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# Rights Talk and Constitutional Emotivism

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## Abstract

This paper builds on the work of several exceptional scholars from the disciplines of philosophy, law, and history. My central aim is to introduce and explicate an idea closely related to (and derivative of) the concept of rights talk, a concept I call 'constitutional emotivism'. By drawing upon scholars including Mary Ann Glendon, Jamal Greene, A.J. Ayer, and Alasdair MacIntyre, I aim to gather the conceptual threads that I trace through their work which together form the idea of constitutional emotivism. In a sentence, constitutional emotivism is the conflation of moral disagreements with constitutional rights grievances. When this conflation occurs, rights conflicts that never needed to occur in the first place reinforce rights talk and its uncompromising nature.

Keywords: *Legal Philosophy; Constitutional Theory; Rights Talk; Emotivism; Metaethics*

## Introduction

> *"We encounter assertions of rights as we encounter sounds: persistently and in great variety."*[1]

Seldom since its promulgation by the legal scholar Mary Ann Glendon in 1991 has the phenomenon of rights talk contributed so deeply to the lamentable state of our political discourse. Rights talk has inflamed our socio-political dialogue in Western liberal constitutional democracies, where it roots itself nowhere more deeply than in the fabric of American constitutionalism. We are now seeing the phenomenon slowly seep into the political consciousness of similar countries like Canada. Popular discourse on rights in these countries has always had the capacity to be competitive, aggressive, and mired in bad faith, but it has rarely been so fierce or severely polarizing as in the last decade. In an era where political polarization is reaching depths that incur severe damage to our democratic institutions, constitutional law seems to be driving that polarization, not mediating it. This is just one consequence of the sort of constitutional rights veneration that rights talk has insidiously encouraged decade after decade. We are now in a position in which there are no assurances that the consequences of rights talk as they have manifested can or will recede without a colossal, systematic, and

1. Leif Wenar, "Rights" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2021), online: https://plato.stanford.edu/archives/spr2021/entries/rights at §1.

drawn-out effort to undo them. A recent and significant contribution to the academic discourse on rights talk comes from American constitutional scholar Jamal Greene, who persuasively argues that:

> Rights have gone viral. We debate policy in the language of rights. We speak solemnly of soldiers heading into battle to defend them. We wave the dog-eared constitutions that enumerate them. We kiss the hems of the judges who recognize and evaluate them. The Frenchman Alexis de Tocqueville wrote in 1835 that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." That was hyperbole in his time, but it rings true in our own. Rights are the commandments of our civic religion.[2]

Greene's writing reflects a polity inflamed by rights talk degenerating our political discourse. When rights are revered exclusively in the fashion Greene describes, with no acknowledgement of their complex nature, they become venerated in an almost religious fashion, where those aptest to deem them absolute and inviolable are inevitably the same ones who misconstrue them most profoundly. My claim here is not hyperbole intended for dramatic effect. Constitutional historian Linda Colley described her experience of encountering the American veneration of their constitutional history as 'cultish.'[3] Perceiving constitutions and the rights they endow in this way cuts rights off from a crucial aspect of their true nature and thus much of their considerable complexity. Encouraging this sort of rights talk is an utterly destructive behavior for the aims of a pluralistic society in a healthy liberal democracy, for it creates something worse. The 'something worse' is constitutional emotivism, which occurs when folk who do not know any better conflate moral disagreements with constitutional rights injustices. In one important respect, constitutional emotivism is a by-product of rights talk's influence over our everyday socio-political lives, but it does far more damage than rights talk alone could ever hope to achieve. This paper is dedicated to explicating that thought.

This paper is split into three parts. In Part I, I introduce the concept of 'rights talk' as explicated by Mary Ann Glendon and by Jamal Greene. That gives us an overview of where rights talk came from and where it is now, and more importantly, it gives us the first of two concepts indispensable for understanding the idea of constitutional emotivism: misconstrued perceptions of rights that lead to adverse emotional reactions. In Part II, I review the philosophical theory known as 'emotivism'. A brief overview of emotivism is the second prerequisite for understanding the idea of constitutional emotivism, as strange a topic as that might seem given our focus here. Part III is dedicated to introducing constitutional emotivism and drawing out why it has the potential to do so much harm to the aims of a modern and pluralistic constitutional democracy. A central aim of this paper is to attract attention to the increasingly haphazard ways in which a significant portion of the citizenry within these sorts of democracies invokes

**2.** Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart* (Houghton Mifflin Harcourt, 2022) at xiv.

**3.** See Linda Colley, *The Gun, the Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World* (Liveright, 2021) at 13.

rights claims. Constitutional rights and the litigation involved in claiming them are not the sort of phenomena that should be thrown around so carelessly. We need to encourage linguistic precision and a heightened critical awareness about the manner in which we choose to speak of, claim, and defend our rights, lest we continue to blur the line between moral disagreements and rights conflicts, thereby emboldening the attitudes that make constitutional emotivism possible in the first place.

## Part I. Rights Talk and Rightsism

Rights are multifarious. "The nature of rights—whether moral, legal, natural, or otherwise—has a way of leaving everyone confused."[4] We are particularly interested in constitutional rights here, so fortunately, much of that confusion can be deftly avoided. In general, however, "[r]ights are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states."[5] This necessarily non-concrete definition of 'what is a right' is required to capture their abstruse nature. Constitutional rights share fundamental elements of this generalized definition but often vary from other conceptions of rights in definitive ways.[6]

One of these characteristics is significant enough that we ought to note it from the beginning, a quality spoken to by Judge James Harvie Wilkinson III in "The Dual Lives of Rights."[7] Wilkinson argues that we ought to understand rights (and American constitutional rights specifically) as having dual lives; moreover, these dual aspects of rights are not inconsistent but instead complementary to one another. "The reason there is so much confusion over rights," Wilkinson argues, "is because everyone seems to misunderstand their fundamental composition."[8] The idea is that the dual characteristics of rights cannot be understood as contrasting; they are mutually reinforcing. Thus, "[t]he way we talk about a right and the way we put it into actual practice are flip sides of the same coin. . . . The rhetoric and the implementation of a right are independent aspects of the right itself. Neither rules the other."[9] Despite that, these characteristics can be seen

**4.** J Harvie Wilkinson III, "The Dual Lives of Rights: The Rhetoric and Practice of Rights in America" (2010) 98:2 Cal L Rev 277 at 277.
**5.** Wenar, *supra* note 1 at Introduction.
**6.** For example, constitutional rights are relatively young when contrasted with other sorts of rights that have been recognized since antiquity. They appeared with the advent of written constitutions, beginning in the 1750s, and it took less than two hundred years before they were no longer obscure entities, as historian Linda Colley establishes here: "The quantum surge in the number of constitutions that followed the First World War, and still more the Second World War, lay in the future. Nonetheless, by 1914, devices of this sort were operating in parts of every continent barring Antarctica." Colley, *supra* note 3 at 3. Despite their relative youth, constitutional rights tend to overshadow other sorts of rights in the attention they draw in the context of our social and political lives where rights talk occurs. As we will see throughout this paper, constitutional rights have qualities not seen in other forms of rights—qualities that make them particularly susceptible to the sort of attitude that rights talk needs to thrive.
**7.** See Wilkinson, *supra* note 4.
**8.** *Ibid* at 277.
**9.** *Ibid* at 277, 279.

as inconsistent, and that should rightly concern us, Wilkinson concedes—after all, if the rhetoric of rights is inconsistent with their purpose, then the rhetoric of rights does us all a disservice.

As a United States Court of Appeals Judge, Wilkinson knows better than most that:

> [I]t is neither easy, nor even desirable, to translate the language of rights word-for-word into practice. Upholding and enforcing rights is a complicated matter that calls for sober judgment and attention to context. Although our words often suggest otherwise, we recognize that rights are, and of necessity must be, qualified. . . . They live practical lives as well, lives far less glamorous than rhetoric admits.[10]

On Wilkinson's account, both the ostentatious rhetoric and the disgruntled realizations of rights limitations are a necessary condition of a rights culture that practices the sort of American exceptionalism that is infused in rights talk. The following paragraph gives us a better idea of why:

> When it comes to rights, our words and our deeds serve different ends, both of which help maintain a vigorous body politic, and each of which reinforces the other. Because of the way rights function, it is necessary both to celebrate them in absolute terms and to practice them in qualified terms. The 'hypocrisy' of strong talk and moderated implementation of rights is not really hypocrisy at all. It is how a system of individual rights should and must work. The absolute language of rights helps protect rights from being obliterated by competing concerns. Rights rhetoric fosters a love of liberty that makes a system of individual rights effective. It promotes the recognition of the corresponding rights of others and of new areas of our common life that ought to be made more free. Above all, it helps to lift our national spirits, pointing out our highest aspirations and supplying the glue that bonds us as a people.[11]

One of my principal aims in this paper is to demonstrate why rights rhetoric of this sort is profoundly idealistic and in service to a not-so-noble lie. Despite that, Wilkinson's thoughts are important to us here because he is undoubtedly correct about one thing: the idea of the dual lives of rights is invaluable in that it both captures a fundamental truth about constitutional rights and helps explain why rights talk occurs. Nonetheless, in our contemporary world, the gap between rhetoric and practice is a far larger problem than Wilkinson thought it to be.[12] This paper is dedicated to demonstrating how the sort of 'love of liberty' Wilkinson

**10.** *Ibid* at 278, 289.
**11.** *Ibid* at 279.
**12.** To be fair to Judge Wilkinson, in the same paper, he acknowledges that "[w]hatever tales of absolutism we may be telling ourselves in our rhetoric about rights, our practices reveal quite a different story. The implementation of rights is qualified in numerous ways: by what a right covers; by what sorts of protections it affords; by who can assert it and whom it can be asserted against; and by myriad procedural rules governing its vindication, to name just a few. . . . At worst, it [rights talk] is a vehicle through which injustice is willfully perpetrated by those seeking to protect their own kind through a stirring, but vacuous, rhetoric." *Ibid* at 303, 306. Despite this concession, Wilkinson does not back down an inch from his overbearing claim that rights talk is a highly desirable aspect of political discourse.

refers to above can go horribly wrong, thereby leading to rights talk of the worst sort: constitutional emotivism.

