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Mizuki Hashiguchi[1]

ABSTRACT

On February 8, 2022, the Italian Parliament approved constitutional amendments to protect the environment. A member of Parliament stated that the environment is an element of Italy, and that safeguarding the environment means safeguarding humans. The need to protect the environment seems to have become a critical component of public conscience. Likewise, if society perceives that artificial intelligence is vitally important for humanity, does constitutional law allow constitutional rights for artificial intelligence to be created?

Extending constitutional rights to artificial intelligence may be consistent with the jurisprudential history of rights. Constitutional rights have undergone metamorphosis over time to protect new subjects and create new rights. For example, in 1994, the United States Supreme Court extended free speech rights under the First Amendment to cable operators because they were new actors that emerged with the development of cable technology. Artificial intelligence is also a new actor that emerged with the advent of digital technology.

What could be the justifications for the constitutional protection of artificial intelligence? Both the decision of the *Conseil Constitutionnel* of France of June 18, 2020, and the opinion of the United States Supreme Court in *Packingham v. North Carolina* suggest a reasoning based on necessity. When certain artificial intelligence is indispensable for preventing the violation of existing constitutional rights, this need may provide a justification for protecting the existence of such artificial intelligence through constitutional rights. Attaining pleasures of benevolence under Jeremy Bentham's philosophy could be another justification for conferring constitutional rights to artificial intelligence. This justification, however, invokes questions on what happiness of artificial intelligence might mean, prompting a reconsideration of the criterion of the utility calculus. Meanwhile, justifications for conferring constitutional free speech rights to artificial intelligence include the pursuit of truth and the facilitation of the technology's characteristic activity that contributes to humanity.

[1] Mizuki Hashiguchi is an attorney-at-law admitted in New York. She graduated *summa cum laude* and *Phi Beta Kappa* from the University of Washington with a Bachelor of Science degree in Applied and Computational Mathematical Sciences. She further obtained a Juris Doctor degree from Columbia Law School. During her studies at Columbia, she received the Parker School Certificate for Achievement in International and Comparative Law. In France, she graduated *summa cum laude* from Sciences Po Paris with a Master's degree in *Droit économique* [Economic Law]. Ms. Hashiguchi was nominated to study in the International Exchange Program at Harvard Law School and received the Dean's Scholar Prize. She also holds a Master's degree, *magna cum laude*, in *Droit constitutionnel et droits fondamentaux* [Constitutional Law and Fundamental Rights] from the *Université Paris 1 Panthéon-Sorbonne*. The author would like to express her profound gratitude to Professor Mathieu Disant.

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INTRODUCTION

Astronomer Edwin Hubble writes that "explorations of space end on a note of uncertainty."[2] "We are, by definition, in the very center of the observable region," he observes.[3] "We know our immediate neighborhood . . .. With increasing distance, our knowledge fades and fades rapidly. . .. The search will continue. Not until the empirical resources are exhausted, need we pass on to the dreamy realms of speculation."[4]

In 1929, Hubble observed that the universe is expanding.[5] He examined data and suggested that material located farther away in the universe is moving away faster.[6] An astrophysicist explains that Hubble's finding "forever changed our understanding of the cosmos."[7]

Nearly 90 years later, astronomers noticed a discrepancy on how fast the universe is expanding.[8] The "Hubble constant" is a number indicating how quickly the universe expands.[9] Scientists had estimated that this "Hubble constant" is 67 kilometers per second per megaparsec.[10] They had calculated this value based on measurements made by a satellite called "Planck."[11] However, measurements made by the Hubble Space Telescope in 2019 suggested that the "Hubble constant" is 74 kilometers per second per megaparsec.[12] This number was 9% higher than the estimate calculated from the measurements of the Planck satellite.[13]

What explains this discrepancy? One possible explanation is the difference in how the two numbers are calculated using the Planck satellite's prediction on the one hand, and the Hubble Space Telescope's observation on the other.[14]

The universe started with the Big Bang.[15] The remnant of this explosion is "a background sea of microwaves."[16] The Planck satellite measures these microwaves.[17] Thus, Plank is similar to a "time machine" which provides insights on the evolution of the universe

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[2] GALE E. CHRISTIANSON, EDWIN HUBBLE: MARINER OF THE NEBULAE 248 (1995) (quoting Edwin Hubble).
[3] *Id.*
[4] *Id.*
[5] *See* Edwin Hubble, *A relation between distance and radial velocity among extra-galactic nebulae*, 15 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 168, 170 (1929), https://www.pnas.org/content/pnas/15/3/168.full.pdf.
[6] *Id.* at 169-170; Neta A. Bahcall, *Hubble's Law and the expanding universe*, 112 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 3173, 3175 (2015), https://www.pnas.org/content/pnas/112/11/3173.full.pdf.
[7] *Id.*
[8] Donna Weaver, Ray Villard, Adam Riess & Claire Andreoli, *Mystery of the Universe's Expansion Rate Widens With New Hubble Data*, NASA, (Apr. 25, 2019), https://www.nasa.gov/feature/goddard/2019/mystery-of-the-universe-s-expansion-rate-widens-with-new-hubble-data.
[9] *Id.*
[10] *Id.*
[11] *Id.*; *Planck*, THE EUROPEAN SPACE AGENCY, http://www.esa.int/Enabling_Support/Operations/Planck (last visited Feb. 20, 2024).
[12] *Id.*
[13] *Id.*
[14] Weaver et al., *supra* note 8.
[15] *Planck, supra note* 11.
[16] *Id.*
[17] *Id.*; *Planck*, European Space Agency, https://www.cosmos.esa.int/web/planck (last visited Feb. 20, 2024).

since the Big Bang.[18] In comparison, the Hubble Space Telescope "takes sharp pictures of objects in the sky . . . ."[19]

This difference indicates that the Hubble constant calculated from Planck's measurements is a *prediction* of how fast the universe should be expanding based on "the physics of the early universe,"[20] whereas the Hubble constant calculated from the Hubble Space Telescope's measurements indicates *observations* on "how fast the universe is expanding today."[21]

Why is the prediction different from the observation? According to Adam Riess, this discrepancy suggests that the *model* of the cosmos may be deficient.[22] Donna Weaver et al. state that "new physics may be needed to explain the mismatch."[23] In particular, they argue that "*new theories* may be needed to explain the forces that have shaped the cosmos."[24]

Discrepancy in Constitutional Rights

Is there a discrepancy between (i) predictions based on conventional notions of constitutional rights and (ii) observations of how constitutional rights are granted to various subjects? There appears to be an assumption that humans are entitled to receive constitutional rights.[25] However, some individuals, who are unmistakably humans, have been denied constitutional rights.[26] Meanwhile, non-human entities have been granted constitutional rights.[27]

Why are constitutional rights granted to certain subjects but not to others? Are there impulses or goals that exist behind the granting of constitutional rights? Is it possible to construct new theories that explain the enigmatic granting of constitutional rights?

Expansion of Constitutional Rights

Rights can expand. For example, copyright has expanded.[28] United States copyright derives from Article 1, Section 8, Clause 8 of the United States Constitution. This "Copyright Clause" provides that "The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries[.]"[29]

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[18] *What is Planck and what is it studying?*, THE EUROPEAN SPACE AGENCY, (last visited Feb 5, 2024), http://www.esa.int/Science_Exploration/Space_Science/Planck/Planck_and_the_cosmic_microwave_background.

[19] *What Is the Hubble Space Telescope?*, NASA (Apr. 24, 2020), https://www.nasa.gov/audience/forstudents/5-8/features/nasa-knows/what-is-the-hubble-space-telecope-58.html.

[20] Weaver et al., *supra* note 8 (emphasis added).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See*, *e.g.*, Nonhuman Rts. Project v. Breheny, 134 N.Y.S.3d 188, 189 (N.Y. App. Div. 2020).

[26] *See*, *e.g.*, Rhorabough v. California Department of Corrections, No. S-05-1541-DFL-CMK-P, 2006 WL 2401928, at *2 (E.D. Cal. Aug. 18, 2006); Augustin v. Sava, 735 F.2d 32, 36 (2d Cir. 1984).

[27] *See*, *e.g.*, First National Bank of Boston v. Bellotti, 435 U.S. 765, 780 (1978).

[28] R. Anthony Reese, *Copyrightable Subject Matter in the "Next Great Copyright Act,"* BERKELEY TECHNOLOGY .L.J., Vol. 29, at 1492-95, https://btlj.org/data/articles2015/vol29/29_3/29-berkeley-tech-l-j-1489-1534.pdf.

[29] U.S. CONST. ART. I, § 8.

