Moral Facts and Constitutional Interpretation

Alonzo Fyfe (20180501)

Introduction

In the wake of multiple mass shootings, we once again enter a debate over how to interpret the Second Amendment to the US Constitution.

> *A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed*

I am going to argue that the phrase, "right of the people to keep and bear arms" refers to an independent moral entity. Determining the properties of this right – and even its existence – does not involve looking at the beliefs of those who wrote the amendment. Instead, it involves determining what is true of the right itself.

By analogy, let us assume that a system of permits for activity in the woods near a city contains the following provision:

> The ecological health of the forest being essential to the quality of life in our community, no permits will be granted for activities harmful to the unicorn population.

We would not determine whether an activity is or is not harmful to the unicorn population by looking at the beliefs of those who wrote the law. Nor could such a law be interpreted as creating unicorns where they do not exist. Nor would such a law require that we pretend that unicorns exist if they do not. The proper way to determine what such a law prohibits or permits would be to determine what, in fact, is harmful to unicorns. If nothing in fact can harm a unicorn, then no permit can be denied on the basis of this law.

The task ahead is to support this analogy between the unicorn law and the Second Amendment and examine its implications.

District of Columbia v. Heller

An important context for this argument will be Justice Antonio Scalia's majority opinion in the Supreme Court decision *District of Columbia v. Heller*. Scalia, delivering the opinion of the court devoted considerable space to understanding the terms "of the people" and "kept and bear arms" in terms of what it meant to the authors of the Second Amendment. However, I will be arguing that he did not give sufficient or proper attention to the meaning of the term "right".

Instead of interpreting "right" as referring to a moral fact that is independent of human construction, which is the way the authors of the Second Amendment understood the term, he referred to it as a pre-existing human construct.

Scalia wrote:

> *[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in United States v. Cruikshank, 92 U. S. 542, 553 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner*

> *dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed . . . .”*[1]

He then went from here to point to legal facts prior to the passage of the Second Amendment as if these historical facts established the existence of such a right. For example, he pointed to the historical fact that attempts to disarm Protestants in England in the late seventeenth century motivated Protestants to obtain political assurances that they will not be disarmed.

Scalia provides us with the wrong type of evidence. What he needed instead was evidence that such a right existed independent of human constructs. This invites the question of what such evidence would look like. Hint: the authors of the Second Amendment thought they were self-evident truths. However, the question of how to determine the properties of this natural right is independent of the question of whether the Second Amendment refers to such a right. Here, I am only aiming to argue that it refers to such a right.

The Plan

Since I am going to argue that the “right” in the Second Amendment refers to an independent moral fact, I am going to start with a discussion of the relationship between law and morality. I will discuss the possibility of an artificial bridge from positive law to morality that people create by putting references to morality in the law.

I will then argue that the Second Amendment creates such a bridge by referencing to an alleged independent moral fact. Because it refers to an independent fact, what is true of the right to keep and bear arms is true of the right as it exists in the realm of moral fact.

I then want to examine the implications of this type of interpretation by looking at the special case where a right referenced actually does not exist in the realm of the right and the good. I am not going to discuss whether the right to keep and bear arms exists, but I will expose the possibility that, if it did not exist, then, like the law against harming unicorns, it could not be violated by any law passed by Congress.

The Relationship between Law and Morality

My first task is to discuss the relationship between law and morality.

In the philosophy of law, the distinction between law and morality comes up in the distinction between legal positivism or natural law theory. Legal positivism holds that we determine what is and is not illegal by looking (solely) at the social norms and facts. Natural law theory, on the other hand, says that the law includes, at least in part, an examination of moral facts. The main distinguishing feature is understood in terms of the slogan, “unjust law is no law at all”. The legal positivist says that this is nonsense. The natural law theorist holds that this is true. The legal positivist would argue that the Fugitive Slave Law of 1850 was valid law. The natural law theorist would deny that legislators were powerless to create an obligation on the part of blacks to be slaves, or on the part of others to return runaway slaves to their owners.