### *Glendon's Warning*

Glendon was the first to draw attention to the dangers of indulging that noble lie in 1991 in *Rights Talk: The Impoverishment of Political Discourse*.[13] Rights talk is a form of politically charged speech popularized in the aftermath of World War Two that emphasizes "an exaggerated and distorted fascination with rights."[14] That fascination has grown increasingly prevalent in the past sixty years and tends to be absolutist, hyper-fixated with abstract notions of liberty and freedom, deep-seated in its focus on the individual, and indifferent in its regard for everything else. Rights talk "promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground."[15] It can seep into and undermine various forms of political discourse by approaching difficult conversations and potential conflicts and invoking the "table-thumping adversarial rhetoric of rights."[16] Rights talk deliberately encourages a point of view that fundamentally misunderstands the complexity inherent in the nature of rights, because "[i]n its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations."[17] Given these descriptions, one gets the idea that Glendon would not appreciate the sort of rhetoric that Wilkinson's account relies so heavily upon—it is far more detrimental than it is advantageous.[18]

The lack of acceptance concerning responsibilities corresponds with what Glendon calls "our all-too-human tendency to place the self at the center of our moral universe."[19] Some level of moral entitlement, then, animates rights talk. However, this is not to say that rights talk is entirely pernicious and debilitating to our civic discourse. On the contrary, rights talk in its healthier incarnations has historically been used as a shield against a myriad of racial, economic, and political injustices. Rights talk can thus establish "an indispensable framework in which talk of needs can be related to ideas about personhood,

**13.** See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991).
**14.** Suzanna Sherry, "Rights Talk: Must We Mean What We Say Review Essay" (1992) 17:3 Law & Soc Inquiry 491 at 491.
**15.** Glendon, *supra* note 13 at 14.
**16.** Jeremy Waldron, "The Role of Rights in Practical Reasoning: 'Rights' Versus 'Needs,'" (2000) 4:1/2 J Ethics 115 at 123.
**17.** Glendon, *supra* note 13 at 14.
**18.** See Glendon on rights rhetoric: "The exaggerated absoluteness of our American rights rhetoric is closely bound up with its other distinctive traits—a near-silence concerning responsibility, and a tendency to envision the rights-bearer as a lone autonomous individual" (*ibid* at 45). These qualities impede the realization that rights, were they genuinely unlimited and absolute in the fashion that rights rhetoric conveys, would run rampant and cause widespread chaos and conflict everywhere they are asserted.
**19.** *Ibid* at xi.

self-assertion and dignity" central to the ideals of a healthy democratic polity.[20] This is not an unpopular idea, nor should it be. Rights are an essential aspect of a liberal democracy, and many scholars have argued that rights talk plays a valuable role in this regard.[21] Even rights talk and its overwhelming focus on absoluteness has been interpreted by some in a positive light, as we just saw with Wilkinson. The focus of this paper, however, is on the kind of rights talk discussed by Glendon—the sort of rights talk that impoverishes our political discourse.

Glendon describes rights talk as a vernacular that is highly effective at leaching into various forms of social, political, and legal discourse while at the same time remaining highly resistant to the influence of any of them.[22] Therefore, rights talk dominates socio-political discussions by "carrying the rights mentality into spheres of American society where a sense of personal responsibility and of civic obligation traditionally have been nourished."[23] Recall the important quotation by Greene in the introduction—the mention of Alexis de Tocqueville's now-famous commentary on the American practice of rights talk. Glendon acknowledged the famous French aristocrat in *Rights Talk* as well, citing de Tocqueville's amazement at the American sociopolitical tendency to draw on the language of legalities—"Wherever he went, he found that lawyers' habits of mind, as well as their modes of discourse, 'infiltrate through society right down to the lowest ranks.'"[24]

In our contemporary era (naturally and regrettably), this phenomenon has grown more severe. Social media is a breeding ground for rights talk. Online, one is disconnected from the responsibilities and duties one might otherwise have, were they talking to someone face to face for example. The internet makes it easy for the sort of adversarial political language that rights talk thrives in to spread like wildfire: an apt example of rights talk's ability to weaken other forms of discourse (and indeed even other mediums) in the process of strengthening itself. This is emblematic of rights talk, for it conveys the idea that for each situation in which there exists a conflict, there probably exists a clash of rights as well. And regardless of whether the rights talk occurs between individuals or in group social settings, "[a]s extravagant claims proliferate, the public forum

**20.** Waldron, *supra* note 16 at 131. For more on this idea, see Waldron's expansion on that thought: "The language of rights has traditionally had connotations of independence and self sufficiency. The right-bearer is seen as someone vindicating her autonomy. *Rights are the claims a person can put forward for her own sake and on her own behalf without the moral embarrassment usually associated with assertions of self-interest*" (*ibid* at 123) [emphasis added]. See also Wilkinson, *supra* note 4 at 308: "Along with pioneers and cowboys, immigrants and activists, generals and foot soldiers, our talk about rights is part of the American story. Its truth lies not in its literal descriptiveness, but in its role in continually reinstructing us in the self-evident propositions articulated by the Framers of our government, which assuredly are true."

**21.** That list includes, among many others, J. Harvie Wilkinson, William E. Forbath, Michael Perry, Robert Rodes, Janet E. Ainsworth, and Richard Epstein.

**22.** See Glendon, *supra* note 13 at x.

**23.** *Ibid*.

**24.** *Ibid* at 1.

becomes a battlefield between rival political factions and interest groups that bolster their positions with loud assertions of rights."[25] This is one way that rights talk promulgates an "intemperate rhetoric of personal liberty" that negatively affects one's understanding of the responsibilities that rights generate and the communities within which rights are contextualized.[26] Glendon rightly describes the responsibilities of democratic citizens to one another as a necessary condition for the vitality of the *demos* as a whole:

> Our stark, simple rights dialect puts a damper on the processes of public justification, communication, and deliberation upon which the continuing vitality of a democratic regime depends. It contributes to the erosion of the habits, practices, and attitudes of respect for others that are the ultimate and surest guarantors of human rights. It impedes creative long-range thinking about our most pressing social problems.[27]

It was not always so. Glendon explains that there was a marked shift in the jurisprudence of American constitutionalism occurring around the 1950s. Rights were not about personal liberties that were weaponized against one's fellow citizens, they were about protections from a potentially tyrannical government and a promise of local authority.[28] A dramatic uptake of rights claims beginning during the Civil Rights Movement was one catalyst responsible for the rise of rights talk.[29] The tangible shift in the *sort* of constitutional rights that were being asserted cannot be understated. It had enormous implications for the way the

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**25.** Richard A Epstein, "Rights and 'Rights Talk'", Book Review *of Rights Talk: The Impoverishment of Political Discourse* by Mary Ann Glendon, (1992) 105:5 Harv L Rev 1106 at 1106.

**26.** See Glendon, *supra* note 13 at x.

**27.** *Ibid* at 171.

**28.** Greene emphasizes this point: "For the Framers, constitutional rights were not primarily intended to protect minorities or unpopular dissenters from the tyranny of the majority, as we so often describe them today. Rather, rights were meant to protect that very majority from factional capture or executive overreach. The statesmen of the Founding generation saw the right to participate in self-government, via the vote and the jury, as sacrosanct. But for them, the substantive rights that we today associate with the Supreme Court's docket—freedom of speech, the right to bear arms, rights of equality, due process of law, and so forth—were best protected by legislatures and juries, not judges. This reflected the Framers' understanding that other local institutions besides courts—institutions such as churches, families, and even the militia—also had a role in self-governance, and thus also had a role both in defining rights and in deciding how rights could be limited in the public interest. Rights lived less in judicial chambers than in meetinghouses and jury rooms, at the ballot box and in the streets." Greene, *supra* note 2 at xxiv.

**29.** See Glendon, *supra* note 13 at 4: "At least until the 1950s, the principal focus of constitutional law was not on personal liberty as such, but on the division of authority between the states and the federal government, and the allocation of powers among the branches of the central government." See also Thomas L Haskell, "The Curious Persistence of Rights Talk in the 'Age of Interpretation'" (1987) 74:3 J American History 984 at 988: "Under the banner of 'equal rights,' blacks and other ethnic minorities made major gains and decisively transformed the shape of public life. In spite of the failure of the Equal Rights Amendment, rights for women expanded steadily. During these years, not only has the routine business of the courts continued to revolve around rights, but moreover thousands of Americans have challenged existing law and pressed for the establishment of new laws because of their perception that their own rights, or someone else's, were being violated."

public views the role and responsibilities of the judiciary, which (in turn and over time) contributed to how judges in constitutional democracies such as the United States respond to major public and political disputes and controversies.[30]

I am thinking in particular of the tangible democratic deficit that our Western institutions have been experiencing for several decades now. One aspect of that deficit is surely the foundational characteristic of rights talk: its fluid ability to seep into other modes of discourse while remaining impenetrable itself. Jeremy Waldron made note of this some years ago:

> People use the language of rights to express their vision of the good society, or their conception of the respect we owe each other. . . . They use it in conversation, in legislatures, in pressure groups, in academic seminars, in democratic deliberations of all sorts. Perhaps, as Mary Ann Glendon and others have argued, they use it too much and too stridently; but it has long ceased to be a language specific to (the threat of) legal proceedings.[31]

There is no 'perhaps' now: the language of rights is most certainly being overutilized and misapplied, and that misuse carries detrimental implications for a modern and pluralistic constitutional democracy.

Glendon argues that the shift in how we use the language of rights "has contributed in its own way to the atrophy of vital local governments and political parties, and to the disdain for politics that is now so prevalent in the American scene."[32] Years later, the lesson seems clear: when rights talk grounds itself in our day-to-day lives, there are consequences for the foundational principles that underlay our democracies. When democratic institutions are perceived in an increasingly negative light, citizens stop believing in the ability of government to resolve socio-political issues that generate social conflict and upset. They turn instead to the language of rights, for "[r]ights dominate modern understandings of what actions are permissible and which institutions are just. Rights structure the form of governments, the content of laws, and the shape of morality as many now see it."[33] The danger of this sort of rights veneration, which corrupts the nature of rights, cannot be understated.

### *Greene on the Ramifications of Ignoring Glendon's Warning*

Jamal Greene's extraordinarily cogent book *How Rights Went Wrong* spells out the danger involved in the increasingly careless rhetoric around rights.[34] This book is the next volume in the history of rights talk—one can view Greene as sophisticating (and in some cases refuting) Glendon's conception of the history of rights talk. More than anything, though, *How Rights Went Wrong* spells out the consequences of rights talk and its continual impoverishment of our political

**30.** See Glendon, *supra* note 13 at 4.
**31.** Waldron, *supra* note 16 at 116 [footnotes omitted].
**32.** Glendon, *supra* note 13 at 5.
**33.** Wenar, *supra* note 1 at Introduction.
**34.** See Greene, *supra* note 2.

discourse. One of the driving themes is its forceful reminder to the reader (made again and again by the compelling real-life examples Greene calls upon) that rights are capable of driving us to a white-hot rage because "in striving to take rights seriously, we take them too literally. We believe that holding a right means getting a judge to let us do whatever the right protects."[35] To be real, the thought goes, rights must be inviolable, and we are often all too willing to test those waters in court—those who have the financial means to pursue lawsuits, that is. Greene notes the absolutist rhetoric empowering rights talk is directly responsible for this attitude:

> Where perceived as absolute, rights take poorly to conflict. When recognizing our neighbor's rights necessarily extinguishes our own, a survival instinct kicks in. Our opponent in the rights conflict becomes not simply a fellow citizen who disagrees with us, but an enemy out to destroy us. Law becomes reducible to winners and losers, to which side you are on, which tribe you affiliate with. With stakes this high, polarization should not just be expected but is indeed the only sensible response. *If only one side can win, it might as well be mine.* Conflict over rights can encourage us to take aim at our political opponents instead of speaking to them. And we shoot to kill.[36]

This outcome is the foreseeable result of de Tocqueville's observation, made almost 200 years ago. A society in which the language of legalities is a commonplace but powerful force is a society that will sooner or later begin to develop habitual entitlements regarding the rights they so casually throw around. A sense of 'rightsism' slowly develops, a direct manifestation of rights talk.[37] Different people from different places will have different perspectives; they will thereby inevitably value different rights over others as essential to their well-being. In reality, no one escapes the fact that "[e]veryone is a little bit 'rightsist'"—we all hold some rights to be intrinsically more valuable than others, depending on the role those rights play in our lives.[38]