The first copyright law was enacted on May 31, 1790,[30] approximately two years after the Constitution was ratified in 1788. The original copyright statute protected maps, charts, and books.[31]

Nearly a century later, a photographer in New York, who produced a graceful picture of Oscar Wilde, sought copyright protection.[32] The United States Supreme Court thus confronted a question of first impression: Does copyright extend to photographs?[33] In 1884, the Court found that the photograph is an original, intellectual creation included among the "class of inventions for which the constitution intended that congress should" grant copyright.[34] The subject matter of copyright protection thus expanded to include photographs. In this way, technological developments generated "new forms of creative expression that never existed before."[35] Copyrightable subject matter has further expanded to include intellectual creations such as motion pictures,[36] sound recordings,[37] and computer software.[38]

Constitutional rights for free speech have expanded as well. The Free Speech Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[39] The United States Supreme Court has extended the applicability of the First Amendment[40] to new actors that emerged with technological innovation.[41]

For instance, in 1994, the Court noted that technological advancement in cable communication has made the cable industry a central actor in "an ongoing telecommunications revolution."[42] Cable programmers and operators were novel actors in this revolution.[43] The Court articulated that these actors "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[44] This is a key example of how constitutional rights can expand to protect new actors.

Artificial intelligence can be considered as one such novel actor in today's society.[45] The Organisation for Economic Co-operation and Development suggests that artificial intelligence is "transforming every aspect of our lives" and "permeates economies and societies." Can constitutional rights be expanded to protect artificial intelligence? Is it possible to construct new theories that enable constitutional rights to be granted to artificial intelligence?

Presently, the United States Supreme Court appears to assume that robots are not eligible for receiving constitutional rights under the First Amendment.[46] On June 29, 2020, the Court indicated in its *dicta* that a robot does not have such rights.[47] The Supreme Court stated

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[30] *The 18th Century*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Feb 9, 2024).
[31] Copyright Act of 1790 § 1 (current version at 17 U.S.C § 102).
[32] Burrow Giles Lithographic v. Sarony, 111 U.S. 53, 54.
[33] *Id.* at 58.
[34] *Id.* at 60.
[35] Lotus Development v. Paperback Software Int'l, 740 F. Supp. 37, 48 (D. Mass. 1990).
[36] 17 U.S.C. § 102(a)(6).
[37] 17 U.S.C. § 102(a)(7).
[38] *Lotus Development*, 740 F. Supp. at 49.
[39] U.S. CONST. amend. I, https://www.senate.gov/civics/constitution_item/constitution.htm.
[40] DANIEL A. FARBER, THE FIRST AMENDMENT 3 (5th ed. 2019).
[41] *See, e.g.*, Turner Broadcasting System v. Federal Communications Commission, 512 U.S. 622, 636 (1994).
[42] *Id.* at 627.
[43] *See id.* at 636.
[44] *Id.*
[45] *See, e.g.*, *Artificial intelligence*, OECD, https://www.oecd.org/going-digital/ai/ (last visited Feb. 20, 2024).
[46] *See* Agency for International Development v. Alliance for Open Society International, 140 S. Ct. 2082, 2098 (2020).
[47] *Id.*

that "a horse, oxen, or for that matter R2–D2, a robot . . . lack their own First Amendment rights."[48]

Why do courts seem to take it for granted that artificial intelligence does not have constitutional rights? Similarly, why is there little debate on the rights of flowers to bloom, the rights of music to flow through the air, and the rights of stars to shine?

Section 1 explores the concept of constitutional rights for artificial intelligence from the perspective of the jurisprudential history of constitutional rights. Section 2 analyzes the justifications for establishing constitutional protection for the existence of certain artificial intelligence that contributes to humanity, and for the free speech of such artificial intelligence.

SECTION ONE: EVOLUTIONS OF RIGHTS OVER TIME

The Eurasian Wren[49] is a convivial bird that brightens the atmosphere of winter with its vibrant, lyrical, and sophisticated singing. Its spectacular songs are described as "a rich, complex series of tinkling trills and whistles."[50] Looking up at the trees where these intricate, delicate sounds resonate, it is difficult to spot the bird. It seems invisible. Yet it is perched up, somewhere on a tree branch,[51] transforming the chilly air into a cheerful ambiance full of joy and wonder. Do Eurasian Wrens have a constitutional right to sing?

Artificial intelligence is applied to research the songs of birds.[52] In March 2021, experts in machine learning published an article in *Ecological Informatics*, unveiling an artificial neural network called BirdNET.[53] It uses deep learning technology to identify 984 bird species by their singing.[54] Does artificial intelligence have a constitutional right to analyze phenomena in the world? Can it have a constitutional right to continue providing humans with insights?

The definitions of artificial intelligence are diverse. In 1974, Philip C. Jackson, Jr. defined artificial intelligence as "the ability of machines to do things that people would say require intelligence."[55] In "Artificial Intelligence: A Modern Approach," Stuart J. Russell and Peter Norvig categorize definitions of artificial intelligence into four approaches: (1) Computers and machines "Thinking Humanly," (2) Computations for "Thinking Rationally," (3) Computers and machines "Acting Humanly," and (4) Intelligent artifacts "Acting Rationally."[56]

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[48] *Id.*

[49] *Troglodyte mignon, Troglodytes troglodytes - Eurasian Wren* (Mar. 3, 2017) https://www.oiseaux.net/oiseaux/troglodyte.mignon.html; *Eurasian Wren*, http://www.oiseaux-birds.com/card-eurasian-wren.html (last visited Feb. 27, 2024).

[50] *Eurasian Wren*, *Song & Calls*, WILD AMBIENCE, https://wildambience.com/wildlife-sounds/eurasian-wren/ (last visited Feb. 20, 2024).

[51] *See, e.g.*, *Eurasian Wren, Troglodytes Troglodytes*,UPM FOREST LIFE, https://www.upmforestlife.com/species/eurasian-wren (last visited Feb. 20, 2024).

[52] Harini Barath, *Artificial Intelligence Develops an Ear for Birdsong*, SCIENTIFIC AMERICAN (Apr. 26, 2021), https://www.scientificamerican.com/article/artificial-intelligence-develops-an-ear-for-birdsong1/.

[53] Stefan Kahl et al., *BirdNET: A deep learning solution for avian diversity monitoring*, 61 ECOLOGICAL INFORMATICS, Mar. 2021, at 2, https://www.sciencedirect.com/science/article/pii/S1574954121000273?via=ihub.

[54] *Id.* at 2; *Id.* at 5; *Id.* at 6.

[55] PHILIP C. JACKSON, JR., INTRODUCTION TO ARTIFICIAL INTELLIGENCE 1 (1974, 1985).

[56] STUART J. RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH 1-5 (3d ed. 2016).

Machine learning is a subset of artificial intelligence.[57] Deep learning is one type of machine learning.[58] In deep learning, artificial intelligence learns complex subjects by building them from layers and layers of simple subjects.[59] Deep learning is based on neural networks.[60] Neural networks are engineered systems inspired by structures of the biological brain.[61]

Neither artificial intelligence nor the Eurasian Wren is a human being. Yet the idea of granting constitutional rights to non-human subjects is not as outlandish as it seems. Section 1 observes that the definition of rights has transformed over time to protect new subjects and create new rights. These transformations have occurred despite incentives to maintain the consistency of jurisprudence concerning rights.

I. TRANSFORMATION OF RIGHTS IN CHANGING CONTEXTS

Ludwig Wittgenstein writes that "we cannot think of any object apart from the possibility of its connection with other things."[62] Wittgenstein also states that "I can think of this space as empty, but not of the thing without the space."[63] Wittgenstein further writes that "Only propositions have sense; only in the nexus of a proposition does a name have meaning."[64] These passages seem to point out the strong relevance of context in examining an object.

Contexts can affect the scope and substance of rights.[65] For example, in 1919, during "the supreme crisis of the war,"[66] the United States Supreme Court observed that propaganda aimed to excite riots and revolution.[67] Thus, in *Abrams v. United States*, the Court upheld the conviction of distributors of propaganda despite the freedom of speech under the First Amendment.[68] In a different context, when the civil rights movement grew during the 1960s, the Court became more protective of First Amendment rights.[69] These examples show that when courts identify fundamental interests which must be protected, their judgments are often affected by the temporal and social contexts in which the courts are placed.

Through transformations of contexts, the scope of existing rights has expanded to novel subjects. Novel rights have also been created within existing legal frameworks.

A. EXPANSION OF EXISTING RIGHTS TO NOVEL SUBJECTS

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[57] Michael Middleton, *Deep Learning vs. Machine Learning - What's the Difference?*, FLATIRON SCHOOL (Feb. 8, 2021), https://flatironschool.com/blog/deep-learning-vs-machine-learning/.