I will begin by arguing that this is a false choice. We do not need to choose between positive law and natural law theories – or create some hybrid theory that captures the best of each. Both sets of claims are perfectly valid. The Fugitive Slave Law of 1850 was law, but it did not create any such obligations. The mistake is in thinking we must choose between these two theories comes from thinking that that

[1] District of Columbia v. Heller, 554 U.S. 570 (2008), p. 19.

they are asking (and answering) the same questions. When we properly distinguish the two questions, we can start to get a better idea of the distinction between law and morality.

Anthropological vs Philosophical Morality

In discussing morality, I often encounter people who confuse what I call an anthropological/sociological concept of morality with what I have generally called "philosophical morality".[2]

The anthropological/sociological concept of morality is descriptive. It asks what people believe to be right or wrong in a particular culture at a particular place and time.

Philosophical morality, as I am using the term, asks, "What is right or wrong in fact, if anything?"

We can see this distinction in how we might answer the question, "Was slavery morally permissible in South Carolina in 1850?"

If we answer using the anthropological/sociological concept of morality, the answer is "Yes, it was." The culture of the time was one in which, if you were to observe events in South Carolina in 1850, the best explanation of those events would include the fact that the people in that culture substantially held slavery to be morally permissible.

If we answer under the concept of philosophical morality the correct answer would be, "No, it was not."[3] The people in South Carolina in 1850 were wrong about the permissibility of slavery. If there was one individual in Charleston, South Carolina, looking down from his apartment where he could see slaves being bought and sold, and he were to say, "That's just wrong," he would be correct. Those who disagreed with him – even if everybody else disagreed with him – were mistaken.

The situation appears to be one in which we see two different answers to the question, "Was slavery morally permissible in South Carolina in 1850?" From one perspective, this is true. From another, it is false. So, one might think we must choose which perspective is accurate.

However, we are asking and answering two different questions. The anthropological/sociological question is, "Did the people in South Carolina in 1850 generally believe that slavery was morally permissible?" The answer to that question is "Yes." The other question asks, "Was slavery as practiced in South Carolina in 1850 right and good?" The answer to that question is "No." We are not required to choose which of two conflicting answers to the same question is correct. We have two different answers to two different questions.

These two questions identify two different categories of inquiry. One concerns the norms and facts of a particular culture. Another concerns the right and the good. These are different questions with different answers.

Cultural norms and facts	The right and the good

[2] I am tempted to call this "normative law". However, in the next section, I will add anthropological/sociological normativity to anthropological/sociological law.

[3] Of course, some philosophers would not agree with this answer. Unfortunately, I do not have the space to address those considerations here. I am going to assume that there are moral facts and that, among those moral facts, there is the fact that slavery is immoral. For an account of what I take to be moral facts, you can find a description at http://desirism.com/morality-from-the-ground-up.

Anthropological vs Natural Science

We see this same distinction even in the hard sciences. We can talk about ancient Egyptian astronomy, Medieval medicine, and Newtonian physics, or we can talk about what is true of the universe we live in.

We can state, for example, "During the Middle Ages, the Earth was at the center of the universe." If we interpret this in the anthropological/sociological sense, this is a true statement in that people living in the Middle Ages almost universally believed that the Earth was the center of the universe.

However, at no time was the earth, in fact, at the center of the universe. The "beliefs of a culture at a place and time" interpretation of the question gives us a different answer from the "fact of the world" interpretation of the question. Yet, the fact that we get different answers does not force us to choose between the two interpretations. Both answers are correct, once we understand that each answer belongs to a different question.

Positive Law vs. Justice

Now, let us look at the statement, "In 1850, slavery was legal in South Carolina."

The anthropological/sociological answer to this question – and the answer that legal positivists would want to give – is that this is a true statement. If you look at the cultural facts applicable to South Carolina in 1850, one of those cultural facts is that the culture substantially agreed that slavery was legal.