As Greene acknowledges, "This attitude might make sense in a world in which rights are few and therefore precious. . . . But in a modern, cosmopolitan society, rights are not few and precious. They are many and ubiquitous."[39] Due respect for the reasonable layers of disagreement that underlay our democracies requires that we reject this attitude. Our first step in doing so, Greene says, is to ask ourselves how we think judges ought to approach constitutional rights adjudication. The minimization approach to rights, for example, necessarily minimizes the number

**35.** *Ibid* at xv. Greene draws on the considerable history of American constitutionalism to illustrate just how bizarre the American judiciary has traditionally understood and applied rights. Throughout the book one will find examples of this claim, of which the substance can be both angering and depressing.
**36.** *Ibid* at xvii [emphasis in original].
**37.** Greene states that "rightsism" emerged in the 1930s and 1940s as a result of a judicial system that was trying its best to make sense of the practice following the strong rights approach of discriminating rights (*ibid* at xix).
**38.** *Ibid*.
**39.** *Ibid* at xv.

of rights that a constitution privileges by protecting and prioritizing those rights that are explicitly or implicitly stated in the constitutional text over all other unenumerated rights. In this way, the rights that the text of a constitution outlines will always prevail over other rights considerations, and so this approach favours a constitutional democracy in which there are very few rights in existence. The discrimination of rights is a little different. It also seeks to reduce the number of rights recognized by judges, but it does not stop at just those rights that are explicitly or implicitly mentioned in the actual constitutional text. So, while the discrimination approach to rights recognizes unenumerated rights as valid, it will always involve a measure of bias, where some rights possess greater validity and are thus affirmed and protected, while the competing right is wholly ignored. Unlike the discrimination approach (which is thriving in American constitutionalism, as Greene demonstrates in great detail), the minimization approach to rights is nonsensical (because it suggests that the vast majority of American constitutional rights would be rendered unconstitutional) and has thus been abandoned.[40]

Neither of these adjudicative approaches seems appealing in our modern world, where constitutional rights only grow more numerous. Fortunately, I have saved the best for last. Adjudicating rights through the mediation approach is the only avenue that makes practical sense. The mediation of rights is premised upon the thought that judges should not be in the business of proclaiming all or nothing winners and losers when it comes to rights grievances. Instead, given the abundance of rights in a modern constitutional democracy, judges ought to be assessing rights conflicts based on the facts and context of the case before them, and in doing so, recognizing that the crucial question is not 'which right wins' but 'how might these rights be reconciled.' Greene speaks to this here:

> U.S. Courts recognize relatively few rights, but strongly. They should instead recognize more rights, but weakly. In determining that someone holds a constitutional right, judges should be more generous, more respectful of the differences among us, of the idiosyncrasies of our personal values and commitments. But that same respect should lead judges to be more discerning in deciding how far my right goes as it comes predictably into conflict with the rights of others. . . . A twenty-first-century court shouldn't earn its keep by declaring rights but rather by reconciling them. The American experiment rests on the audacious belief that liberalism and pluralism are not just compatible but also mutually constitutive. Until we can turn the language of rights that dominates our politics into a language of reconciliation, the experiment will remain in peril.[41]

The mediation approach is the only normatively desirable path forward for a judiciary in a pluralistic and modern constitutional democracy. "It would accommodate conflicts among rights instead of erasing the values and commitments of one side or the other. In doing so, it would lower the stakes of those conflicts, enabling us more readily to see each other as friends who disagree instead of

**40.** See *ibid* at xvii-xix for Greene's summary of these approaches to rights adjudication.
**41.** *Ibid* at xx-xxi.

enemies who must annihilate each other," Greene argues.[42] It is this strategy that leads us to a 'love of liberty' that does not undermine our democratic commitments.

What impact would the practice of rights-mediation have on rights talk? First and foremost, it would require accepting that disagreements over rights are inevitable, and that rights are categorically not absolute and indomitable. They are often context-dependent and conditional; thereby they are almost never absolute. But these are not facts that are well received by the typical person to whom rights talk appeals—rightsism has become powerfully entrenched in the minds of many. This is worrisome, because "[r]ights conflicts, like diseases, are forms of pain. The treatment courts prescribe can help ameliorate that pain—or make it much, much worse."[43] We are now seeing what 'much, much worse' looks like in excruciating detail.

### *Rightsism and the Power of the Judiciary*

Rights talk's ill effects show us why *who decides* what rights are and how far they extend is so imperative. The prominence of rightsism in our contemporary political world is thus intimately connected to the practice of judicial review. Legal conflicts that in other contexts could be resolved through deliberation and negotiation become battlegrounds for rights claims, where "[c]ourts would come to frame the interest these laws implicated in the lofty language of rights—unassailable, nearly absolute, and the peculiar province of the judicial branch."[44] Judges take those rights claims and arbitrate winning and losing sides, vindicating one party's claim to a right and erasing the others'. This practice contributes to a view of judicial review that damages the perception of neutrality that judges must uphold, and we need to be careful here. Highly persuasive and entirely reasonable arguments can be made for the normative value of judicial review (I have made some myself).[45] But we ought to be careful about romanticizing the considerable powers that judges can wield, lest we forget Robert Cover and his infamous reminder regarding American constitutionalism: "The Judges deal pain and death. That is not all they do. Perhaps that is not what they usually do. But they *do* deal death, and pain. From John Windthrop to Warren Burger they have sat atop a pyramid of violence, dealing . . . ."[46] A central consequence of a society in which rights talk is prevalent is the sort of pain to which both Greene and Cover refer.

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**42.** *Ibid* at xxi.
**43.** *Ibid.*
**44.** *Ibid* at xxiv. See also Emmett MacFarlane, "Terms of Entitlement: Is There a Distinctly Canadian Rights Talk?" (2008) 41:2 Can J of Political Science 303 at 307, citing FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (University of Toronto Press, 2000) at 157: "[Morton and Knopff] contend that, as part of the institutional transfer of power to the courts, the 'moral inflation of rights claiming' transforms 'reasonable disagreement into uncompromising rights talk.'"
**45.** See Alexander Loehndorf, "Old Constitutions and Originalism: Re-Examining the Normative Foundations of the Great Debate" (29 January 2022), online: *SSRN* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920528.
**46.** Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601 at 1609 [emphasis in original].

Under the discrimination approach, when rights claims are invoked and legal proceedings are initiated, judicial action will result in pain for one of the parties—the party whose rights the judge deems to be the lesser of the two. Aside from being a precarious lens to view judges and their actions with in general, in the specific context of rights talk, "[r]omantic judging also atrophies the political process by encouraging everyone to look to the courts for the redress of their grievances. Since litigation is more apt to produce winners and losers than to discover and enlarge common ground, the whole development contributes to the rights-mindedness described in *Rights Talk*."[47] It also creates a political culture—of which the United States is the paradigmatic example—in which judges' political values implicitly become more important than their qualifications. In this way, "[r]ights stop being about justice and start being about the justices."[48] Where judicial review plays an influential role in political and legal matters of public interest and deliberation, then, unscrupulous rights talk has everything it needs to begin its slow seep into a multitude of areas spanning our political and civic lives. We are long past the beginning of that seep; rights talk has most certainly bled into our everyday lives. We hear it at the dinner table, we hear it in the public square, we hear it in on the car radio, we hear it at work, and we certainly hear it when we relax in front of the TV. More and more, constitutional rights seem to dominate our debates and conflicts.

The work of Lorenzo Zucca on incommensurability in the context of rights conflicts is particularly relevant for us here, given our interest in the flaws of the discrimination approach. In the literature that this paper draws upon, Zucca develops an account of what a *genuine* conflict of fundamental rights entails, which is largely explicated by reference to a singular legal case adjudicated by the European Court of Human Rights: *Evans v The United Kingdom*, wherein Evans applied to stop the destruction of frozen embryos after the dissolution of her relationship with the father.[49] The case is an archetypical example of a genuine conflict of fundamental rights. Zucca draws upon the case to argue that although genuine fundamental rights conflicts are rare, when they do occur they are incommensurable in the sense that "the two valid claims are mutually exclusive: either one can be upheld, but the two cannot be [upheld] at the same time, nor can they be partly upheld to reach a compromise."[50] In other words, the focus

**47.** Robert Rodes, Book Review of *Rights Talk: The Impoverishment of Political Discourse* and *A Nation Under Lawyers* by Mary Ann Glendon, (1995) 40 Am J Juris 411 at 412-13.
**48.** Greene, *supra* note 2 at 94.
**49.** [2006] ECHR 200, (2006) 43 EHRR 21.
**50.** Lorenzo Zucca, "Laws, Dilemmas, and Happy Endings" in Stijn Smet & Eva Brems, eds, *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press, 2017) 96 at 97. Zucca wants to clearly establish that the sort of genuine rights conflicts that create constitutional dilemmas are rare. Put differently, the ability to balance claims (even if it is slight) can be found in rights conflicts more readily than one might initially think. Zucca elaborates on this here: "A dilemma arises in the light of contingent circumstances. And this is an important point concerning genuine conflicts of rights: human rights do not conflict in abstract, but they may conflict once they are properly specified in light of the facts of a case. Most of the time, the facts are such that a compromise can be reached. Rarely, we face a situation in which the decision is truly either/or" (*ibid* at 99).

of Zucca's work is centred on rights conflicts that wholly lack the capacity for even partial resolution, because both parties in the rights dispute simultaneously have valid claims: recognizing one necessarily dismisses the other. In such cases, "[w]hen courts identify genuine conflicts, they cannot solve them."[51] All that they can do, Zucca convincingly argues, is decide which right will be protected (which right will 'win') and which one will not—and they can only make a choice of which right to affirm based on the contextual information within which the case occurs. Put differently, there is no judicial balancing that can occur in these cases, because there is nothing to balance—there is only, as Zucca terms it, a constitutional dilemma.

Implicit in his work on the subject, Zucca stresses that genuine conflicts of rights involve a winner and a loser, a sentiment that we have seen Greene mirror to describe how rights go wrong as they are presented and adjudicated throughout the American legal system. Zucca does not explicitly use the terms 'winner' and 'loser' in his arguments, but one sees the thought here:

> Whichever way you look at it, you are going to lose something fundamental. A constitutional dilemma typically involves two elements: a choice between two separate goods (or evils) protected by fundamental rights; a fundamental loss of a good protected by a fundamental right no matter what the decision involves.[52]

Although Zucca maintains that such cases are rarer than we think, in a world of increasingly pluralistic constitutional democracies, one can reasonably predict that genuine rights conflicts will (at best) continue to rarely occur, and (at worst) become increasingly frequent as time passes and change occurs. When courts are forced to declare winners and losers in such cases, the resulting incommensurability can only serve to reinforce the fact that genuine conflicts of rights can be thought of as discriminatory contests, in which adjudication results in one party losing their stake in the game entirely.