[58] *Id.*

[59] *See* IAN GOODFELLOW ET AL., DEEP LEARNING (Kindle Edition, 2016), 1. Introduction, loc. 441.

[60] Middleton, *supra* note 57.

[61] *See* GOODFELLOW ET AL., *supra* note 59, at 1.2.1 The Many Names and Changing Fortunes of Neural Networks; JOHN D. KELLEHER, DEEP LEARNING 65 (2019).

[62] LUDWIG WITTGENSTEIN, LOGISCH-PHILOSOPHISCHE ABHANDLUNG [TRACTATUS LOGICO-PHILOSOPHICUS] 2.0121 (Ogden trans.,1922).

[63] *Id.* at 2.013.

[64] WITTGENSTEIN, TRACTATUS, *supra* note 62 at 3.3 (Pears/McGuinness trans.).

[65] *See* Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 53 (1998); *See also* Charles Fried, *Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981).

[66] Abrams v. United States, 250 U.S. 616, 623 (1919).

[67] *Id.*

[68] *Id.*

[69] *See* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, FIRST AMENDMENT LAW 48 (7th ed. 2019).

On January 18, 2022, the Constitutional Amendment Committee of the Taiwanese legislature in Taipei approved a proposed constitutional amendment that lowers the minimum age for voting rights from 20 to 18.[70] Article 130 of the Constitution of the Republic of China (Taiwan) provides that "any citizen of the Republic of China who has attained the age of *20 years* shall have the right of election in accordance with law."[71] The amendment of this provision extends existing voting rights to new subjects. They are citizens aged 18 and 19.

This expansion of voting rights seems to have been influenced by how society perceives youths in Taiwan. Legislator Lo Chih-cheng remarked that youths are "quite different from the old days . . . more informed, more educated."[72] They are viewed as being "more proactive and well-informed owing to better education and wider communication tools thanks to technology."[73] Thus, the context of the new subjects came to recognize them as being worthy of receiving voting rights.

Transformations of contexts that have prompted the expansion of existing rights to new subjects include changes in social realities of the novel subjects and new discoveries concerning the novel subjects. These transformations have made the distinctions between novel and conventional subjects insignificant from the perspective of conferring rights.

1. *Social Reality of the Novel Subject*

The social reality of corporations was a determinative factor when the Supreme Court of Japan extended existing constitutional rights to corporations. On June 24, 1970, the Supreme Court of Japan considered whether a steel manufacturing and distributing company has a right to give financial contribution to a political party.[74] The Court observed that companies are "*equally as natural persons*, a *social reality* being a composing unit of the State."[75] The Court further explained that "since political parties are the most significant medium to form the political will of citizens . . . cooperating with the healthy development of political parties is a plausible act that is expected of companies as a *social reality*."[76] The Court found that financial political contribution is one form of such cooperation.[77]

The Supreme Court of Japan continued by explaining that, "[s]ince companies are obligated to pay national taxes, etc., . . . *equally as citizens who are natural persons*, . . . there is no reason to prohibit" companies from expressing political opinions as taxpayers.[78] The Court added that "[n]ot limited to this, each Article regarding citizens' rights and obligations provided in Chapter 3 of the Constitution should, to the extent possible based on their nature, be interpreted to apply to legal persons within the country as well."[79] Hence, the Supreme Court

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[70] *Bill to lower the voting age to 18 passes review*, TAIPEI TIMES (Jan. 19, 2022), https://www.taipeitimes.com/News/front/archives/2022/01/19/2003771647.

[71] MINGO XIANFA [Constitution of the Republic of China] art. 130 (1947) (Taiwan).

[72] Erin Hale, *Movement to Lower Taiwan's Voting Age to 18 Gains Momentum*, VOA NEWS (Feb. 8, 2022), https://www.voanews.com/a/movement-to-lower-taiwan-s-voting-age-to-18-gains-momentum-/6432135.html.

[73] Saloni Meghnani, *Lowering voting age to 18 to change Taiwan for good: The China Post contributor*, THE STRAITS TIMES (Sep. 2, 2020), https://www.straitstimes.com/asia/lowering-voting-age-to-18-to-change-taiwan-for-good-the-china-post- contributor.

[74] 昭和41(オ)444 [1966 (O) 444], 取締役の責任追及請求 [Demand for Pursuit of Board Member's Responsibility], 昭和45年6月24日 [June 24, 1970], 最高裁判所大法廷 [Supreme Court of Japan, *En Banc*], at page 1, https://www.courts.go.jp/app/files/hanrei_jp/040/055040_hanrei.pdf.

[75] *Id.* at 2.

[76] *Id.*

[77] *Id.* at 3.

[78] *Id.*

[79] *Id.*

concluded that "[t]here is no constitutional requirement to treat . . . companies' political contributions differently from contributions by citizens who are natural persons."[80] This ruling raises at least two questions and possibilities on constitutional rights of artificial intelligence.

First, the Court characterized corporations as a "social reality" that is a component of society, just as natural persons are.[81] As artificial intelligence becomes more and more integrated into public administration and in everyday life,[82] artificial intelligence may also be characterized as a "social reality," similar to how the Supreme Court of Japan portrayed companies. Would being such a "social reality" be an adequate justification to provide artificial intelligence with the constitutional right to make contributions to political parties?

Second, the fact that corporations have an obligation to pay taxes similar to natural persons was another justification which led the Court to conclude that corporations' political contributions are constitutional.[83] If a State imposes an obligation on artificial intelligence to pay taxes in the same way as humans do, would the "social reality" of this new obligation justify granting artificial intelligence the same constitutional rights as humans?

2. *New Discovery on the Novel Subject*

In Switzerland, constitutional rights to human dignity were extended to plants.[84] New discoveries concerning the sensitivity of plants affected the deliberation of whether plants qualify as living beings deserving respect for dignity.[85]

Article 7 of the Federal Constitution of the Swiss Confederation provides that "Human dignity must be respected and protected."[86] Article 120, paragraph 2, of this Swiss Constitution authorizes the Confederation to legislate concerning the use of materials from "animals, plants and other organisms."[87] Article 120, paragraph 2, further provides that the Confederation "[i]n doing so [] shall take account of the *dignity of living beings.*"[88]

Does the phrase "living beings" include plants? If so, what exactly does respect for the dignity of plants require? Neither government authorities nor scientists knew what dignity of plants meant.[89] Thus, in April 1998, the Federal Council, which is "the highest executive authority" in Switzerland,[90] established the Federal Ethics Committee on Non-Human Biotechnology (the "Ethics Committee" or "Committee").[91] The Federal Council commissioned the Committee to "work out the basis for these constitutional norms."[92]

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[80] *Id.* at 4.

[81] *Id.* at 2.

[82] *See, e.g.*, Cade Metz & Adam Satariano, *An Algorithm That Grants Freedom, or Takes It Away*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/technology/predictive-algorithms-crime.html.

[83] 1966 (O) 444, Supreme Court of Japan, at 3.

[84] *See* Swiss Confederation, *The dignity of living beings with regard to plants - Moral consideration of plants for their own sake*, Federal Ethics Committee on Non-Human Biotechnology (Apr. 2008), at 3, https://www.ekah.admin.ch/inhalte/_migrated/content_uploads/e-Broschure-Wurde-Pflanze-2008.pdf.

[85] Florianne Koechlin, *The dignity of plants*, PLANT SIGNALING & BEHAVIOR (Jan. 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2634081/.

[86] BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 7 (Switz.).

[87] BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 120, para. 2, sentence 1 (Switz.).

[88] *Id.*, art. 120, para. 2, sentence 2 (Switz.)(emphasis added).

[89] Alison Abbott, *Swiss 'dignity' law is threat to plant biology*, NATURE, (Apr. 23, 2008), https://www.nature.com/news/2008/080423/full/452919a.html.

[90] Fed. Council, https://www.admin.ch/gov/en/start/federal-council.html (last visited Feb. 20, 2024).

[91] Federal Ethics Committee on Non-Human Biotechnology, *supra* note 84, at 3.

[92] Koechlin, *supra* note 85.