The other perspective on slavery interprets the proposition, "In 1850, slavery was legal in South Carolina," as saying, "In 1850, in South Carolina, slavery was just and binding on the conscience." This is a false statement. The slave who had an opportunity to escape in 1850 had no obligation binding on the conscience to stay on the plantation. The northern farmer who found an escaped slave hiding in his toolshed should have felt no twinge of conscience giving the refugee a few good meals, an opportunity to clean up, some place comfortable to sleep, and help her find her way to Canada with a full sack of food and some cash.

I will identify these two areas of study as follows:

Positive law	Just and "binding on the conscience"

The legal positivists are right when they said that whether the Fugitive Slave Law was law is one question (and is certainly was), and whether it was just and binding on the conscience (which it certainly was not).

I do not want to be interpreted as reducing legal positivism to the anthropological/sociological view as described here, and to be reducing natural law theory to the moral fact view. Instead, what I would say is that legal positivism borrows much of its intuitive appeal from the anthropological/sociological perspective, and natural law theory borrows many of its intuitions from the moral fact perspective. Coming up with an account that fits the intuitions of both perspectives is not likely to happen.

Now, rather than choose between legal positivism and natural law theory, I want to separate the descriptive study of law from its prescriptive component.

Areas of Inquiry

Respecting the distinctions that I have made above, I am not going to discuss the relationship between law and morality in terms of the traditional debate between legal positivism and natural law theory. Instead, I am going to recognize four different areas of inquiry and the relationships between them.

Cultural norms and facts	The right and the good
Positive law	Justice and "binding on the conscience"

The Separation Theses

One of the battlegrounds for the conflict between legal positivism and natural law theory is *the Separation Thesis*.

The Separation Thesis states that there is a distinction between law and morality. In the words of John Austin:

> *The existence of law is one thing; its merits or demerits another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed test, is another and a distinct inquiry.*[4]

If we allow the two categories of study that I defended above, then we no longer have a single separation thesis. We have four separation theses.[5]

1. The separation, if any, between justice and the right and the good.
2. The separation. If any, between positive law and cultural norms and facts
3. The separation, if any, between justice and cultural norms and facts
4. The separation, if any, between positive law and the right and the good.

Of these, the last is the most important for my purposes. However, to understand Separation Thesis (4) we should take a look at the other categories and see what is true of them. This should help us avoid possible sources of confusion.

Separation Thesis (1): The separation, if any, between justice and the right and the good

There is little reason to doubt that there is a strong connection between the just, on the one hand, and the right and the good on the other. I will take as given that Separation Thesis (1) is false.

Separation Thesis (2): The separation. If any, between positive law and cultural norms and facts

I want to spend some time on this separation thesis since the distinction between Separation Thesis (2) and Separation Thesis (4) is a potential source of significant confusion.

---

[4] Austin, John, *The Providence of Jurisprudence Determined,* https://archive.org/stream/provincejurispr02austgoog#page/n5/mode/2up, Accessed April 18, 2018.

[5] In addition to the four Separation Theses already mentioned, we have room for two more.

5. The separation between cultural norms and facts and the right and the good
6. The separation between positive law and justice

All of human history tells of the presence of a gap between the morality of any given culture and moral fact. In fact, we have never had a morally perfect society. Nor has any society ever built legal system in perfect agreement with the natural moral law. While no society has yet promoted a perfect moral and legal system, if a society did not get at least some facts right in terms of morality and justice it likely would not have survived more than a few moments.

Legal positivism clearly states that what is law in a culture at a time depends on cultural norms and facts. Consequently, a separation thesis between cultural norms and facts and positive law appears to be false at the start.

However, this still leaves us with two questions to answer. First, does positive law depend exclusively on cultural norms and facts? Second, do those cultural norms and facts include cultural moral attitudes?

I will answer the first question – the question of whether positive law depends exclusively on cultural norms and facts – when I address Separation Thesis (4). There, I will examine the possibility that it also depends, in part, on facts about the right and the good.