Zucca's conclusions on rights incommensurability and constitutional dilemma's adds something valuable to this paper. He writes that "I do not think that it is helpful to overuse the language of conflict, because it creates a presumption of heightened difficulty of a case, and is likely to justify a broader discretionary power to decide those cases."[53] Zucca makes it clear that there is an important distinction between "mere tensions of valid human rights claims" and genuine conflicts of fundamental rights.[54] The former occur all the time, since rights claims arise in the first place from conflicts that test the power of both rights-holders involved and the particular authority that the rights conflict is based upon. To reject the discrimination approach to rights, we need to foster an understanding of rights that recognizes their potential for near constant conflict

**51.** *Ibid* at 96.
**52.** Lorenzo Zucca, "Conflicts of Fundamental Rights as Constitutional Dilemmas" in Eva Brems, ed, *Conflicts Between Fundamental Rights* (Intersentia, 2008) 19 at 20.
**53.** Zucca, *supra* note 50 at 109.
**54.** *Ibid*.

and places heavy emphasis on a mediation-forward approach. Zucca is correct to advise avoiding the language of conflict in cases where there are rights conflicts that are not incommensurable—mediation ought to be the goal there, not discrimination.

It is past time to admit that "[r]ights in a modern constitutional democracy are not the glass we break in the emergency of a government captured by bigots or morons. They are the predictable byproducts of ordinary governance in a pluralistic society in which we disagree with one another about important matters."[55] If this acknowledgement was as easy to spread as rights talk, there would be little importance in writing this paper. But getting the everyday person to that understanding will be immensely difficult. Rights drive us to white-hot rage, and that vicious anger is our biggest obstacle here. When judges escalate rights conflicts that could have been resolved outside of the courts, the loser often loses everything—cue the rage. Greene presses this point home here:

> Treating a rights conflict as a question of who has rights and who doesn't degrades our relationship to the law and to each other. By denying the loser any claim of rights, the court tells him not just that he has lost but that *he does not matter*. Although the loser's interests and projects remain important—perhaps even essential—to him, he is made an outsider to the law.[56]

This sort of rights disenfranchisement is peculiar, for it simultaneously denies the absolute nature of rights talk (for the loser) while it reinforces that very concept for the winner. The result is a mixture of winners who are drawn ever deeper into the rhetoric of rights talk and losers who will no doubt either feel betrayed by that very same rhetoric or believe that the government unfairly trampled over their rights—and neither outcome is sustainable for the long-term goals of a healthy democratic polity. All of this lends credence to the thought that rights talk is not practically sustainable (and far from being normatively desirable). A system cannot go on like this forever, and the longer we continue the worse our political polarization becomes. This section has established the first of two ideas necessary to understand constitutional emotivism: what rights talk is, why it matters, and where it is now. Now we need the second idea, and so we turn to a seemingly peculiar topic: the metaethical theory known as emotivism.

## Part II. Emotivism

### *The Basics of Emotivist Theory*

Emotivism was born of philosophical investigations into the nature of morality and language. The origin of emotivism as a metaethical theory has a long and complex history. Many philosophers will insist that it cannot be properly understood without reference to non-cognitivism, and many similarly assert that logical

**55.** Greene, *supra* note 2 at xxv.
**56.** *Ibid* at xxxii [emphasis added].

positivism must be properly explicated in order to truly understand the theoretical premises of emotivism.[57] Both topics are quite interesting. For the purposes of this paper, however, neither of these contexts is necessary.[58] Regarding emotivism, we need just two things: the basics of the theory, and how emotivism was articulated by Alasdair MacIntyre. Once those are established, the relevance between emotivism and rights talk becomes clearer.

Emotivism is most often associated with A. J. Ayer, who brought the theory to prominence, and C. L. Stevenson, who sophisticated Ayer's work.[59] I draw on Ayer's emotivism in this paper, because the idea of constitutional emotivism requires only a basic understanding of the metaethical theory. Ayer presents the fundamental tenets of emotivism in the following paragraph:

> We begin by admitting that the fundamental ethical concepts are unanalysable, inasmuch as there is no criterion by which one can test the validity of the judgements in which they occur. . . . The presence of an ethical symbol in a proposition adds nothing to its factual content. Thus if I say to someone, 'You acted wrongly in stealing that money,' I am not stating anything more than if I had simply said, 'You stole that money.' In adding that this action is wrong I am not making any further statement about it. I am simply envincing my moral disapproval of it. It is as if I had said, 'You stole that money,' in a peculiar tone of horror, or written it with the addition of some special exclamation marks. The tone, or the exclamation marks, adds nothing to the literal meaning of the sentence. It merely serves to show that the expression of it is attended by certain feelings in the speaker.
>
> If I now generalize my previous statement and say, 'Stealing money is wrong.' I produce a sentence which has no factual meaning—that is, expresses no proposition which can either be true or false. It is as if I had written, 'Stealing money!!'—where the shape and thickness of the exclamation marks show, by a suitable convention, that a special sort of moral disapproval is the feeling which is being expressed.[60]

The first and foremost emotivist premise is thus an anomalous and remarkable one. Plainly put, the idea is that moral language (and thus morally charged speech) has no truth metric—it is not a phenomenon that has the capacity for

**57.** See Richard Creath, "Logical Empiricism" in Edward N Zolta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy* (Winter 2022), online: https://plato.stanford.edu/entries/logical-empiricism/; Mark van Roojen, "Moral Cognitivism vs Non-Cognitivism" in Edward N Zolta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2018), online: https://plato.stanford.edu/entries/moral-cognitivism/.

**58.** To be clear, there is no doubt that such inquiries would be essential if this paper were solely dedicated to emotivism, but that is not at all the case. Emotivism is only useful to the bigger picture here, as a diving board is useful to a diver who wishes to become airborne. Put differently, we need emotivism because it is useful for building an understanding of how rights talk led to the rise of constitutional emotivism. It is useful as a jumping-off point—and once that is established, emotivism has served its purpose. Accordingly, this paper is not going to take a stance on emotivism itself; that is far outside the scope of this work. Instead, I am trying to harness emotivism to show how its basic premises can contribute to the idea of constitutional emotivism.

**59.** See AJ Ayer, *Language, Truth and Logic* (Gollancz, 1936) (developing Ayer's theory of emotivism); Charles L Stevenson, *Ethics and Language* (Yale University Press, 1944).

**60.** Ayer, *supra* note 59 at 109-10.

truth or falsity.[61] Since Ayer laid emotivism's foundations, numerous scholars have contributed to defining emotivism. Some define the theory as "the view that when anyone says 'this is right' or 'this is good,' he is only expressing his own feeling; he is not asserting anything true or false, because he is not asserting or judging at all; he is really making an exclamation that expresses a favorable feeling."[62] Similarly, emotivism can be articulated by the claim that one has only moral *feelings*, and these cannot be objectively evaluated in any way—they are neither morally nor epistemically good or bad, right or wrong, justified or unjustified. Feelings and attitudes—not meaning—is all there is in morally charged speech.

For an emotivist, moral judgements express emotions, and so the proclamation that a speech or physical act is right or wrong, ethical or unethical, or good or bad is merely expressing a visceral reaction 'I approve!' or 'I disapprove!' Emotivism is often referred to as the 'boo-hurrah' theory for this very reason. Ayer's emotivism rests on the idea that moral language does not actually refer to anything that can be verified by empirical truth metrics. Morally charged speech acts are, in this sense, quite literally meaningless—"They are neither factual nor logically determinate as to truth value, but fall into some other linguistic category."[63] Such a brief survey of emotivism is not much. It is sufficient, however, to establish at least two fundamental aspects of the concept:

1) Emotivism holds that morally charged speech is meaningless in that it is speech that is incapable of having a verifiable truth value.
2) Morally charged speech adds nothing to the literal meaning of a proposition. It merely expresses an emotional reaction.

We are not interested in emotivism's theoretical defenses or its appeal as a moral theory. We need only a rough idea of the theory for my aims here. Having said that, one might get the sense that there is something about the core idea of emotivism that seems intuitively appealing at first glance. It may be that emotivism captures an intrinsic part of moral discourse: Even if, defying emotivism completely, there are morally objective phenomena that we share an understanding of and refer to when saying things like 'what you did was wrong,' there

**61.** This is a remarkable position to defend. Dallas Willard gives further context on Ayer's theoretical position. "As he looks about upon the uses of moral language, Ayer finds that those who are using it *have an attitude* or posture (perhaps just a feeling?) of approval or disapproval toward some person or action, or some *type* of person or action, mentioned in their statement. That already amounts to a good deal more than a simple 'emission.' An attitude is not a feeling. It is a disposition to behave in certain ways, often but not always accompanied in action by a characteristic feeling state. One who 'seriously' says that stealing is wrong, for example, would be expected not to steal, or very rarely to do so, and to have a certain feeling of disgust (or something like it) toward the practice of stealing and toward those who engage in it, possibly including himself." Dallas Willard, *The Disappearance of Moral Knowledge*, ed by Steven Porter, Aaron Preston, & Gregg Elshof (Routledge, 2018) at 179 [emphasis in original].

**62.** Brand Blanshard, "The New Subjectivism in Ethics," (1949) 9:3 Philosophy & Phenomenological Research 504 at 504.

**63.** Willard, *supra* note 61 at 176.

is still something about the idea of moral utterances singularly expressing one's emotions and attitudes rather than referencing ethical truths or falsities that has some basis in how we sometimes use moral language. As we will see, this intuitive pull is important for understanding why emotivism and rights talk are alike in some respects, and how that similarity is reflected in the idea of constitutional emotivism.

### *MacIntyre and the Weight of Emotivism*

The prominent moral philosopher Alasdair MacIntyre has written about his perception of the grim state of moral discourse that he believes saturates Western culture.[64] In a single cogent sentence from his book *After Virtue*, MacIntyre spells out the thought that "[t]here seems to be no rational way of securing moral agreement in our culture."[65] MacIntyre argues that this fault in our understanding of morality incurred detrimental consequences because moral language as a whole has become embroiled in the language of conflict to a significant degree. He claims "[t]he most striking feature of contemporary moral utterance is that so much of it is used to express disagreements; and the most striking feature of the debates in which these disagreements are expressed is their interminable character."[66] These ideas are explicated with great detail and tied to emotivism, for MacIntyre maintained that "it is indeed in terms of a confrontation with emotivism that my own thesis must be defined."[67] *After Virtue* is a remarkable book, and I regret that we have so little time for it. A few brief points from MacIntyre are all we are looking for here, and they are crucial to our aims because MacIntyre's views on the hostile state of moral disagreement are heavily influenced by his view of emotivism, which he thinks lies on the Western world's moral discourse with a crushing weight that makes progress in moral disagreements impossible.[68]

MacIntyre thereby soundly rejects emotivism, but in critiquing it, he offers some fascinating insights about the theory that we require for the concept of constitutional emotivism. MacIntyre's description of emotivism is similar

**64.** See Alasdair C MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 1984) [MacIntyre, *After Virtue*]. Originally published in 1981, MacIntyre's critical inquiry into the moral decline of the Western world is well known among a field of interdisciplinary scholars. For more recent scholarship related to the central focus of *After Virtue*, see Willard, *supra* note 61; James Edwin Mahon, "MacIntyre & the Emotivists" in Fran O'Rourke, ed, *What Happened In and To Moral Philosophy in the Twentieth Century? Philosophical Essays in Honour of Alasdair MacIntyre* (Notre Dame Press, 2013) at ch 7.