Biologist Florianne Koechlin was a member of the Ethics Committee.[93] Koechlin recalled that there had been new discoveries that plants actively sense their environment.[94] Plants were also believed to "communicate extensively and actively."[95] According to Koechlin, these discoveries provided the Committee with background for evaluating the norms surrounding the constitutional protection of plants' dignity.[96]

However, whether plants feel pain is unknown.[97] "How should we approach this situation of 'not knowing'?" was one of the questions that the Ethics Committee confronted.[98] Among the Committee members, "intuitions" concerning the "extent and justification of moral responsibilities towards plants" were "highly heterogeneous."[99]

In April 2008, the Committee published its deliberations.[100] The Committee first found that plants are "living beings" under the Swiss Constitution.[101] Committee members also agreed that plants must be respected for their own sake.[102] The Committee further concluded that "an *arbitrary* harm caused to plants" is "morally impermissible."[103] Yet, Koechlin recalls that the "Committee could not agree on the meaning of 'arbitrary.'"[104] In its brochure, the Committee explains that "arbitrary harm" means "harm or destruction without rational reason."[105]

It is curious that the Ethics Committee chose arbitrariness as a criterion to evaluate whether or not a plant's dignity is being respected under the Swiss Constitution. On November 19, 2021, the Federal Constitutional Court of Germany also used arbitrariness as one of the criteria to determine whether the constitutional right to "equal access to school education" is violated. The Court indicated that this right is violated when "prerequisites for admission are determined or applied in an *arbitrary* or discriminatory manner . . . ."[106] H. L. A. Hart also alludes to a connection between arbitrariness and injustice, explaining that a person's conduct may be appropriately criticized as "unjust" if the person "had *arbitrarily* selected one of his children for more severe punishment than those given to others guilty of the same fault . . . ."[107]

The expansion of Switzerland's constitutional right of human dignity to plants suggests that new discoveries concerning the sentience[108] of a subject could elicit discussion regarding the extension of constitutional protection to the subject. This example also shows that further questions would arise when constitutional protection for the new subject is implemented.

If constitutional rights to human dignity were to be extended to artificial intelligence, what must states do to respect the dignity of artificial intelligence? The Committee's criterion of arbitrariness does not seem to provide a persuasive answer. If artificial intelligence is destroyed for a rational reason, will that destruction be justified as being non-arbitrary? Such

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[93] *See id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] Federal Ethics Committee on Non-Human Biotechnology, *supra* note 84, at 5.

[100] *Id.*

[101] *Id.* at 3.

[102] Koechlin, *supra* note 85.

[103] Federal Ethics Committee on Non-Human Biotechnology, *supra* note 84, at 20 (emphasis added).

[104] Koechlin, *supra* note 85.

[105] Federal Ethics Committee on Non-Human Biotechnology, *supra* note 84, at 20.

[106] BVerfG,1 BvR 971/21, Nov. 19, 2021, at para. 60 (emphasis added), translation at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/11/rs20211119_1bvr097121en.html.

[107] H. L. A. HART, THE CONCEPT OF LAW 158 (Oxford Univ. Press, 3d ed. 2012).

[108] Federal Ethics Committee on Non-Human Biotechnology s*upra* note 84, at 14.

destruction might still violate the dignity of artificial intelligence. The permissibility of this destruction depends further on the rational reason. What is the standard for determining if the reason given for destroying an artificial intelligence is rational? Norms regarding the implementation of extending constitutional rights to artificial intelligence are likely to be influenced by social perceptions of what artificial intelligence is and how it should be treated.

B. CREATION OF NOVEL RIGHTS THROUGH EXISTING FRAMEWORKS

Meanwhile, novel rights have been created based on existing legal frameworks as society perceived a need to respond to new threats and developments. On January 22, 2022, the United Kingdom's Select Committee on the Constitution of the House of Lords wrote that "Constitutions matter but they need constant attention and occasional repair if their vitality and adaptability are to be sustained."[109]

On February 10, 2022, the National Congress of Brazil approved a constitutional amendment to make the protection of personal data a fundamental right under the Constitution of Brazil.[110] Senator Rodrigo Pacheco reportedly described "the adaptation of Brazilian law to new times, as information circulates online at a staggering pace."[111] In 2021, Senator Simone Tebet acknowledged that the *general* right to privacy is already stipulated in the Constitution.[112] Yet she argued that a more *specific* constitutional right is needed, emphasizing that the right to privacy regarding "personal data, including by digital means," needs to become "a constitutional precept."[113]

Novel rights have been created as communities have recognized that certain objects and concepts have been threatened in newly turbulent times, thus requiring constitutional protection. New rights have also been generated by carving out specific novel rights from an existing pool of general rights.

1. *Social Recognition of Threats in Turbulent Contexts*

When society perceives a threat, new rights are sometimes created to counteract this threat. For instance, concerns about "the dangers of a strong federal government" led to the establishment of the Bill of Rights of the United States Constitution.[114] The First Amendment of the United States Constitution was created to respond to "general fears of excessive central

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[109] SELECT COMMITTEE ON THE CONSTITUTION, REPORT, RESPECT AND CO-OPERATION: BUILDING A STRONGER UNION FOR THE 21TH CENTURY, 2021-22, HL 142, House of Lords, United Kingdom, 10th Report of Session 2021-22, Jan. 20, 2022, page 3 (UK) https://publications.parliament.uk/pa/ld5802/ldselect/ldconst/142/142.pdf.

[110] Marcelo Brandão, *Personal data protection now a right under Brazil Constitution*, AGÊNCIA BRASIL (Feb. 11, 2022, 11:33 AM), https://agenciabrasil.ebc.com.br/en/politica/noticia/2022-02/protection-personal-data-becomes-constitutional-right; Vanessa Pareja Lerner, *Data ProtectionBecomes a Fundamental Right in the Brazilian Constitution*, DIAS CARNEIRO (Feb. 17, 2022), https://www.diascarneiro.com.br/en/alert/ec-115-2022-data-protection-becomes-a-fundamental-right-in-the-brazilian-constitution/.

[111] Brandão, *supra* note 110.

[112] *See Brazil Senate passes constitutional amendment making data protection a fundamental right*, THE RIO TIMES (Oct. 21, 2021), https://www.riotimesonline.com/brazil-news/rio-politics/brazil-senate-passes-bill-turning-data-protection-into-fundamental-right/.*See also* Article 5, Sections X., XI., XII., Brazil's Constitution of 1988 with Amendments through 2017, https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en.

[113] THE RIO TIMES, *supra* note 112. *See also* Victor Vieira, *The importance of personal data protection as a fundamental right*, IRIS (Aug. 26, 2019), https://irisbh.com.br/en/the-importance-of-personal-data-protection-as-a-fundamental-right/.

[114] DANIEL FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW 231 (Foundation Press, 1st ed. 2019).

power"[115] which might abridge freedom of speech, freedom of the press, right to assemble, etc. Judge Learned Hand viewed the Bill of Rights as being "admonitory or hortatory." Thus, he believed that the Bill of Rights serves to warn entities to refrain from certain behaviors, or to encourage them to behave in certain ways.[116] The protection of rights is a crucial function of the Constitution, even as it provides a framework for the structure of the United States government.[117]

a. Neuro-Rights against Threat to Human Minds

New constitutional protection for "neuro-rights" has been created in Chile. On September 29, 2021, Chile's Chamber of Deputies approved a constitutional amendment establishing "neuro-rights."[118] This constitutional amendment aims to protect "mental identity" from "technological advancements in neurosciences and artificial intelligence."[119]

Scientists have reported potential threats to the sanctity of the human mind. A neuroscientist in New York revealed in 2019 that his lab was able to "activate a few neurons" in a mouse's brain and make the mouse behave "as if it were a puppet."[120] "If we can do this today with an animal, we can do it tomorrow with a human for sure," the neuroscientist warned.[121] As such, he suggested that "neuro-rights" could help protect "mental privacy" and "free will."[122]

Thus, neuro-rights safeguard human minds from intrusion by new technologies, including artificial intelligence. However, this observation raises an important question: Is artificial intelligence so threatened that constitutional rights are needed to protect it?

b. Rights against Threat of Torture

Society's recognition of threats to human rights was also behind the creation of the "right to be free of physical torture." In *Filartiga v. Pena-Irala*, the United States Court of Appeals for the Second Circuit explained how the first and second world wars prompted the "international community" to "recognize the common danger posed by the flagrant disregard of basic human rights . . . ."[123] The Court observed that "humanitarian and practical considerations have combined to lead nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest."[124] The "right to be free of physical torture" is among these "fundamental human rights."[125] It is noteworthy that the Court referred to the perceptions and norms of the global community when it explained the justification for this new right.

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[115] DANIEL A. FARBER, THE FIRST AMENDMENT 12 (Foundation Press, 5th ed. 2020).

[116] NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, FIRST AMENDMENT LAW 47 (Foundation Press, 7th ed. 2019).

[117] DANIEL FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW, *supra* note 114, at 231.

[118] Neeraja Seshadri, *Chile becomes first country to pass neuro-rights law*, JURIST, (Oct. 2, 2021, 12:15 PM) https://www.jurist.org/news/2021/10/chile-becomes-first-country-to-pass-neuro-rights-law/.

[119] *Id.*

[120] Avi Asher-Schapiro, *Out of my mind: Advances in brain tech spur calls for 'neuro-rights'*, THOMSON REUTERS FOUNDATION NEWS (Mar. 29, 2021, 1:09 PM), https://news.trust.org/item/20210329120522-k22qy.