Here, I still want to say some things in response to the second question – the question of whether positive law depends on cultural moral norms.

One possible interpretation of legal positivism says that laws depend on cultural norms and facts, but not cultural moral attitudes. Positivism in this strong sense denies all connections between law and morality, even the morality of a culture. If a theory includes reference even to cultural moral attitudes, then, on some accounts, it would be a natural law theory.

Ronald Dworkin appears to have this strong thesis in mind when he argues against legal positivism. He presents his claim that legal practice also includes the application of certain rules or principles as an objection to legal positivism.[6] However, the method he suggests for determining these principles – making the most sense of prior decisions – puts those principles in the realm of cultural moral attitudes. Leslie Green also criticizes legal positivism by defining it as a thesis that denies even a connection between positive law and what he calls "positive morality" – where positive morality are the moral attitudes of a culture at a time. [7]

Regardless of whether we agree that legal positivism denies even a reference to cultural moral norms, or whether we call theories with such a connection a type of natural law theory, there appears to be a strong connection between positive law and positive morality. I find it difficult to even conceive of a society whose members aim to create a system that completely ignores that society's own moral attitudes. This would be a society whose members say, "It does not matter that our law is – by our own standards – completely immoral. It's not as if morality tells us what to do."

Those who defended slavery in 1850 did so not only on legal grounds, but on the basis of their cultural moral attitudes. The majority decision of *Dred Scot vs. Sandford* makes explicit reference not only to social facts and customs but cultural moral norms.

> *[Black Africans imported as slaves] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of*

[6] Dworkin, Ronald, 1978, *Taking Rights Seriously*, London: Duckworth.
[7] Green, Leslie, "Positivism and the Inseparability of Law and Morals", *83 New York University Law Review*, 1035 (2008).

> *disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.* [8]

Whether a society postulates a warlord's belief that might makes right, a divine right of kings, a moral rule that the king's first-born son was the legitimate heir, the Lockean theory of private property, the Rousseauian general will, the Marxist dictatorship of the proletariat, or decisions made behind a Rawlsian veil of ignorance, societies ground their laws on their moral attitudes.

Imagine a judge who must decide the case before her. Let us assume that the judge thinks that she ought to judge the case according to what the law actually says and that she ought not to let her moral opinions influence her decision. The judge fails before she even begins. Her first decision involved answering a moral question – whether she morally ought to apply the law as written and morally ought not to allow her moral principles to impact her decision. This decision cannot strictly come from the law itself because she must answer it before she even considers the law itself.

For these reasons, I am going to deny Separation Thesis (2). There is a very strong connection between positive law and positive morality. I will leave it to others to decide whether this is a type of legal positivism or a type of natural law theory.

Separation Thesis (3) The separation, if any, between justice and cultural norms and facts

I am adding this for the sake of completeness, though I do not need to spend much time on it.

There is no natural law theorist who asserts that natural law – what is just – does not depend, in part, on social facts. Thomas Aquinas drew the analogy whereby reason may dictate some of the general features of a house (e.g., the size of the doors and the height of the walls), it does not dictate every feature (e.g., the color of the walls).

A paradigm example concerns laws that provide coordination. Reason may dictate that society make it the case that everybody drives on the same side of the road. However, the society itself gets to decide whether people drive on the left or the right. Similarly, reason may require taxation, and establish some principles of fair taxation, but leaves lots of room for societies to work out the details such as the specific days in which to file taxes and the specific amount owed. Yet, so long as the tax law does not violate these basic principles of justice, people owe the precise amount determined in the law, and not a penny more or less.

In summary, though justice does depend heavily on the right and the good, it does not depend exclusively on the right and the good. It also depends, in part, on cultural norms and facts.

Separation Thesis (4) The separation, if any, between positive law and the right and the good

This is the thesis that appears to be the source of the bulk of the debate between legal positivists and natural law theorists. Here, I will argue that there are some weak connections between positive law and the right and the good. However, I will argue that the most important connection one can find here is an artificial construction – a bridge to the realm of the right and the good that those who make the law can build into positive law.