**65.** MacIntyre, *supra* note 64 at 6.

**66.** *Ibid.*

**67.** *Ibid* at 22.

**68.** MacIntyre thus joins a number of moral philosophers who blame emotivism for the moral decline the West is experiencing. I am not aware of any philosophers who have addressed this idea with greater sophistication than the late Dallas Willard, whose book aims to call our attention back to the foundations of ethics in order to escape the emotivist predicament in which Willard believed we find ourselves. See Willard, *supra* note 61.

to the ones we have already encountered, where emotivism is the idea that "all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character."[69] MacIntyre asks us to consider the sentence 'Arson, being destructive of property, is wrong.' He points out that sentences can be both factual and emotive and claims that those differing aspects of meaning must be conceptually differentiated for logical clarity. Accordingly, "'Arson, being destructive of property, is wrong' unites the factual judgment that arson destroys property with the moral judgment that arson is wrong."[70]

Note that this is a clean delineation: 'arson is destructive of property' is a factual claim capable of being tested and empirically verified. Here, MacIntyre is careful to stress that "in the realm of fact there are rational criteria by means of which we may secure agreement as to what is true and what is false."[71] Not so with the moral element of our example sentence. As we know by now, the addition of 'is wrong' to the factual assertion that 'Arson being destructive of property' does nothing more than add tone—you might as well have angrily shouted 'Arson is destructive of property!!!' MacIntyre then stresses why he feels emotivism has been so damaging to Western societies: because it denies the sort of objective (or at least intersubjective) morality or moral order required to rationally approach moral disagreement on a level playing field, a field on which moral incommensurability is absent.[72]

### *MacIntyre on the Third Defect of Emotivism*

The third critique of emotivism presented in *After Virtue* zeros in on how emotivism operates in the reality within which moral utterances are made, thus presenting a sharply different view of the concept compared to its standard theoretical background. MacIntyre attempts to convince the reader that emotivism ought to be understood through a particular lens; he sought to demonstrate how emotivism is "convincing as a thesis about a certain kind of moral utterance."[73] Emotivism is typically thought of as a metaethical theory about the meaning of moral language, but MacIntyre's focus is on a more plausible form, on emotivism-in-practice. He thus rejects the concept of emotivism as a theory of meaning. Instead, he maintains that for emotivism to make sense, morally charged utterances cannot be about the *meaning* of the utterance but rather how the utterance is *used*—emotivism is thus an empirical theory of use, not a metaethical theory of meaning. Put differently, MacIntyre thinks of emotivism as a theory that can only be illuminated by further aspects of the society in which it takes root. He speaks to this in the following quotation:

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**69.** MacIntyre, *supra* note 64 at 11-12 [emphasis in original].
**70.** *Ibid* at 12.
**71.** *Ibid.*
**72.** *Ibid* at 70.
**73.** *Ibid* at 17.

> Emotivism on this account turns out to be an empirical thesis, or rather a preliminary sketch of an empirical thesis, presumably to be filled out later by psychological and sociological and historical observations, about those who continue to use moral and other evaluative expressions, as if they were governed by objective and impersonal criteria, when all grasp of any such criterion has been lost.[74]

In this way, morally charged utterances are "understood as purpose or function of members of a certain class of expressions rather than about their meaning."[75] MacIntyre's next move is to suggest that because emotivist utterances are emotional attitudes and reactions, the purported objective meaning of moral terms like 'good' or 'evil' or 'brave' are used by the speaker as guises for subjective emotional attitudes that the speaker wields with persuasive intent. "If the emotive theory thus interpreted were correct," MacIntyre postulates, "it would follow that the meaning and the use of moral expressions were, or at the very least had become, radically discrepant with each other. *Meaning and use would be at odds in such a way that meaning would tend to conceal use*."[76] We get a third fundamental aspect of emotivism here. Emotive utterances express emotions, yes—but they can also arouse them. There is thus something potentially prescriptive about emotivist utterances in that they can influence the listener to act in a certain way, and Ayer definitively establishes this when constructing his account of emotivism:

> It is worth mentioning that ethical terms do not serve only to express feeling. They are calculated also to arouse feeling, and so to stimulate action. Indeed some of them are used in such a way as to give the sentences in which they occur the effect of commands. Thus the sentence 'It is your duty to tell the truth' may be regarded both as the expression of a certain type of ethical feeling about truthfulness and as the expression of the command 'Tell the truth.'[77]

Here we see another characteristic that rights talk and emotivism share: a prescriptive force behind the language, where the more purportedly objective and impersonal (or, in rights talk's case, the more absolute) the meaning, the stronger that force can be. As historian Thomas Haskell brilliantly writes:

> To be conscious of a right is at least tacitly to lay claim to a kind of knowledge that is not merely personal and subjective but impersonal and objective. When I say that I have a *right* to do something—whether it is to exercise dominion over a possession, to enjoy equal employment opportunities, or to express controversial opinions in public—I am not merely saying that I want to do it and hope that others

**74.** *Ibid.*
**75.** *Ibid* at 13.
**76.** *Ibid* at 13 [emphasis added].
**77.** Ayer, *supra* note 59 at 111. In a similar vein of thought, Alberto Oya has written that "[a]ccording to emotivism, ethical language not only aims to express the feelings or attitudes of the speaker, but also to exert an influence on the hearer. Thus, if I say to you, 'Stealing books from libraries is (morally) wrong', I am not only aiming to express my attitude of disapproval towards the action of stealing books, but I am also trying to get you to adopt that same attitude." Alberto Oya, "Classical Emotivism: Charles L. Stevenson" (2019) 22 Bajo Palabra 310 at 312 [footnotes omitted].

> will let me; I am saying that they *ought* to let me, have a *duty* to let me, and will be guilty of an injustice, a transgression against established moral standards, if they fail to do so.[78]

I argue that the appeal to an objective notion of rights is no different than the appeal to objective morality. Haskell's thoughts can just as easily apply to rights in our contemporary times—by constantly trivializing and misusing the language of rights, we risk eroding what those rights stand for, what role they are meant to hold. The problem is that the language of legalities is everywhere, but the knowledge that would give that language objective (or even intersubjective) meaning is sorely lacking. Since emotivist utterances can carry prescriptive qualities, the appeal to the collective understanding of moral norms in moral statements can easily be perceived as a façade for personal emotional attitudes. Sometimes, for example, it is far simpler (and more convincing) to say 'It was immoral of you to do that' and cite a moral rule or norm than it is to say 'I am personally averse to what you did, and I have intersubjective reasons why you ought to share that view.' One characteristic that emotivism espouses, then (and one feature that is pertinent to our interests here), is the idea that one could never know when moral language is being used in a sincere manner. MacIntyre stresses that very point here:

> We could not safely infer what someone who uttered a moral judgment was doing merely by listening to what he said. Moreover the agent himself might well be among those for whom use was concealed by meaning. He might well, precisely because he was self-conscious about the meaning of the words that he used, be assured that he was appealing to independent impersonal criteria, when all that he was in fact doing was expressing his feelings to others in a manipulative way. . . . We use moral judgments not only to express our own feelings and attitudes, but also precisely to produce such effects in others. . . . For evaluative utterance can in the end have no point or use but the expression of my own feelings or attitudes and the transformation of the feelings and attitudes of others.[79]

We already know that MacIntyre believes emotivism heralded the inability to make progress in the realm of moral disagreement. He develops this idea in part by arguing that emotivism is largely responsible for the moral decline of the West, which he describes as "a cogent theory of use rather than a false theory

**78.** Haskell, *supra* note 29 at 984 [emphasis in original].

**79.** MacIntyre, *supra* note 64 at 13, 12, 24. See also Haskell, *supra* note 29 at 997: "What is distinctive about emotivist culture is a cluster of beliefs and practices that tends to obliterate the distinction between manipulative and nonmanipulative social relations." If we are to fully understand emotivism as a philosophical doctrine, MacIntyre says, we must understand what it would look like if it were socially embodied. That is, if we stipulate that nearly all the people in a given society subscribe to emotivism, what can we expect their society look like? How will they behave? It turns out, MacIntyre says, that such a society would look much like ours, and that (as has been said) we act as though we believe emotivism to be true. MacIntyre says that "the key to the social content of emotivism . . . is the fact that emotivism entails the obliteration of any genuine distinction between manipulative and non-manipulative social relations." MacIntyre, *supra* note 64 at 22.

of meaning, connected with one specific stage in moral development or decline, a stage which our own culture entered early in the present century."[80]

Adopting this same line of thought, I argue that emotivism and its negative repercussions for an objective (or at least intersubjective) moral order are related in one sense to the increasing dominance of rights talk.[81] Put differently, the incommensurable nature of moral arguments encourages us to reach for different methods of solving disagreement, foreshadowing Greene and his cogent analysis on how rights can be misused and abused in this context. MacIntyre understood that incommensurability as an indication of a moral and cultural decline that has surely contributed to the prominence of rights talk. In this way, MacIntyre's third critique gives us an answer to the question 'What is the connection between rights talk and emotivism?' Understood as an empirical theory of use (where the meaning of the purportedly objective phenomenon will often act as a façade for personal use), emotivism empowers rights talk—there are emotive features within the practice of rights talk that worsen its deleterious effects, leading us to the idea of constitutional emotivism. The well-known thought experiment at the beginning of *After Virtue* can just as easily apply to rights literacy.[82] Discourse on rights has grown ever worse, reaching what seems to me to be unprecedented levels of intensification through sheer *dis-use*—a clear catastrophe that distances us from the political commitments of a healthy, pluralistic, and moderate constitutional democracy.

### *Rights as Moral Fictions*

We can hardly study MacIntyre on emotivism without also addressing MacIntyre on rights (albeit ever so briefly). Interestingly, rights loom large in *After Virtue*, but the focus there is human or natural rights, rights considered inalienable simply by being a human being.[83] MacIntyre does not share the same concern for the lack of objectivity of rights as he holds for morality, going so far as to call human rights 'moral fictions,' albeit fictions "with highly specific properties."[84] Historian Thomas Haskell has made note of this apparent contradiction, stating that "MacIntyre ultimately segregates rights from other claims to objective moral knowledge and treats them dismissively."[85] Haskell finds this puzzling given that "[t]he idea of a right, after all, is only one variation on

**80.** *Ibid* at 18.
**81.** I do not mean to suggest that emotivism is solely responsible for the dominance of rights talk; that would be a gross overestimation of the complexity of rights talk. All I am saying is that it is a powerful contributing factor.
**82.** See MacIntyre, *supra* note 64 at 1-3.
**83.** *Ibid* at 66-69. MacIntyre specified that by 'rights' he did not mean those rights conferred by positive law, which is the exact sort of rights we are focused upon here: constitutional rights. "I mean those rights which are alleged to belong to human beings as such and which are cited as a reason for holding that people ought not to be interfered with in their pursuit of life, liberty and happiness" (*ibid* at 66). Nonetheless, we can learn a great deal from his work that contributes to the idea of constitutional emotivism.
**84.** MacIntyre, *supra* note 64 at 70.
**85.** Haskell, *supra* note 29 at 995.

the claim to objective knowledge about morality."[86] Regardless of the cause of MacIntyre's rejection of the possibility of objective moral criteria grounding human rights, we can learn something about constitutional emotivism by examining his thoughts on why human rights are moral fictions.