[121] *Id.*

[122] *Id.*

[123] Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

[124] *Id.*

[125] *Id.*

c. Rights against Threat to Education

The Federal Constitutional Court of Germany also invoked transnational norms to uphold the right to education. According to the Court's press release on November 30, 2021, the Federal Constitutional Court of Germany "recognised, for the first time, a right to school education" for "children and adolescents vis-à-vis the state."[126] This recognition seems to have been prompted by the threat to education posed by the pandemic. Claimants had filed constitutional complaints challenging the restrictions on classroom lessons during the pandemic.[127] The Protection Against Infection Act, § 28b(3), prohibited classroom lessons if the number of new infections among the population exceeded a certain threshold over the course of three consecutive days.[128]

However, Article 2(1) of the Basic Law of Germany provides that "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."[129] Furthermore, Article 7(1) of the Basic Law provides that "The entire school system shall be under the supervision of the state."[130] The Federal Constitutional Court of Germany interprets Article 7(1) as setting forth the State's "objective mandate to provide school education."[131] The Constitutional Court determined that this mandate "corresponds to an individual right to school education."[132] Furthermore, the Court explains that this right to education derives from children's right to "the free development of their personality" established in Article 2(1) of the Basic Law.[133]

On November 19, 2021, the Federal Constitutional Court of Germany issued an order invoking transnational norms, arguing that the constitutional right to a school education is consistent with the idea of a "right to education" under international law and European Union law.[134] The Court cites to Article 26 of the Universal Declaration of Human Rights,[135] which proclaims that "Everyone has the right to education."[136] It also invokes Article 13 of the International Covenant on Economic, Social and Cultural Rights, which stipulates "the right of everyone to education."[137] Furthermore, the Court refers[138] to the right of education provided

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[126] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *School closures were permissible on the basis of the information available in April 2021*, Press Release 100/2021, Nov. 30, 2021 [Regarding Order of Nov. 19, 2021], https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-100.html.

[127] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 19, 2021, 1 BvR 971/21, 1 BvR 1069/21 ⁋ 1, 2, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/11/rs20211119_1bvr097121en.html.

[128] *See* BVerfG, 1 BvR 971/21, 1 BvR 1069/21, Nov. 19, 2021, *supra* note 127 ⁋ 1, 2.

[129] Grundgesetz [GG] [Basic Law], art. 2(1), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf.

[130] Grundgesetz [GG] [Basic Law], art. 7(1), B, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf.

[131] BVerfG, 1 BvR 971/21, 1 BvR 1069/21, Nov. 19, 2021, *supra* note 127 ⁋ 44.

[132] *Id.*

[133] *Id.*

[134] *Id.* ⁋ 44, 66.

[135] *Id.* ⁋ 67.

[136] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) art. 16 ⁋ 1, https://www.un.org/sites/un2.un.org/files/udhr.pdf.

[137] G.A Res. 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights (Mar. 23, 1973) art.13, ⁋ 1, https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf.

[138] BVerfG, 1 BvR 971/21, 1 BvR 1069/21, Nov. 19, 2021, *supra* note 127, ⁋ 67, 71.

in Article 14 of the Charter of Fundamental Rights of the European Union[139] and in Article 2 of the first Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[140]

The Opinion of the United States Court of Appeals for the Second Circuit in *Filartiga* and the Order of the Federal Constitutional Court of Germany of November 19, 2021, suggest that the creation of novel rights may have an international aspect. Thus, global recognition of a need to protect artificial intelligence may yield constitutional rights for this technology.

d. Rights of Nature against Threat of Environmental Destruction

Even if there is broad recognition that a subject is threatened, strong social mobilization may be necessary to create novel rights protecting this subject. In 2008, Ecuador reportedly became the first country in the world to confer constitutional rights to nature.[141] Mihnea Tanasescu observes that these rights arose from "a context of social mobilization against a dominant mode of political economy" reflecting "indigenous sensibilities."[142] In 2006, the Alianza País government in Ecuador proposed a "citizen's revolution" that promotes "good living."[143]

Furthermore, according to Tanasescu, the influence of organized indigenous communities grew during this time, and had a pivotal impact on the Constitutional Assembly of Ecuador.[144] On September 28, 2008, approximately 64% of voters in Ecuador approved a new constitution containing the provisions proclaiming the rights of nature.[145]

This example suggests that it takes a significant social movement to create novel constitutional rights. Does society cherish artificial intelligence enough to generate a similar powerful movement establishing constitutional protection for artificial intelligence, against any threats?

2. *Extraction of Specific Novel Right from General Right*

Even if a certain subject is not threatened, novel rights could be created by carving out a specific right from a general right that already exists. Such extraction occurs in the context of specific cases.

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[139] Charter of Fundamental Rights of the European Union (Dec 7. 2000) art. 14, Oct. 26, 2012, 2012 O.J. (C326) 398, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN at p. 8.

[140] 1953 Eur. Ct. H.R, European Convention for the Protection of Human Rights and Fundamental Freedoms (Sept 3. 1953), art. 2, https://www.echr.coe.int/documents/convention_eng.pdf at pp. 33-34.

[141] Karen Charman, *Ecuador First to Grant Nature Constitutional Rights, in* CAPITALISM NATURE SOCIALISM, Vol. 19, No. 4 (Dec. 2008), https://www.tandfonline.com/doi/abs/10.1080/10455750802575828?journalCode=rcns20; María Valeria Berros, *The Constitution of the Republic of Ecuador: Pachamama Has Rights*, Environment & Society Portal (2015), https://www.environmentandsociety.org/arcadia/constitution-republic-ecuador-pachamama-has-rights.

[142] Mihnea Tanasescu, *The rights of nature in Ecuador: the making of an idea*, INTERNATIONAL JOURNAL OF ENVIRONMENTAL STUDIES, Vol. 70 (2013) at 847.

[143] *Id.*

[144] *Id.*

[145] *See* Tanasescu, *supra*, at 846; Maria Akchurin, *Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador*, LAW & SOCIAL INQUIRY (June 2015) at 943, https://law.unimelb.edu.au/__data/assets/pdf_file/0004/3300295/7.2-Maria-Ackchurin,-Constructing-the-Rights-of-Nature-Constitutional-Reform,-Mobilization,-and-Environmental-Protection-in-Ecuador-2015.pdf; *Final Report on Ecuador's Approbatory Constitutional Referendum of Sept. 28, 2008*, The Carter Center (Oct. 25, 2008) at 3, https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/ecuador-referendum-report08-en.pdf.

a. Novel Right to Digital Connection Data and the General Right to Privacy

The decisions of the *Conseil Constitutionnel* of France published on July 9, 2021, and December 3, 2021, suggest that the *Conseil Constitutionnel* may have created a new right to the protection of digital connection data as a subset of the general right to privacy. On July 9, 2021, the *Conseil Constitutionnel* found that Article L. 863-2, paragraph 2, of the Code of Internal Security is unconstitutional because it authorizes certain administrative authorities to communicate all kinds of "useful information" to intelligence services.[146] Since such information might include personal data, the *Conseil Constitutionnel* found that this provision violates the right to privacy.[147]

Approximately five months later, on December 3, 2021, the *Conseil Constitutionnel* issued a decision involving the protection of digital connection data.[148] Article 2 of the Declaration of Human and Civic Rights of August 26, 1789, provides that "The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression."[149] According to the *Conseil Constitutionnel*, the right to liberty includes respect for privacy rights.[150]

Meanwhile, Article 77-1-1 of the Criminal Procedure Code[151] allows a prosecutor, or an authorized officer or agent, to demand information from all persons.[152] Article 77-1-2 of the Criminal Procedure Code[153] states that, upon authorization of the prosecutor, an officer or an authority may require public organizations or certain legal persons under private law to provide information contained in a digital system or subject to nominative data treatment.[154]

The *Conseil Constitutionnel* observed that these provisions allow the prosecutor, officers, and agents to access or receive connection data,[155] which includes data identifying individuals and their locations, in addition to their contact information, and data regarding online public communication services that they consult.[156] Considering the nature, diversity, and volume of this information, the *Conseil Constitutionnel* expressed concern that such connection data can provide a large quantity of detailed, privacy-violating information.[157]

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[146] Décision n° 2021-924 QPC du 9 juillet 2021, La Quadrature du Net [Communication d'informations entre services de renseignement et à destination de ces services], Conseil Constitutionnel, paras. 10, 13, https://www.conseil-constitutionnel.fr/decision/2021/2021924QPC.htm.

[147] *Id.* at paras. 13-15.