Dworkin's interpretive theory describes one of the two natural bridges between positive law and the right and the good.

---

[8] Legal Information Institute, "Scott v. Stanford", 60 US 393.

Insofar as determining the law is a matter of interpretation, it must follow the rules of interpretation. One of those rules of interpretation is the Principle of Charity, which states that the best interpretation is – all else being equal – the interpretation that contains the most truth.

If we must interpret a law using a principle that demands that we put it in the best possible light – interpret it so that it contains the most truth – this would require that we interpret it in a way that corresponds to the moral facts, if we are able. This requires us to keep an eye looking in the direction of the moral facts when we try to figure out what the law says.

However, even when we use the Principle of Charity, we are forced to often admit that something we are interpreting is false. No principle of charity will change the fact that President Donald Trump says a great many things that are not true.[9] We can also easily find a great may false claims on our social network wall or news feed. Accordingly, a principle of charity will still leave us with a great many unjust laws. Even after applying the Principle of Charity, it would still be the case that the Fugitive Slave Act became the law of the land in 1850.

Second, the legal system in a society must clear some minimal threshold of rationality and justice or the society itself would collapse. Imagine a legal system that commands everybody to always do the most irrational, destructive thing they can do in the circumstances. Such a legal system, so far removed from the right and the good, would immediately fail, to be replaced by a system closer to the moral fact.

Yet, this minimally just system also leaves a great deal of room for injustice. We know this from the study of history. Slavery existed on a grand scale until 150 years ago. People have long been forced to endure unjust despots. A minimally just society does not guarantee much in terms of just laws.

There may be other bridges from positive law to the right and the good. However, there is one bridge in particular that is relevant to this discussion. It is an artificial bridge – a bridge built into the law by those who write it – that leads directly from positive law to the right and the good.

Bridging the Gap

In this section, I am interested in a specifically of building a bridge across the gap from positive law to the right and the good. In this type of case, positive law explicitly reference the right and the good. The law can refer to such a fact in the same way that it can refer to a place (e.g., a county line, a railroad crossing, or a river) or an object (e.g., money kept in savings, a pipeline, or a vehicle headlight). When the law refers directly to a moral fact, then what is true about that moral fact becomes relevant to what is true of the law.

To explain what this means, I want to first look at a phrase that references a person. This phrase is taken from the Declaration of Independence:

> *The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.*

Who is, or was, "the present king of Great Britain?"

A look at the context tells us that the Declaration of Independence was talking about King George III.

[9] Washington Post, "Trump Claims Database", https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm_term=.633e835c040e, accessed 04/15/2018.

When did King George III die?

I am not really interested in the answer to this question. I am interested in how we would go about determining the answer. I want to look at two options.

Option (1): We determine when King George III died by looking at the beliefs and attitudes of the authors of the Declaration of Independence in 1776.

Unfortunately, this will give us no clue as to when King George III died. Those writers at that time had no way of knowing. This is a poor way to answer any question about what was true of the person referred to as "the present king of Great Britain," other than the fact that he was "the present king of Great Britain."

Option (2): We study a biography of King George III.

Going with Option (2), a quick trip to Google tells me that he died on January 29, 1820.

The point here is that when it comes to answering any question of this type – questions about the properties of things referred to in text, we study the thing itself, not the beliefs and attitudes of the authors of the text.

In the next step, I will argue that phrases like "the right to keep and bear arms" are statements of this type. Consequently, we discover the truth of the right to keep and bear arms by looking at the right itself, not at the beliefs and attitudes of the authors.

External Moral Facts

For the next step in my argument, I want to argue that terms and phrases contained within the Bill of Rights – phrases such as "the right of the people to keep and bear arms" refer to moral facts, which are external to the law itself.