MacIntyre takes a radical position on this subject, arguing that human rights are entirely rhetorical, for which the best evidence is MacIntyre's famous assertion: "the truth is plain: there are no such rights, and belief in them is one with belief in witches and in unicorns."[87] Given that, MacIntyre's take on rights has been labelled by some as a "human rights weariness ... a state of moral fatigue with rights languages and logics.... Its dissipated residual energies contest the very notion of human rights as a moral language and rhetoric."[88] MacIntyre is also considered by some to be a human rights nihilist.[89] What is important to remember here is that MacIntyre's view of emotivism is heavily influencing his perception of rights; more specifically, his view of emotivism as a theory of use. He states it clearly here: "A central characteristic of moral fictions ... is now identifiable: they purport to provide us with an objective and impersonal criterion, but they do not. And for this reason alone there would have to be a gap between their purported meaning and the uses to which they are actually put."[90] Although unaware of it, MacIntyre is strongly alluding to a core element of constitutional emotivism here. He goes on to argue that in "a rights-conscious emotivist culture,"[91] since we can never judge the sincerity of the speaker, we cannot know if they are manipulating us. We thereby have no way of authenticating the sincerity of rights claims—we cannot know if they are merely a façade for moral emotions and attitudes. More than any other scholar cited in this paper, MacIntyre is espousing the idea of a rights emotivism of which my own project is reminiscent. It is now time to explore why there is value in reframing this idea with a specific focus on rights talk and the landscape of constitutional politics.

## Part III. Constitutional Emotivism

### *The Constitutional Mythos*

There is a sort of emotivism growing more and more inherent in rights talk. It is similar to the emotivism that we have just been studying, a kind of empirical sketch of a thesis about how moral utterances occur. This sort of emotivist rights talk occurs most often at the level of constitutional rights, so I refer to it as 'constitutional emotivism.' Constitutional emotivism is, in a sentence, the conflation of

**86.** *Ibid* at 994-95.
**87.** MacIntyre, *supra* note 64 at 69.
**88.** Upendra Baxi, *The Future of Human Rights,* 3rd ed (Oxford University Press, 2012) at 51-52.
**89.** Marie-Bénédicte Dembour categorizes MacIntyre, like herself, as a human rights nihilist or discourse scholar. See Dembour, *infra* note 106.
**90.** MacIntyre, *supra* note 64 at 70.
**91.** Haskell, *supra* note 29 at 1001.

moral disagreements with constitutional rights grievances. This phenomenon is a form of rights talk—perhaps its worst form. It is the result of a powerfully entrenched culture of rights talk that takes on significant emotive qualities. It is thus derivative of rights talk—its next step in an evolutionary sense—but there are significant differences between the two concepts. For example, as we know, rights talk impoverishes our political discussions by constantly dragging rights to the forefront of every conflict. Constitutional emotivism is even worse—it aims to undermine a coherent, realistic, and good faith language of rights to the point of illegibility.

Constitutional emotivism is not merely the result of a body politic saturated through by rights talk with emotivist underlying; there is more to it than that. A central premise of constitutional emotivism is a constitutional mythology—a basis of shared beliefs about what a constitution embodies and represents. The mythos that constitutional emotivism is predicated upon, however, is a mythology of disinformation and propaganda. The American example is, of course, the paradigmatic case of a constitutional mythology of exactly this sort—it should come as no surprise, then, that you will find more people who practice constitutional emotivism in the United States alone than you will find anywhere else in the world.[92] Greene was not exaggerating in the least when he claimed that in America, "[r]ights are the commandments of our civic religion."[93] Exactly what sort of rights, though? Not *just* constitutional rights as they are *correctly* understood, for "stark constitutional formulations alone [the kind the American constitution is built upon] cannot explain our fondness for absolute rights talk."[94]

But what Glendon could not yet see is that the sort of folk to whom rights talk appeals would abandon a standard understanding of what constitutional rights entail—if they held that understanding at all. We are talking about a mythology of disinformation and alternative truths, so *of course* there will be a warped perception of constitutional rights (we live in the era of alternative facts, after

**92.** I maintain that constitutional emotivism is not yet a prevalent force in most Western societies—America is the exception. Although I have no empirical method of verifying my claim, I believe that the United States has so thoroughly embraced rights talk that constitutional emotivism is ascendant. I do not have the space to better explicate and justify this claim here. Instead, see F Cartwright Weiland, "Careless Words: Rights Talk, Redux", *The American Interest* 14:1 (31 May 2018), online: https://www.the-american-interest.com/2018/05/31/rights-talk-redux/. Writing three years ago on the legacy of *Rights Talk*, Weiland stated: "Because of the powerful channeling effect careless language has on thought, Glendon soberly wondered whether American leaders had the will, ability, or imagination to speak candidly, moderately, and in complex terms about the shared public challenges we face. The problem Glendon identified 27 years ago has since undergone a metamorphosis, and its evolution in some ways explains the wide divergence of opinion regarding our current President, as well routine discontent with other branches and perhaps all levels of government. Today, a sense of helpless frustration and moral panic abounds—one that is despairing in tone, and, in its ugliest form, resembles hatred. Our politics certainly haven't improved since 1991. One reason is that the words citizens and government officials deploy to describe and participate in public affairs remain redolent, as Glendon put it, with starkness and simplicity, absoluteness, insularity, and silence with respect to responsibilities" (*ibid*).

**93.** Greene, *supra* note 2 at xiv.

**94.** Glendon, *supra* note 13 at 43.

all). A defining aspect of constitutional emotivism is therefore a conflation between constitutional, natural, and human rights. Constitutional emotivist's believe that their constitutional rights are inalienable in a manner similar to the commitment laid out in the preamble of the *Universal Declaration of Human Rights*.[95] Moreover, they tend to conflate the positivist origins of their rights with moral or religious sources; for example, the statement 'our God-given constitutional rights' has been uttered many times in American political circles, with not even a shred of awareness of that simultaneously amusing and irritating oxymoron. This bizarre perspective is the result of the constitutional mythos. People who fall into the trap of constitutional emotivism allow their rights fervour to overwhelm their common sense. Rights, after all, drive us to white-hot rage ... and that rage is compounded when citizens conflate their constitutional rights with their religious beliefs and vague, half-baked ideas of natural law and human rights.

The constitutional mythos is also fueled by political forces that capitalize on rights talk. When politicians use the promise of absolute and inviolable rights or freedom to gain favor, they appeal to the imaginary and rhetorical aspects of rights, purposely ignoring the fact that rights cannot be understood that way in a grounded manner. They thus breed resentment of any legal system that recognizes limitations on their rights. When met with the harsh reality, with no hesitation they invoke tyrannical authoritarian government claims. In this way, rights are misconstrued until they are little more than rhetorical weapons—"A right's very raison d'être, Americans today believe, is to exempt the rights holder from the law's reach."[96] When constitutional emotivists are brought back down to earth from their lofty mythos high in the clouds—when they are told that their rights simply are not absolute entitlements—rage is typically the first reaction. That rage is channelled into terms like 'unconstitutional,' 'communist,' or 'dictatorship'—as if the reality that rights must operate in is fundamentally oppressive and anti-democratic. Furious and spluttering references to 'the law' are then invoked. If one disagrees with a constitutional emotivist's rights claim, one is told to educate themself and 'read the constitution'—an utterly laughable thought to anyone who has any idea of how the American constitution functions and is adjudicated in reality.[97]

Constitutional rights come to be idolized as all-inclusive entitlements that empower the principles of freedom, liberty, and the individual. The bottom line is that constitutional emotivism cannot be separated from its mythos. Either one accepts the mythos or rejects it, but where it is accepted, it is taken with religious

**95.** See *Universal Declaration of Human Rights*, GA Res 217a (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at Preamble.
**96.** Greene, *supra* note 2 at 10.
**97.** The perspective of a full-blown constitutional emotivist is reminiscent of an amusing (but uncomfortably close to the mark) satirical piece by The Onion. See "Area Man Passionate Defender Of What He Imagines Constitution To Be", *The Onion* (14 November 2009), online: https://www.theonion.com/area-man-passionate-defender-of-what-he-imagines-consti-1819571149.

fervor. I stated earlier in this paper that the American Constitution is the best example of constitutional emotivism taking hold, and that is because the United States is "a country which has made a cult out of its own written constitutions."[98] Much like a cult, the mythos is considerably difficult to move away from. You either love individual liberty and freedom and hate government 'tyranny,' or you are outside of the mythos. That is why I focus on constitutional rights here. Through misinformation and a dangerous conflation of different categories of rights, they have become the focal point for claims about what justice requires, the ideals that constitute good governance, what the state owes its citizens, and what citizens owe one another in a democratic community.[99]

### *The Continuation of Constitutional Emotivism*

Constitutional emotivism occurs when rights claims are made that are not based upon any reasonable or plausible instance of a rights grievance, nor based in a history of recognized rights violations, nor loosely derived from reference to any controlling precedent. In a sentence, they are highly emotional reactions mired in a constitutional mythos that encourages willfully misinformed ideas on what constitutional rights *are* and *do* for citizens living in a constitutional democracy. The sort of individual that constitutional emotivism appeals to tends to believe (and act upon) the vast entitlements they feel their rights afford them. But there is widespread illiteracy about the complexity of rights, made all the worse by rights talk and its focus on understanding rights in a simple and absolute manner. Because it is an exacerbated form of rights talk, constitutional emotivism encourages parties in a verbal or written dispute to hurl rights claims like spears, where each side seeks to gain the argumentative advantage they imagine their rights invocation—however grossly extraneous—grants them.

All too often, those rights invocations are not expressing a claim that is based on the reality within which constitutional rights operate. They are instead making an emotionally laden utterance that expresses their displeasure with the way they are being treated. These sorts of rights claims are not all bad faith, however. Driven by the mythos, a constitutional emotivist might genuinely believe that their constitutional rights were unjustly violated (and they can sincerely maintain this belief because they have no idea what their rights genuinely entail, nor any

**98.** Colley, *supra* note 3 at 13.

**99.** Constitutional emotivism also seems to reject the idea that constitutional rights are products of legal positivism. Rather than being mere products of a social fact (i.e., Canadian citizens have Charter rights because the Constitution was democratically amended to include the Charter, where the Charter was a political compromise agreed upon by the required number of actors according to the Canadian Constitution's amendment formula), rights are instead fundamentally charged with the force of inviolable natural laws (i.e., we have rights because they are an entitlement that all humans are born with.) Once again, we see the conflation of different sorts of rights (in this case, human and constitutional are being mistakenly conflated). In short, you will not find any exclusive legal positivists among those who buy into constitutional emotivism—rights are far more than social facts, for they carry moral weight. This is one small but noteworthy contributing factor to a constitutional emotivist's tendency to conflate the forces of law and morality.

understanding as to how a judge might adjudicate their rights claim). The point, however, is that they will rarely have reliable or valid information to base their claim upon—the kind of content that would give valid significance or meaning to the invocation of the right. In this way, the *use* of their rights claims undermines the *meaning* of the right itself—the similarity to MacIntyre's view of emotivism as a theory of use ought to become clearer here. We cannot know whether those rights claims are sincere or mere deceptions on the part of the speaker, who may recognize that their subjective emotional reaction can be presented in a stronger manner as a reference to an objective right.