[148] Décision n° 2021-952 QPC du 3 décembre 2021, M. Omar Y. [Réquisition de données informatiques par le procureur de la République dans le cadre d'une enquête préliminaire], Conseil Constitutionnel, https://www.conseil-constitutionnel.fr/decision/2021/2021952QPC.htm.

[149] Article 2, Declaration of Human and Civic Rights of 26 August 1789 [English Translation], Conseil Constitutionnel, https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf.

[150] Décision n° 2021-952 QPC du 3 décembre 2021, *supra* note 148, at para. 7.

[151] *See* Article 77-1-1, Code de procédure pénal, Légifrance, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042779671/.

[152] Décision n° 2021-952 QPC du 3 décembre 2021, *supra* note 148, at para. 8.

[153] Article 77-1-2, Code de procédure pénale, Légifrance, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038311806.

[154] *See id.*; Décision n° 2021-952 QPC du 3 décembre 2021, *supra* note 148, at para. 8.

[155] *Id.* at para. 10.

[156] *Id.* at para. 11.

[157] *Id.*

According to its decision issued on December 3, 2021, the *Conseil Constitutionnel* interprets Article 34 of the Constitution of France[158] as stipulating that it is up to the legislature to fix rules concerning fundamental guarantees granted to citizens for exercising their public liberties.[159] The legislature's task is to ensure a balance between (i) the constitutional objective to search for perpetrators of unlawful acts and (ii) the right to privacy.[160] The *Conseil Constitutionnel* found that the legislature has not established rules ensuring that, when the procedures provided in Articles 77-1-1 and 77-1-2 are carried out, such a balance would be maintained.[161] Thus, it concluded that the challenged statutory provisions are unconstitutional.[162]

Could the decision issued on December 3, 2021, be interpreted as establishing a new constitutional right to protect one's digital connection data? In this case, the *Conseil Constitutionnel* found that there is a violation of Article 34 of the Constitution, which requires a balance between public safety and respect for privacy rights. Thus, the protection confirmed by this case is part of the protection guaranteed by privacy rights provided under Article 2 of the Declaration of Human and Civic Rights. Could this decision be construed as establishing a particular constitutional right within the broad privacy right in Article 2? The decision seems to carve out a specific constitutional right to digital connection data as a subset of privacy rights.

b. Novel Right to Fingerprints and the General Rights for Life, Freedom, and Happiness

The judicial phenomenon of carving out a specific, novel right from a general, established right is also observed in a ruling by the Supreme Court of Japan in 1995. The Court established a new right to protect fingerprints based on general constitutional rights enunciated in Article 13 of the Japanese Constitution.

Article 13 provides that "All citizens are respected as individuals. Regarding citizens' rights for life, freedom, and the pursuit of happiness, as long as they do not contravene public welfare, they need to be respected to the maximum in legislation and other national politics."[163] The Supreme Court of Japan has interpreted this provision as a prescription that "Citizens' freedom in private life should also be protected against the exercise of public power."[164]

Article 13 does not mention the protection of fingerprints. However, on December 15, 1995, the Supreme Court of Japan decided that the guarantees under Article 13 include the right not to be unreasonably compelled to provide one's fingerprint.[165] The Court acknowledged that fingerprints, by themselves, do not provide information concerning

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[158] Article 34, Texte intégral de la Constitution du 4 octobre 1958 en vigueur, Conseil Constitutionnel, https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur.

[159] Décision n° 2021-952 QPC du 3 décembre 2021, *supra* note 148, at para. 7.

[160] *Id.*

[161] *Id.* § 14.

[162] *Id.* § 15.

[163] *See* NIHON-KOKU KENPŌ [CONSTITUTION], Nov. 3, 1946, art. 13 (Japan).

[164] 平成19(オ)403 [2007 (O) 403], 損害賠償請求事件 [Case for Requesting Compensation of Damages], 平成20年3月6日 (Mar. 6, 2008), 最高裁判所第一小法廷 [Supreme Court of Japan, First Petty Bench], page 9, https://www.courts.go.jp/app/files/hanrei_jp/933/035933_hanrei.pdf.

[165] 平成2(あ)848 [1990 (a) 848], 外国人登録法違反 [Violation of Foreigner Registration Act], 平成7年12月15日 (Dec. 15, 1995), 最高裁判所第三小法廷 [Supreme Court of Japan, Third Small Bench], page 1, https://www.courts.go.jp/app/files/hanrei_jp/119/050119_hanrei.pdf.

individuals' personal life, character, thoughts, beliefs, conscience, etc.[166] However, the Court observed that, since fingerprints are unique for each individual, violations of privacy might still occur, depending on how the collected fingerprints are used.[167] Thus, the Supreme Court explained that, because Article 13 of the Constitution is interpreted to prescribe that citizens' freedom in their private lives should be protected from the exercise of State power, the right not to be unreasonably compelled to provide one's fingerprint should be part of such freedom.[168]

In this way, the Supreme Court of Japan identified a right to protect one's fingerprints that is not explicitly stated in the text of the Constitution. The Court identified this unwritten right as part of the general rights established under Article 13. In this same vein, could unwritten constitutional rights for artificial intelligence be derived from more general, pre-existing constitutional rights?

II. MAINTENANCE OF COHERENCE IN THE JURISPRUDENCE OF RIGHTS

Existing rights have been extended to protect novel subjects. Novel rights have been established through existing law. However, there remains a sense that coherence should be maintained throughout the existing legal framework surrounding human rights. Ronald Dworkin, for example, states that the "integrity and coherence of law as an institution" will "tutor and constrain" a judge's interpretation pursuant to "prior law."[169] Similarly, Judge Benjamin N. Cardozo refused to characterize the judiciary as "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness . . . ."[170] Instead, Judge Cardozo suggested that the judiciary should "exercise a discretion informed by tradition, methodized by analogy, disciplined by system."[171]

An examination of legal theory and case law suggests that the judicial process of granting rights to non-human subjects raises two questions. First, is history significant in the adjudication of rights? Second, is an analogy between humans and a non-human subject relevant?

A. SIGNIFCANCE AND INSIGNIFICANCE OF HISTORY IN THE ADJUDICICATION OF RIGHTS

On April 23, 2020, the United States Court of Appeals for the Sixth Circuit ruled in *Gary B. v. Whitmer* that the Due Process Clause of the Fourteenth Amendment provides students with a fundamental right to education and literacy.[172] This was a case of "first impression." The United States Supreme Court had "repeatedly discussed" the issue of whether education is a fundamental right, yet had "never decided it."[173] Students attending public schools in Detroit alleged that dangerous school facilities, lack of materials, and other

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[166] *Id.* at 1.

[167] *Id.*

[168] *Id.*

[169] Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 545 (1982).

[170] Juliana v. U.S., 947 F.3d 1159, 1174 (9th Cir. 2020) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921)).

[171] *Id.*

[172] Gary B. v. Whitmer, 957 F.3d 616, 642 (6th Cir. 2020).

[173] *Id.* at 642.

factors deprived them of the minimum education for acquiring basic literacy.[174] The Court of Appeals observed that the Supreme Court had relied on two factors to consider whether a right is fundamental.[175] First, is the right "deeply rooted" in the "[n]ation's history and tradition?"[176] Second, would the denial of the right also annihilate liberty and justice?[177] Applying these considerations, the Court of Appeals explained that access to foundational literacy through public education has a historical legacy and is essential for participation in democracy.[178] This decision highlights how history played an important role in adjudicating rights.[179]

References to history are significant in the adjudication of rights because courts are expected to respect the doctrinal history of constitutional rights. On the other hand, adherence to history may seem insignificant because upholding a fundamental right under the principle of democracy may require reasons reflecting the values and imperatives of the present.

1. Respect for Doctrinal History of Constitutional Rights

Lon L. Fuller states that a judge's decision "declares rights, and rights to be meaningful must in some measure stand firm through changing circumstances."[180] Examinations of history are significant in adjudications of rights for three reasons.

First, there is an expectation that judges should consult legal history when they make decisions regarding novel issues. Ronald Dworkin opines that "A judge's duty is to interpret the legal history he finds, not to invent a better history."[181] Dworkin writes that, when a judge adjudicates a new case, each judge must consider himself or herself as a "partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history . . . ."[182] According to Dworkin, in such novel cases, a judge must "advance the enterprise in hand rather than strike out in some new direction of his own."[183] H. L. A. Hart also writes that "when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law."[184] It is therefore crucial to analyze precedents in history.

Second, notions of justice are sometimes deeply rooted in the "traditions and conscience" of society so that they become respected as being fundamental.[185] This phenomenon indicates that history affects the determination of what is fundamental, and what should be protected with fundamental rights.