The Bill of Rights contains a number of such phrases:

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. (Amendment IV)
- No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (Amendment V)
- Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (Amendment VIII)
- The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (Amendment IX)

Here, the question becomes: Do these terms – "just compensation", "due process", "excessive fines", "cruel and unusual punishment", and, most importantly, "rights" – refer to cultural facts and norms or to facts in the realm of the right and the good?

The founding fathers obviously believed in a set of moral facts that does not depend on their or anybody else's opinions.

In writing the Declaration of Independence they wrote:

> *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 . . .*

Clearly, these rights are not human creations – assigned to Americans because some human wrote them into law. They existed and continue to exist as a matter of fact independent of government or public opinion. Humans can violate or respect those rights, but humans can neither create nor destroy those rights.

The James Madison Research Library contains a number of examples of writings at the time the Second Amendment was being ratified that indicated its status as a natural moral right.[10] For example:

> *PENNSYLVANIA GAZETTE (PHILADELPHIA) (Unknown author, writing under the pseudonym "Philodemos") Every free man has a right to the use of the press, so he has to the use of his arms. March 8, 1788.*

> *WINCHESTER GAZETTE (VIRGINIA) There are other things so clearly out of the power of Congress, that the bare recital of them is sufficient. I mean "rights of conscience, or religious liberty — the rights of bearing arms for defence, or for killing game — the liberty of fowling, hunting and fishing. February 22, 1788.*

While it is difficult to provide examples of something that does not exist, but I can report that none of the examples presented in this list talked of the right to keep and bear arms as a gift of government – that its existence and its properties are to be determined by looking at opinions. Nowhere is it asserted that, if opinion changed, the existence and nature of the right would change.

Furthermore, the existence of the Ninth Amendment tells us that rights are neither created through enumeration nor destroyed by being excluded from the list.

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

We see evidence as well in the wording of the Bill of Rights itself. The Second Amendment does not say, "People shall have a right to keep and bear arms." It says, in effect, "a right [that exists independent of this Amendment] shall not be abridged." It does not tell us that the government, through the passage of this amendment, is creating such a right.

For these reasons, I assert that the mention of a right to keep and bear arms was meant to be a reference to an external moral fact.

The proper method for determining what is true of these external moral facts is the same method that is the proper way for determining what is true of "the present king of Great Britain." That is, we do not study the beliefs and attitudes of the writers. We study the thing itself.

A Reference to Non-Existence

What does it mean to say that we determine what is true of the right of the people to bear arms is determined by examining the moral facts?

[10] James Madison Research Library, "2nd Amendment Library", http://www.madisonbrigade.com/library_bor_2nd_amendment.htm, Accessed April 27, 2018.

I wish to examine the implications by looking at an extreme case. What if no right to keep and bear arms exists in the realm of moral fact?

To study this possibility, let us imagine a law that refers to something else that does not exist.

> The ecological health of the forest being essential to the quality of life in our community, no permits will be granted for activities harmful to the unicorn population.

Now, assume that Maria applies for a permit so that she and her family can go camping in the park. The Park Ranger goes over the application, checking it against what the law says about granting a permit.

Only four permits can be granted for a given day. Only two permits have so far been granted for that day, so . . . check.

The party can have no more than ten people. The application is for six people, so . . . check.

Applicants must pay a $50 fee. There is a check for $50 so . . . check.

The list of activities cannot include anything harmful to the unicorn population. There is no unicorn population to be harmed, so . . . check.

In fact, because no unicorns exist, no permit can be denied on the grounds that the list of activities includes something harmful to the unicorn population. Nothing can ever violate this law. This box is always checked.

Notice that, in making this argument, two sets of facts are completely irrelevant: (1) the beliefs and the attitudes of the authors regarding the object (e.g., their beliefs regarding what harms unicorns or even whether they exist), and (2) what is said in the preamble.

The fact that the authors of the original law believed that unicorns exist, that it was important not to harm them, and (falsely) believed that certain actions could harm the unicorn population are irrelevant. If somebody tries to defend denying a permit because "the authors believed that this activity would harm the unicorn population," their argument has no weight. The law does not prohibit "that which we, the authors, believe would harm the unicorn population." It prohibits that which would harm the unicorn population.