The result is that just as emotivism holds that moral utterances have no meaning, constitutional emotivism occurs when one invokes constitutional rights with no real knowledge of their purpose or limitations—their *meaning*. Constitutional emotivists invoke rights to give legal objectivity and thus social power to their position, to release their emotions *not* in the subjective and personal language of morality, but in the objective and chilling language of rights. Expressions of constitutional emotivism are grounded in emotion far more than reason. The rights holder is angry and wants to express that emotion, but because an emotional outburst lacks the chilling effect that hurling rights claims carries, the constitutional emotivist will instead use the language of rights—for it is far more effective. American historian Jill Lepore speaks to this in the foreword of *How Rights Went Wrong*:

> Claiming that your rights have been violated has become the best and in many cases the only way to pursue your political interest. Instead of seeking political change in pursuit of my interest in the realm of political debate and the making of the law—where my interest will compete with your interest, and we will likely arrive at a compromise—my remedy is to claim that my interest is not an interest but a right. You do that too. And then we go to court. As a result, conflicts that don't need to be settled in the courts are settled in the courts, where the winner takes all. In a contest between your rights and my rights, the courts decide whose rights win based on each judge's preferences. This is neither fair nor democratic. And, as Greene writes searingly "it divides us up into those who have rights and those who don't."[100]

Constitutional emotivism relies on this sort of political atmosphere to gain ground. In practice, constitutional emotivism is the spear hurling from one rights holder to the other. The sort of rights claims that rights talk encourages (regardless of whether they are legally plausible or justified) are intended to *command action—they are prescriptive in this sense*. When rights are abused in this way, "[p]eople use speech as a club to intimidate or posture, not as a tool to teach and learn."[101] Political conflicts understood through this narrow and antagonistic lens cause the value of constitutional discourse to wither. Captivation with the rhetoric of rights and indifference to their reality is exactly what constitutional emotivism requires. But rhetoric without reality is insidious; for "[w]hen our rights come into conflict, instead of seeking common ground, we see in the opposing position

**100.** Greene, *supra* note 2 at ix.
**101.** Epstein, *supra* note 25 at 1106.

the worst version of our opponents" and thus the way we discuss rights ought to be done carefully in public and political spheres.[102] That sort of careful thinking is antithetical to constitutional emotivism. There are no positives to be gained from celebrating rights rhetorically as absolute entitlements of natural liberty with no thought for the duties that accompany rights or the responsibilities that individuals have to the communities within which they reside. There is nothing to be gained by supplanting the language of morality with that of legality—it will only lead a modern constitutional democracy to ruin, corrupting the national conversation from the inside out by conflating political conflicts that arise from moral disagreements and differences with legal conflicts that arise from rights grievances.[103]

The language of the constitutional emotivist is empty in the very same way that MacIntyre understood contemporary human rights language to be empty—he argued that the modern idiom and rhetoric of rights were both inadequate and barren, in the sense that nothing good could come of utilizing it.[104] Glendon speaks to this inadequacy at length in *Rights Talk:* "Our rights-laden public discourse easily accommodates the economic, the immediate, and the personal dimensions of a problem, while it regularly neglects the moral, the long-term, and the social implications."[105] Constitutional emotivism worsens rights talk's already ill effects in this particular sense. It does not *neglect* the moral implications of political language; it conflates them with the language of rights in an attempt to give the constitutional emotivist all the power in the argument. Constitutional emotivism thus embodies the idea of human rights nihilism, or the idea that human rights, far from being "inherent and inalienable … is 'a system of persuasion', a 'kind of rhetoric', an 'expression of the will to power—even to domination—of those making the [human rights] truth-claims over those who are being addressed by them." [106]

For the third and final time in this paper, we see evidence of the danger that Alexis de Tocqueville observed with regard to the language of lawyers being utilized by everyday folk who cannot help but inevitably misconstrue it. Those who are influenced by constitutional emotivism are often experts in the art of grievance theatre—of making themselves and their rights claims the center of the issue and ignoring the other parties' rights, their responsibilities as a citizen, and the duties that rights can establish. Put differently, they see themselves as the center of the moral universe—an attitude Glendon made note of decades ago.[107] The rights of others are unimportant—for *my* rights are in play;

**102.** Greene, *supra* note 2 at 90. See also *ibid* at xiv.
**103.** The idea here is not that those two categories are mutually exclusive, because they are not—claiming such a thing would greatly reduce the complex set of factors that animates both sorts of conflicts.
**104.** See MacIntyre, *supra* note 64 at 110.
**105.** Glendon, *supra* note 13 at 171.
**106.** Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press, 2006) at 277, citing Jon R Snyder, "Translator's Introduction" in Gianni Vattimo, The End of Modernity: Nihilism and Hermeneutics in Post-Modern Culture (Polity Press, 1988) at xii.
**107.** See Glendon, *supra* note 13 at xi.

it is *my* needs and concerns that must be taken seriously. Constitutional emotivism thus encourages those it influences to blur the two senses of entitlement regarding rights. Instead of understanding rights as entitlements in the sense that they grant a right *to* something, constitutional emotivists prefer to understand rights as trumps that afford one special privileges or protections.

Constitutional emotivism cares nothing for the obligations/duties that rights claims generate, because those who practice it have been taught by rights talk to view individual liberty as a constant trump over those collective obligations. Nor are they making rights claims that they intend on seeing through to court—rather, they are using the chilling effect of rights to mask their wants and needs, hoping to win a political conflict, not instigate a legal one.[108] When rights are understood as offensive weapons used to win arguments rather than protective tools against injustice and interference, rights claims change in substance. They become less about seeking remedies against government wrongs and more about perpetuating chilling effects via their invocation against other citizens. Disagreements about ethical norms, arguments about the morality of the law, and hard conversations that ought to be resolved on moral grounds become hidden behind a façade of legal pretense. The sort of political climate in which such a "hair-trigger rights consciousness" exists is not one that will be compatible with the goals of a modern pluralistic constitutional democracy for long.[109]

In describing rights talk, Glendon hints at the idea of constitutional emotivism: "Claims of absoluteness have the further ill effect that they tend to downgrade rights into the mere expression of unbounded desires and wants. Excessively strong formulations express our most infantile instincts rather than our potential to be reasonable men and women."[110] Put differently, the absoluteness of rights talk encourages emotive language. Rights become a medium for channelling the emotions of the rights claimant, for it is easier to shut down a hard conversation with a rights invocation than it is to make moral progress, something that requires humility on both sides. It is easier to claim one has a right to something than it is to express that one is upset or offended by some rule or requirement. Constitutional emotivists do not care about the obligations that those rights claims generate because they are not actually making a *real* rights claim—they are using the chilling effect of a 'rights' claim to mask their wants and needs. In this way, emotivism degrades constitutional meaning in the same way the theory is alleged to have degraded the meaningfulness of morality, "[f]or the new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires."[111] Yes—subjective desires masked as absolute rights.

**108.** No doubt there exist constitutional emotivists who have gone to court many times for their erroneous beliefs about rights—see the United States as the paradigmatic example—but the idea here is that the majority simply use the language of legalities without intending to instigate formal legal proceedings. Keep in mind they are trying to win primarily moral disagreements.
**109.** See Glendon, *supra* note 13 at 67.
**110.** *Ibid* at 45.
**111.** *Ibid* at 171.

This represents yet another way that constitutional emotivism differs from rights talk: constitutional emotivism does not fixate on the actual court battle—it is all about the rights claim itself and what the *mere invocation* of the language of rights can do. Rights talk has created such a malevolent socio-political climate that the chilling effect created by a rights claim is enough to win arguments forthrightly—in this way, "[r]ights fetishism act[s] as an enabler."[112] We allow our worst selves to come to the forefront, driven by white-hot rage. When one feels their rights are threatened, one goes on the offensive, where the goal is clear: "You don't negotiate with such people; you destroy them."[113] Driven by the mythos, constitutional emotivist's have a tendency to fervently believe that their highly abstract and vaguely worded constitutional rights vindicate their actions whenever they believe that those rights are being violated. These individuals thus make rights claims that are manifestly erroneous and little more than emotionally-laden outbursts for that exact reason—they tend to genuinely believe that they have legal trumps for socio-political/moral problems and conflicts. This leads to the widespread use of the phrase, 'I have *every* right to do X' where the language of rights is a façade intended to mask an assertion of nakedly greedy entitlement. Phrases such as 'you either have free speech or you don't' are saturated with the absoluteness at the heart of rights talk—and that absoluteness breeds an unnatural level of entitlement, which in turn breeds conflict. In short, constitutional emotivists are imagining a sort of freedom that does not exist within the reality of the social contract of a modern legal system.

British philosopher Onora O'Neill has made note of this in her work, in which she emphasizes the overwhelming focus on assertions of rights but a total lack of corresponding obligations.[114] O'Neill negatively views the abundance of scholarly literature that makes this mistake, claiming that an integral part of the reality of rights—a need for a delineation between the rights-claimant to a specified obligation-bearer—obscures the content of the right in question.[115] For this reason, rights talk is damaging. In her words: "But at worst a premature rhetoric of rights can inflate expectations while masking a lack of claimable entitlements."[116] O'Neil's writing identifies a central characteristic of constitutional emotivism: the simultaneous inflammation of rights-expectations and the obscurement of rights-responsibilities. When this occurs, it "tempts many to settle for rhetoric not matched or readily matchable by performance" and rights thereby become even more disconnected from their legal realities.[117]

Up to this point, I have been explicating constitutional emotivism with no examples, so it may be difficult to imagine a real-life scenario. Here are two illustrations of what constitutional emotivism looks like in the real world.

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**112.** Greene, *supra* note 2 at 144.
**113.** *Ibid* at 151.
**114.** See Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge University Press, 1996).
**115.** *Ibid* at 131-32.
**116.** *Ibid* at 133 [emphasis omitted].
**117.** *Ibid* at 134.

1) Nancy attempts to enter a grocery store without a mask during the COVID-19 pandemic, at a time in which the federal government has instituted a public health mask mandate. When she is asked to put on a mask, she refuses and is subsequently denied entry to the grocery store. Nancy then flies into a rage and tells the store owner that she is going to sue them for violating her constitutional rights and unduly restricting her liberty.
2) Kyle is a dogmatically religious individual whose faith compels him to regularly protest at abortion clinics. One day, while attempting to convince a woman to alter her plans, Kyle gets in the woman's way and proceeds to verbally harass her and threaten her physically in an attempt to deter her from entering the clinic. The police happen to arrive as this occurs, and when Kyle subsequently faces consequences for his act, he claims that his constitutional right to protest has been violated, shouting at the police that they have unduly restricted his freedoms.

*Nota bene* the conflation here: the subjective and personal language of wants is weaponized by invoking the objective and absolute language of rights. Nancy does not want to wear a mask, and she claims she has the right not to be required to do so. Kyle is upset that the woman at the clinic is about to commit, in his mind, a grave sin; he claims he has a right to protest against that sin. In both cases, the language of rights is twisted into emotive outbursts. Glendon describes a quality of rights talk that is closely related to this pattern of behavior when she claims that "[a]ll of these traits [of rights talk] promote mere assertion over reason-giving."[118] Moreover, notice the fact that each individual was solely concerned with their individual rights, wholly ignoring the fact that they have obligations to their communities. Nancy refusing to wear a mask ignores the obligation shared by everyone in that community to do their part in the face of a public health mandate. The woman at the abortion clinic that Kyle assails and harasses has a right not to be subjected to assault and harassment and to move freely as she goes about her business, and so Kyle has a corresponding obligation to allow her to do so—an obligation he completely and utterly tramples upon, because *only his* rights matter.