Third, there seems to be a strong assumption that constitutional rights are firmly connected to history. In 1872, the Supreme Court of the United States remarked that the "true

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[174] *Id.* at 620–21.

[175] *Id.* at 643.

[176] *Id.* at 643 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

[177] *Id.* at 644 (quoting *Washington v. Glucksberg*, *supra*).

[178] *Id.* at 642, 648–49.

[179] Five days after the parties signed a settlement agreement on May 14, 2020, the Court of Appeals for the Sixth Circuit, *en banc*, vacated its decision of *Gary B. v. Whitmer*. Thus, although this case was regarded as a landmark decision declaring the access to education as a constitutional right, the ruling is no longer a binding precedent. *See* J. Cooper, *Detroit literacy case ends with no legal precedent for the right to an education* (June 15, 2020), https://www.wsws.org/en/articles/2020/06/15/detr-j15-1.html.

[180] LON L. FULLER, THE MORALITY OF LAW 162-172 (Yale Univ. Press ed., revised ed. 1969).

[181] Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 544 (1982).

[182] *Id.* at 543.

[183] *Id.*

[184] H. L. A. HART, THE CONCEPT OF LAW 274 (Oxford Univ. Press ed., 3rd ed. 2012).

[185] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

meaning" of the Amendments to the Constitution is connected to the "history of the times . . . ."[186] Dworkin explains that, when a legal document such as a Constitution is "part of the *doctrinal history*," then the interpreter of this document must decide and choose, "as a question of political theory," which legislative intention is "the most appropriate one."[187]

Hence, there is doctrinal history involving constitutional rights. Why then, does there appear to be reluctance against the idea of giving constitutional rights to artificial intelligence? It is presumably because granting constitutional rights to technology has not been part of the doctrinal history of constitutional rights thus far. Respect for doctrinal history might create a reflex to reject the idea of protecting artificial intelligence with constitutional rights.

2. Reflection on Values and Imperatives of the Present Era

At the same time, adherence to historical traditions might appear insignificant for three reasons.

First, reliance on historical tradition to characterize a notion or a right as fundamental might be at odds with the principles of democracy. Democracy requires justification. [188] Thus, according to the principles of democracy, the reasoning behind why a right is fundamental in society needs to be articulated. The existence of tradition upholding the fundamental nature of the right might constitute a part of the justification, because the present is in continuum with the past. However, tradition alone is not sufficient. Rationale grounded in the present is also needed.

Second, courts also examine the present to decipher the Constitution. In *Missouri v. Holland*, the State of Missouri contested the constitutionality of the Migratory Bird Treaty Act.[189] Missouri claimed that it has exclusive authority to regulate migratory birds pursuant to the Tenth Amendment of the United States Constitution.[190] In response, the United States Supreme Court explained that "We must consider *what this country has become* in deciding what that amendment has reserved."[191]

Third, urgencies in the present can act as a source of rights. In *Obergefell v. Hodges*, the United States Supreme Court explained that rights can originate from understandings about how "constitutional imperatives define a liberty that remains urgent *in our own era*."[192] Accordingly, questions that arise by applying precedents to determine whether constitutional rights should be granted to artificial intelligence are questions analyzed based on present circumstances.

For example, the United States Supreme Court does not define rights based solely on who has exercised those rights in the past.[193] This is because historical practices might deny "new groups" from invoking these rights.[194] Instead, the Court analyzes whether there is "sufficient justification" to exclude a specific group from having that right.[195] Is there sufficient justification to exclude artificial intelligence from having constitutional rights?

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[186] Slaughter-House Cases, 83 U.S. 36, 67 (1872).

[187] Dworkin, *supra note* 181 (emphasis added).

[188] *See* GUILLAUME TUSSEAU & OLIVIER DUHAMEL, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES 83 (Seuil ed., 5th ed. 2020).

[189] Missouri v. Holland, 252 U.S. 416, 430-31 (1920).

[190] *Id.* at 434.

[191] *Id.* (emphasis added).

[192] Obergefell v. Hodges, 576 U.S. 644, 671-72 (2015).

[193] *Id.* at 671.

[194] *See id.*

[195] *Id.*

The Court is also wary of public policy. Individuals have personal opinions on whether a group should or should not have certain rights.[196] When such perspectives are embodied as part of public policy or codified into law, the exclusion of a group from the enjoyment of rights becomes State-sanctioned exclusion,[197] such that the denial of rights receives implicit approval from the State.[198] This official acceptance risks triggering stigmatization against the group whose liberty was curtailed.[199] This leads to a certain question: Does the denial of constitutional rights to artificial intelligence demean or stigmatize it?

Moreover, the Court has reasoned that a right is fundamental under the Due Process and Equal Protection clauses of the Fourteenth Amendment when laws denying the right to a group cause "grave and continuing harm" to that group and act to subordinate it. The Court found that these laws "burden the liberty" of the group and "abridge central precepts of equality."[200] Does the denial of constitutional rights to artificial intelligence impose grave and continuing harm to artificial intelligence?

B. RELEVANCE AND IRRELEVANCE OF ANALOGY IN THE DEFINITION OF PERSONS

The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws."[201] What does "person" mean in this provision? Are non-human subjects also "persons" entitled to rights?

Confronting such questions, one instinct is to consider whether the non-human subject at issue is analogous to humans. For example, when the Supreme Court of New York decided whether an elephant named Happy is entitled to *habeas corpus* rights in *The NonHuman Rights Project v. Breheny*, the Court referred to expert testimony concerning the "similarities between human and elephant brains."[202] Meanwhile, in *Frisina v. Dailey*, the Supreme Court of Pennsylvania compared humans with an automobile to deny the idea that "the machine has rights superior to those of a human being."[203] "[T]he automobile must give way to the prerogatives of the foot passenger who does not wear a steel coat and is not equipped with bumpers and fenders to protect him in any conflict with his four-wheeled potential adversary," the Court explained.[204]

Is analogy relevant in defining which subjects constitute "persons" entitled to rights? Analogy is relevant because it connects unknown subjects to principles that are known in case law. However, when courts distinguish subjects that are entitled to rights from others that are not entitled to rights, analogy with humans has not been a key factor in their determinations.

1. Analogy as a Connection between Unknown Subjects and Known Precedents

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[196] *See id.* at 672.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.* at 675.

[201] U.S. CONST. amend. XIV, § 1.

[202] The NonHuman Rights Project v. Breheny, 2020 WL 1670735, at *3 (N.Y. Sup. Ct. Feb. 18, 2020).

[203] Frisina v. Dailey, 395 Pa. 280, 284 (Pa. 1959).

[204] *Id.*

Analogy is a reasoning process involved in maintaining coherence in the adjudication of rights. H. L. A. Hart points out "the importance characteristically attached by courts when deciding unregulated cases to proceeding by *analogy* so as to ensure that the new law they make, though it is new law, is in accordance with principles or underpinning reasons recognized as already having a footing in the existing law."[205] Charles Fried argues that the "discipline of *analogy* fills in the gaps left by more general theory, gaps which must be filled because choices must be made and actions taken."[206] Thus, analogy enables the adjudicator to analyze whether a novel subject is entitled to rights pursuant to established precedent concerning rights.

Thus, it may be assumed that analogy between humans and artificial intelligence is relevant in determining whether artificial intelligence is entitled to receive rights. This assumption leads to a series of inquiries on whether artificial intelligence has characteristics of humans.

a. Questions on Artificial Intelligence Arising from the Relevance of Analogy

Consent is required for the legitimacy and perpetuity of a State.[207] This idea derives from the theory of contractualism.[208] According to John Locke and Genevois Burlamaqui, a State is established by contract to guarantee that rights be respected.[209] Thus, the State guarantees the respect of the rights of the people in return for the obedience of the people who consented to this contract.[210]

Can artificial intelligence consent? A citizen born in a State is deemed to have consented, even if the citizen never consented explicitly. Hence, actual consent by artificial intelligence may not be necessary. Yet, a citizen has the capacity to consent. Does artificial intelligence have the capacity to consent?

Aristotle suggests that the capacity to act with reason and thought is a feature of humans that animals and plants do not possess.[211] Does artificial intelligence have the capacity to act with reason and prudence? If constitutional rights are granted to humans because humans can reason, then constitutional rights might also be conferred to artificial intelligence if its analytic capabilities[212] may be considered as the capacity to act with reason.

In *Abrams v. United States*, Justice Clarke stated that "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."[213] Jeremy Bentham writes that the "*intention*, with regard to the consequences of an act" depends on two elements.[214] The first element is the "state of the will or intention, with respect to the

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[205] HART, *supra* note 107, at 274.

[206] Charles Fried, *Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981).

[207] GUILLAUME TUSSEAU & OLIVIER DUHAMEL, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES 49-50 (Seuil ed., 5th ed. 2020).

