursue private interests is severely curtailed.

Fundamental rights and freedoms, therefore, are not simply a collection of various principles, unrelated and without deeper meaning. They are principles relating to circumstances, of actions and inactions, tending to promote a proper balance of life, happiness and equality most of the time. They cannot be discarded without undermining the very foundation of justice.

Tolerance, too, is inherent to an understanding of justice as a balance of life, happiness and equality. What people desire often varies significantly from culture to culture. As a consequence, which particular actions tend to promote the common good will vary across different groups of like-minded individuals. In other words, cultures, within limits, may be regarded as having consented to different sets of rules. And yet, it may still be said that a particular law or course of action tends to promote a proper balance of life, happiness and equality *under the circumstances* – where one of the circumstances is the desires people actually do have. But there are some actions for which even consent cannot be a cure; for consent, under such circumstances, would never be rationally given. Both tolerance and confidence can thus be maintained, consistently, within the theoretical framework of constitutional justice.

Even our system of government can thus be explained. The Constitution is understood to derive its legitimacy from the consent of the governed – and consent is only ever freely given to bring about the aims, the desires, of individuals. Democracy, too, is a principle firmly grounded upon desire, being based upon the will of the majority. Similarly, capitalism, as classically formulated, is based upon the idea that the common good is promoted by individuals rationally seeking their own interests, their own desires.

Reason, which is to say, rationality, is the avowed foundation of the United States Constitution; the mantra of natural law; the guiding principle of modern economics, and the basis of all modern scientific endeavors. The concept of rationality, in furtherance of the common good, thus provides a common ground, uniting legal tradition, constitutional principles, and modern attitudes.