Look at this case from the other direction. Imagine that unicorns did exist. Further imagine that the presence of electronic devices were harmful to the unicorn population. The authors of the law did not know this. Yet, as soon as it was known, the law would prohibit activities involving electronic devices. In the same way that activities could be added to the list when they were discovered to be harmful without amending the law, activities could be removed when they were discovered to be harmless without amending the law. Once it was discovered that unicorns do not exist (or once they became extinct), all activities would be removed from the list of activities harmful to the unicorn population.

Also, the preamble describing the importance of the ecological health of the forest is irrelevant. Though the authors of the unicorn law expressed a concern with the ecology of the forest, the law does not prohibit activities harmful to the ecology of the forest. It prohibits activities harmful to the unicorn population. If the authors wanted to protect the ecology of the forest in other ways, they would have to pass other laws.

For these reasons, if there is no right to keep and bear arms as a matter of moral fact, then no law can ever be unconstitutional on the grounds of abridging that which does not exist. Whenever somebody

brings up points about the beliefs of the founding fathers in such a right or the value of a well-regulated militia, these points are as irrelevant as beliefs about unicorns and their importance to the ecology of the forest. Only what actually abridged the right – as with what actually harms the unicorn population – is relevant.

I have not argued that, in the realm of the right and the good, there is no right to keep and bear arms. That would be a different project. Furthermore, if there is such a right, it may well be grounded on a right to security. So, in the realm of the right and the good, the preamble to the Second Amendment may identify a relevant fact. However, it is not made relevant by the fact that it is written into the Second Amendment. This is still an independent, fact, if it is a fact at all.

I want to reiterate that, even where the licensing law assumes the existence of unicorns, it does not bring unicorns into existence. It does not make them real. Similarly, even though the Second Amendment assumes the existence of a right of the people to keep and bear arms, it does not bring the right into existence. It does not make it real.

Objections

To this point I have argued that the authors of the Bill of Rights meant for terms and phrases such as "the right of the people to keep and bear arms" to point to facts in the realm of the right and the good. We determine what is true of these rights by determining what is true of the facts in that realm. It is no more legitimate to determine what is true of the right to keep and bear arms by looking at the attitudes of the authors than it is to determine when "the present King of Great Britain" referred to in the Declaration of Independence died by looking at the attitudes of the authors of that phrase at the time they wrote it.

Some people may be uncomfortable with that conclusion. I would like to address some possible sources of discomfort.

Originalism

An advocate of the constitutional interpretation theory of originalism may object to this account. Originalism bases interpretation squarely on the beliefs and attitudes of the author. However, a close examination of what originalism requires will show no contradiction between originalism and the account of the meaning of the Second Amendment and similar provisions that I provided. Originalism itself allows us to determine that the authors of the Second Amendment meant to refer to an inalienable right that exists in the realm of independent moral facts.

As shown above, former Supreme Court Justice Scalia, the archetypical originalist, argued specifically with respect to the Second Amendment that the term "right" referred to a "pre-existing" right. His mistake was in thinking of this as a right created by social facts and norms prior to the Second Amendment, rather than to independent facts in the realm of the right and the good.

There is nothing in originalism that requires that we determine the properties of the person the Declaration refers to as "the present King of Great Britain" by examining the beliefs of the authors at the time of writing. There is nothing in originalism that requires that we determine the properties of the entity the Second Amendment refers to as "the right of the people to keep and bear arms" by examining the beliefs of the authors at the time of writing.

Judicial Activism and Separation of Powers

An opponent of judicial activism may be worried that, under this interpretation, judges may create law rather than enforce the law by replacing legislation with their own opinions of the right and the good – thus usurping the power of the legislators.