In reality, all of these rights are limited because all of these rights must co-exist together in a world where rights and duties are flip sides of the same coin. But as Greene asserts, "[t]he problem is that in a diverse and complex world, rights do not sort easily into the ones that are 'true' and the ones that aren't."[119] When we phrase matters that are primarily moral disagreements about socio-political events/issues in terms of constitutional rights claims, we damage both the perceived legitimacy of that constitution and the ability to have a conversation about issues that require democratic resolution—not legal arbitration. Rightsism and its empowerment of judicial review in the United States tell us this very clearly. As Greene writes, "[a] constitution for the modern world asks judges neither to ignore nor to supplant politics, but rather to structure it, to push it, and to police it, giving the people of this country the tools to resolve our own disputes in a way that respects one another's

**118.** Glendon, *supra* note 13 at 14.
**119.** Greene, *supra* note 2 at 4.

legitimate ends."[120] This is a goal that can only be achieved if the language of unassailable rights is prevented from impeding rational political discourse, the sort of conversations that focus not just on the individual but on their immediate community and their democracy as a whole.

Glendon argues that "[o]ur rights talk is like a book of words and phrases without a grammar and syntax."[121] Constitutional emotivism takes it a step further: it is not really a coherent language at all, in the sense that it does not correspond to an idea of rights that allows for them to be anything less than inviolable and absolute, all of the time and in every situation (a crude book indeed!). But more importantly, constitutional emotivism is not using the language of legalities where a legal problem exists (or more accurately *needs* to exist, since much of the conflict that constitutional emotivist rights claims arise from are moral disagreements on socio-political issues).[122] Instead, it relies on a language of emotionally driven rights claims, derived from a powerful mythology of disinformation in which individual liberty and absolute—but incredibly vague—rights are infringible elements of a *true* democracy.

Absoluteness, Glendon writes, "is an illusion, and hardly a harmless one," for when we assert our rights, even our most basic claims to life, liberty, and property, in absolute form, we are "expressing infinite and impossible desires—to be completely free, to possess things totally, to be captains of our fate, and masters of our souls."[123] Our rights talk gives a false account of what we are, she tells us. It causes us to misunderstand our own nature and to cast aside the prerequisites of a flourishing, harmonious society.[124]

The concept of unassailable rights began with rights talk and matured into constitutional emotivism. The more that rights talk takes on emotive qualities, the more these sorts of infinite and impossible desires will come to define rights claims where rights claims need not be expressed—indeed, in situations where their invocation seems bizarrely out of place. Should it become as deeply rooted as rights talk, constitutional emotivism will worsen our already exhaustingly dystopian political climate. This should worry us, because "[c]onstitutional rights provide an avenue for individuals or groups to appeal to values so basic they transcend simple majoritarian preferences. . . . It is because of their importance

**120.** *Ibid* at xxxv.
**121.** Glendon, *supra* note 13 at 14.
**122.** See Greene, *supra* note 2 at 147-53. Greene speaks to a particularly apt example of this idea when he discusses *Masterpiece Cakeshop v Colorado Civil Rights Commission,* 138 S Ct 1719, wherein a baker refused to design a wedding cake for a gay couple based on his religious belief. See also Weiland, *supra* note 92: "Whatever one's views on religious freedom and state-sanctioned marriage between individuals of the same sex, the eventual judicial outcome will be a rather Pyrrhic victory for the winning side. Courts are not particularly well suited to persuade non-litigants, much less resolve strongly held, extra-legal differences in values. When it comes to a Christian baker's refusal to provide a cake for a same-sex ceremony, competing visions of history, morality, and human intimacy are implicated—making genuine public discussion difficult, and court opinions imperfect conduits for it. As Greg Weiner noted in the *Washington Post*, when the Supreme Court ultimately decides the case in favor of petitioner or respondent, it won't change the fact that, in some deeper sense, 'everybody loses.'"
**123.** Glendon, *supra* note 13 at 45.
**124.** *Ibid* at 305.

that society should be alarmed when rights are treated in a haphazard manner."[125] Already, the true nature and function of constitutional rights are being obfuscated by rights talk; we hardly need to add to the mix by allowing rights claims to become more and more meaningless through sheer disuse and conflation with ethical socio-political issues.

### *Caveats on Constitutional Emotivism*

Constitutional emotivism appeals to those who are most apt to conflate privileges with rights, and conveniences with fundamental freedoms. There is an undercurrent of privilege that fuels constitutional emotivism. We see it in our democratic conversations on a daily basis. Rights claims made by those who are genuinely relying on rights talk to seek access to justice because of injustices are using rights claims as defense shields, not offensive weapons. But constitutional emotivism is not a defensive phenomenon—it relies on volatile emotional reactions that typically generate indignation, the sort of rage we feel when we believe something to which we are wholly entitled is taken away from us.

However, those emotivist rights expressions, despite invoking the claim as a weapon to win a conflict, may indeed be appealing to a relevant precedent, or they may correctly assert that a constitutional right may allow them to do X and Y. The point here is that an emotivist rights claim may not be meaningless in the sense that I have described in the preceding pages. To be clear, the idea of constitutional emotivism does not entail that *all* emotive rights claims border on meaninglessness—it merely suggests that the majority of them will appeal to notions of rights that are manifestly unrealistic, absolute, and incapable of being limited; thus they will not be grounded in the reality within which rights operate. This is not quite the same lack of meaning that emotivism claims is found in moral language, but it is a meaninglessness that does harm to our political and constitutional discussions about what we, as democratic citizens, owe one another, and it further encourages rights talk to dominate those discussions. In a world where political polarization grows worse every day, constitutional emotivism presents a grave threat to the ability of citizens to get along. Rights are not trumps that should be used to intimidate other citizens into acceding to one's demands. They cannot be understood as conveniences that make one's life easier by shutting down socio-political conflicts that, like it or not, are a central element of a pluralistic and liberal constitutional democracy. Moral disagreements are everywhere, and rights claims understood as instant trumps are not how we ought to deal with them—that is a wholly disastrous plan of action.

Some last thoughts from Glendon seem fitting. Despite its grim central point, *Rights Talk* ends on a somewhat positive note. Glendon points to the ways in which she believes American democracy could begin to recover from the severe faults in its political discourse: "Merely refining the rhetoric of rights—if such a

**125.** MacFarlane, *supra* note 44 at 324.

thing could be done—would hardly remedy all the ills that currently beset American culture and politics. Yet language, with its powerful channeling effects on thought, is centrally implicated in our dilemma and in our prospects for surmounting it."[126] Rights talk will certainly be difficult to move away from; the recent pandemic has demonstrated that fact many times over. Nonetheless, "[r]efining the rhetoric of rights would be but one element in a project of transformative politics. Yet even quite small shifts in circumstances can produce remarkable distant effects in complex systems."[127] Small shifts seem to be ineffectual against rights talk and its gradual seep—it thereby remains to be seen whether they can combat constitutional emotivism in a normatively satisfactory manner.

## Conclusion

Constitutional emotivism is a symptom of a political and legal culture that is, very simply, not in a healthy state. It is not *just* another form of rights talk, nor is it *merely* a tendency to make emotivist utterances. The worldview of a constitutional emotivist is fabricated out of a mythos of disinformation and willful ignorance. As I have explicated it here, the concept is predicated on the conflation of moral disagreement with constitutionality itself—it encourages a rhetoric of rights that is all boo-hurrah, where rights are weapons with which to win arguments that often spring from incommensurable moral disagreements between citizens rather than valid rights grievances against a government. In this way constitutional emotivism draws people who do not know any better into beliefs about our legal system that are manifestly erroneous, which in turn leads them to become disillusioned with the aims of a pluralistic constitutional democracy where incommensurable moral disagreements are everywhere and unavoidable.

We need to encourage the widespread recognition of the inevitable fact that, as Greene tells us, "[r]ights are not precious. They are all around us."[128] Truly accepting that notion means recognizing that our rights will sometimes end where others begin. As we saw with Glendon, even small changes in the false accounts through which we frame the rhetoric of rights can have huge impacts. I am convinced that Greene is undoubtedly correct about how we ought to challenge the popular perceptions of rights. American judges have proven time and again (and especially so in recent times) that the practice of discriminating against

**126.** Glendon, *supra* note 13 at 172. Glendon also writes on the onus that judges and lawyers bear, and their role to play in reducing rampant rights talk: "At the very least, judges and legislators need to be more conscious of the radiating pedagogical effects of their activities in a law-saturated society. Lawmakers and law-sayers have more responsibility today than ever before to consider how their words will be understood—not only within a professional community schooled to distinguish between law and morality, but by a wider public that experiences these spheres as overlapping and interpenetrating. Willing or no, judges and legislators can no longer afford to ignore the way in which law, especially criminal, family, and constitutional law, is aspirational and educational, expressing something about what kind of people we are and what kind of society we are in the process of creating" (*ibid* at 104-05). Glendon's thoughts here are heavily elaborated upon by Greene, *supra* note 2 at xx-xxi.

**127.** Glendon, *supra* note 13 at 183.

**128.** Greene, *supra* note 2 at xxv.

rights is a catastrophic one. We need to push not only judges but members of the general public to mediate rights conflicts, beginning from a place of common ground—that this is not a winner-takes-all contest. The first step to getting away from constitutional emotivism is an alteration of the popular rhetoric around constitutional rights that opposes both the callous absoluteness and unrealistic inviolability of rights talk. We need a rhetoric of rights that rejects constitutional emotivism's dangerous conflation and its consequences for our national discussions of constitutional politics, and that rhetoric must begin with a heightened focus on how we speak about our rights in the abstract. Put differently, we need a rhetoric of rights that emphasises the importance of linguistic precision, so that rights are not distorted as we continue to speak about them in both politically charged and abstract manners; where we lack the sort of context that grounds rights when they are adjudicated. Such a rhetoric would recognize the importance of recognising that rights do indeed live dual lives.

Former Chief Justice of the Supreme Court of Canada Beverley McLachlin has publicly shared a similar concern about rights rhetoric. In a recent op-ed, McLachlin speaks to the disturbing penchant of invoking the idea of absolute freedom, citing the 'Freedom Convoy' as the archetypical example of that insidious rhetoric: "Freedom, misconstrued as license to do and say whatever one wants, is dangerous."[129] That is one of the points this paper has aimed to make. As Glendon told us so many years ago, "[h]istory has repeatedly driven home the lesson that it is unwise to dismiss political language as 'mere rhetoric.'"[130] In an era where rights literacy is depressingly low, it is all too clear that not enough of us have learned that lesson.

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**129.** Beverley McLachlin, "The Ottawa truck convoy has revealed the ugly side of freedom," *The Globe and Mail* (22 February 2022), online: https://www.theglobeandmail.com/opinion/article-the-ottawa-truck-convoy-has-revealed-the-ugly-side-of-freedom/. McLachlin cites a new book by American studies scholar and political scientist Elisabeth Anker. The book's central thesis argues that the historical narrative of individual rights has often—if not always—been mired by undesirable aspects of a hegemonic power structure in which rights are wielded by those in power to oppress those without power. In this way, the book makes a valuable contribution to arguments that the hard critics of constitutionalism have defended for decades. See Elisabeth R Anker, *Ugly Freedoms* (Duke University Press, 2021). On constitutionalism, see Wil Waluchow & Dimitrios Kyritsis, "Constitutionalism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Summer 2022), online: https://plato.stanford.edu/entries/constitutionalism/ at §10.

**130.** Glendon, *supra* note 13 at 11.