

rule or set of rules. Rather, the right is supposed to function as a principle or value, with weight, not as a specific rule such as the rule against requiring a license to speak.

There is only one problem with this third possibility, but it is a doozy. This possibility is in truth an impossibility. One cannot, however hard one tries, create a right that is not coterminous with a determinate rule. If there is nothing in the world preexisting the constitution to which this right refers—if this right comes into being only by virtue of its being mentioned in the constitution—then its contours and weight cannot be assessed nonarbitrarily, as there is nothing in the world that would make any such assessment true. I have said that referring to actual moral principles is a risky business. One reason, already mentioned, is that moral principles, unless cabined, can overrun all positive law, including those decisions meant to settle the controversial content of moral principles themselves. However, another reason is that there is no relation between the number of moral principles our vocabularies reveal and the number of moral principles there actually are. We have all sorts of moral principles as a matter of vocabulary. Thus, we can refer to freedom of speech, protection against cruel and unusual punishment, equal protection, and so on. But suppose utilitarianism is the correct moral theory. There are no such “joints” in utilitarianism. Seeking to enact only a limb, we may have enacted an entire beast. In short, if there are objective referents for our moralized enactments, there is no reason to assume that morality has the joints our terms reflect, or, if it does, that morality deems it morally permissible that it be carved at such joints.

What does it mean to say a principle or value has “weight”? It means that the principle or value is supposed to incline one to reach a certain result, but, unlike a rule, it does not mandate that result. Rules either apply or do not apply; and if they apply, then they determine what should be done. Principles or values, in contrast, are supposed to be always applicable but can be outweighed by other principles or values that incline one in the opposite direction.

The courts would be making it up if they were to declare that such a constitutional right applied or did not apply, outweighed the government’s interest in its legislation or did not outweigh it.

I shall give one illustration of the problem that will stand in for every possible illustration. Suppose that we wish to create a right that does not exist in the moral realm—say, a right to fine art. We do not, however, specify through determinate rules just what the right entails: Does it entail government funding of art, and if so, how much, and how is this funding to be balanced against other governmental resource needs? Does it entail a legally enforceable obligation of talented artists to produce such art, and if so, how is this obligation to be balanced against artists’ right to liberty? And may government suppress fine art that threatens public order, and if so, of what magnitude must the threat be? Suppose that instead of resolving these questions through detailed determinate rules, we simply say that we will let the courts resolve these questions. Well, how will the courts resolve them other than according to judicial preference? There is no right to fine art in the moral realm which they can consult. When they resolve these questions, then, there will be no criteria available to determine if their resolutions are correct or incorrect. We made up the right, and they will have to make up its contours in deciding cases rather than looking to independently existing contours that could render their decisions right or wrong. They will be in the position of one who is told that a nonexistent creature—say, a unicorn—has a horselike body and a horn on its head, but is then asked to give its height, weight, color, and speed. One would protest, “This is an invented