Regarding the separation of powers fear, I wish to return to the fact that legislators themselves manufacture these artificial bridges to the realm of the right and the good. They exist in the law only where the legislators (or the authors of the Constitution) write them into the law. If legislators do not wish to have judges attempt to use these bridges, then legislators should not build them.

If the Second Amendment had been written, "A well regulated militia being necessary for the security of a free people, the people shall have a right to keep and bear arms," this would have created a legal right that would not have judges looking to the realm of the right and the good to determine what is true about this right. However, please note that, if it had been written this way, then the whole national discussion of the Second Amendment would be different. A legal right explicitly created by the legislature it is a right that can be uncreated by the legislature. It has none of the power and authority that comes from perceiving it as an inalienable right – a right that exists in nature and is independent of human construction.

If a law states that a person convicted of robbery will be sentenced to a time of "no less than 5 years and no more than 15 years," it is not the fault of the judge that the judge has discretion to determine the length of a convict's prison sentence within this range. If the legislature does not want judges to have this discretion, then it is up to the legislature to remove it. But if the legislature gives judges this discretion, then it is within a judge's legitimate authority to use it.

In exercising this discretion, judges are not obligated to answer the sentencing question by asking exclusively, "What would the sentence be if the authors of this legislation were here to do the sentencing?" The judges, in such a case, have the discretion to look elsewhere for the answer – including, insofar as they are able, into the realm of the right and the good. In this way, having judges look into the realm of the right and the good to answer legal questions is not uncommon. Any time judges have discretion, they may look into the realm of the right and the good.

This leads to the next concern that I wish to address – the burden placed on judges to determine what is true in the realm of the right and the good.

The Burden on Judges

On considering the idea that judges are being asked to determine what is true in the realm of the right and the good one is placing a tremendous new burden on judges unlike anything they have had to do in the past.

In fact, as I illustrated in the previous section, this is not the case. Judges routinely make decisions by appealing to their best judgment regarding the right and the good. This is the case when judges are given discretion in sentencing. It also applies when the law uses terms such as "reasonable doubt" and "probable cause".

The very question, "How ought I to decide this case?" requires that the judge answer a moral question. Even the answer, "You ought to apply the law as written," cannot be decided by the law alone. Write this into the statute and the question remains, "Ought I to follow the statute?"

The standard law on defamation asks whether an intentionally false statement harms the reputation of the victim or induces disparaging, hostile, or disagreeable opinions. To answer these questions, judges are invited to look into the realm of the right and the good. They seldom review the writings of the authors of the laws against libel and slander – those are not relevant. What are relevant are the facts of the matter as best as the judge can determine, which includes facts in the realm of the right and the good regarding what counts as a harm, and what counts as disparaging opinions.

In short, this is not introducing anything new into the law. It can substantially be understood as applying to the Second Amendment and other provisions in the Bill of Rights where it is not currently being practiced (e.g., the concepts of “cruel and unusual punishment”) those methods of interpretation already in use elsewhere.

Conclusion

There is one step left in this argument, but I am not going to do that here. It is a separate project.

What I have established here is that the correct interpretation of the Second Amendment turns on what is true of the right of the people to keep and bear arms. The opinions of the authors of the amendment are irrelevant. Any reference to their beliefs and attitudes – other than their belief that they were referring to an independent moral fact – is beside the point. Even their belief as to the existence of such a right is irrelevant. What matters is whether such a right exists in fact.

One question we can ask at this point is: Who gets to decide the existence or extent of this alleged right?

As the law is written, and according to our norms and customs, judges get to decide. We can change this, and there may be reasons to do so. However, current legal practices say that the law builds a bridge to the realm of the right and the good, and judges have discretion regarding what exists on the other side.

These same principles apply to the example of the unicorn law. When the legislature says that actions harmful unicorns is prohibited, it leaves it up to judges to determine what (if anything) is harmful to unicorns.

This may not be the best way to answer the questions. However, it is the way we have. Though the Principle of Charity and the need for minimal justice creates some links to moral fact, and though we can build artificial bridges to connect the two, some gap between positive law and the right and the good remains.