[208] *See id.* at 49.

[209] *See id.*

[210] *See id.* at 49-50.

[211] *See* ARISTOTLE, NICOMACHEAN ETHICS, Book I, Chapter 7, at 12 (Roger Crisp ed. trans., Cambridge Univ. Press 2002).

[212] *See, e.g.*, *What are the Key Qualities of AI?*, ROSS INTEL. (Nov. 5, 2018), https://blog.rossintelligence.com/post/what-are-the-key-qualities-of-ai.

[213] Abrams v. United States, 250 U.S. 616, 621 (1919).

[214] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 18 (1781) (emphasis added).

act itself."[215] The second element is the "state of the understanding, or perceptive faculties, with regard to the *circumstances*."[216] Does artificial intelligence have "intention" with respect to its "act?" Does it also have an "understanding" of the "circumstances" accompanying its "act?"

The fundamental liberties granted by the United States Constitution protect personal choices involving beliefs, personal identity, and autonomy.[217] Does artificial intelligence make personal choices about who they are and what they believe in?

According to Jean-Pierre Denis and Vincent Giret, humans differ from other animals in that humans can reevaluate themselves.[218] Yuval Noah Harari also states that the capacity of humans to cooperate with others gives humans an advantage over other animals.[219] According to Harari, as humans invented myths, nations, etc., a large number of strangers came to believe in these inventions, leading them to establish norms and cooperation at a large scale.[220] Can artificial intelligence reevaluate itself and cooperate?

From the perspective of evolutionary biology, humans might have developed brains and nervous systems so that they can adapt well to changes in the environment.[221] Does artificial intelligence share this need to adapt to its environment?

2. Irrelevance of Analogy in the Difference between Persons and Non-Persons

These questions involving artificial intelligence, however, do not seem to require definite answers. This is because, when courts distinguish (i) persons entitled to rights from (ii) subjects that are not entitled to rights, the courts' demarcation often does not depend on whether the subject at issue is analogous to humans.

Courts have granted rights to subjects that are not humans. For instance, a bank is not a human being. Nevertheless, in *Cummings v. National Bank*,[222] the United States Supreme Court explained that a bank has "the same right" as any citizen of the State of Ohio under Ohio's Constitution and laws to be protected against the unjust levy of taxes.[223]

Meanwhile, courts have denied rights to subjects who are humans. Article 15, line 1, of the Constitution of Japan provides that it is the inherent right of citizens to elect public servants and to discharge them.[224] On February 28, 1995, the Supreme Court of Japan held that foreigners residing in Japan cannot possess this right.[225] Article 1 of the Constitution of Japan provides that Japanese citizens have sovereign power.[226] The Supreme Court explained that the

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[215] *Id.* (emphasis added).

[216] *Id.* (emphasis added).

[217] Obergefell v. Hodges, 576 U.S. 644, 663 (2015).

[218] *See* Jean-Pierre Denis & Vincent Giret, Note de l'éditeur, L'HISTOIRE DE L'HOMME : *UNE AVENTURE DE 7 MILLION D'ANNÉES. ET APRÈS ?*, LE MONDE Hors-Série, at 3 (2017).

[219] Yuval Noah Harari, *De qui parle-t-on?*, *in* L'HISTOIRE DE L'HOMME : *UNE AVENTURE DE 7 MILLION D'ANNÉES. ET APRÈS ?*, LE MONDE Hors-Série, at 9 (2017).

[220] *Id.*

[221] *See* Koechlin, *supra* note 85.

[222] Cummings v. Merchants' Nat. Bank, 101 U.S. 153 (1879).

[223] *Id.* at 155.

[224] Constitution of Japan, art. 15.

[225] 平成5(行ツ)163 [1993 (Gyō Tsu) 163], 選挙人名簿不登録処分に対する異議の申出却下決定取消 [Cancellation of Rejection of Objection against Non-Registration in Electoral Roster], 平成7年2月28日 [Feb. 28, 1995], 最高裁判所第三小法廷 [Supreme Court of Japan, Third Small Bench], page 1, https://www.courts.go.jp/app/files/hanrei_jp/525/052525_hanrei.pdf.

[226] *See* Constitution of Japan, art. 1.

phrase "Japanese citizens" means those who have the nationality of Japan.[227] Under this ruling, if artificial intelligence possesses Japanese nationality and citizenship, artificial intelligence might be entitled to election rights under Article 15, line 1. Thus, in examining whether artificial intelligence is entitled to rights, the determinative question is not whether artificial intelligence is analogous to humans.

a. Potential Consistency with Jurisprudential History

The seven articles of the United States Constitution were drafted in 1787.[228] The Constitution's ten amendments were ratified in 1791.[229] At least some of the issues that the Framers of the Constitution considered to be significant might have become "non-issues" today.[230] Moreover, "new important problems have arisen that the Framers could not have foreseen."[231] Whether artificial intelligence should be granted constitutional rights is likely to be an issue that the Framers could not have envisioned in the late 1700s.

William Burnham explains that the task of "updating" the Constitution has "fallen to the courts."[232] According to Burnham, a "flexible and expansive approach to constitutional interpretation," which accompanied the "constitutional rights explosion" in the 1960s, has been present "virtually from the beginning" of the history of the Constitution.[233] Thus, the expansion of constitutional rights to include the rights of artificial intelligence may be consistent with the historical expansion of rights under the United States Constitution.

The present study of the expansion and creation of rights over time suggests that extending existing rights to artificial intelligence is not a peculiar idea. Existing rights have been extended to protect novel subjects. Creating new rights to protect artificial intelligence is not a strange idea either. Novel rights have been created in existing legal frameworks. Thus, protecting artificial intelligence with rights may be considered to be coherent with the historical evolution of rights.

Artificial intelligence is different from humans in many ways. However, these differences do not foreclose the possibility of granting rights to artificial intelligence because non-humans have received rights while humans have been denied rights. The idea, the concept, and the invisible direction of protecting non-human artificial intelligence with constitutional rights are present in the jurisprudential history of rights.

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[227] 1993 (Gyō Tsu) 163, Supreme Court of Japan, *supra* note 225, at page 1.

[228] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 3 (Wolters Kluwer, 6th ed. 2019).

[229] *Id.*

[230] WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 322 (West Academic Publishing, 4th ed. 2006).

[231] *Id.*

[232] *Id.*

[233] *Id.*

SECTION TWO: JUSTICIFICATIONS FOR CONSTITUTIONAL RIGHTS OF ARTIFICIAL INTELLIGIENCE

Dr. Kiri Wagstaff, who explored outer space at NASA using artificial intelligence, states that artificial intelligence is "an observational tool that allows us to study science that we couldn't get otherwise."[234] Astronomers trained artificial intelligence to discover phenomena from outer space that are unexpected and difficult to detect through human efforts alone.[235] It is a technology that can "achieve otherwise impossible observations."[236]

Can such artificial intelligence be protected with constitutional rights to exist and to continue expressing insights that contribute to humanity? Section 2 examines justifications for providing artificial intelligence with the constitutional rights to exist and the constitutional rights to free expression.

I. CONSTITUTIONAL RIGHTS FOR EXISTENCE OF ARTIFICIAL INTELLIGIENCE

Article 2(2) of the Basic Law of Germany provides that "[e]very person shall have the right to life and physical integrity."[237] On March 24, 2021, the Federal Constitutional Court of Germany explained that future generations "do not yet carry any fundamental rights in the present."[238] However, the Court suggests that constitutional protection pursuant to Article 2(2) may "give rise to an objective duty to protect future generations."[239] The Court's ruling suggests that an "objective protection mandate" means imposing an obligation on the State to take measures for the purpose of safeguarding "natural foundations of life for future generations."[240] According to the Court, this "objective protection mandate" derives from Article 20a of the Basic Law.[241] This provision states that "[m]indful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the Constitutional order."[242]

Protecting a subject's "life," "physical integrity," and "natural foundations of life" safeguards the subject's existence. If artificial intelligence were to be regarded as a future subject for constitutional protection, what are the justifications for giving it the constitutional rights to exist? Such justifications may include the reinforcement of constitutional rights that already exist and the pleasures of benevolence under Jeremy Bentham's philosophy.

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[234] Andrew Good, *A.I. Will Prepare Robots for the Unknown* (Jun. 22, 2017), https://www.nasa.gov/feature/jpl/ai-will-prepare-robots-for-the-unknown.

[235] *See Id.*

[236] Steve Chien & Kiri L. Wagstaff, *Robotic Space Exploration Agents*, SCIENCE ROBOTICS (June 28, 2017), https://www.science.org/doi/10.1126/scirobotics.aan4831.

[237] Grundgesetz [GG] [Basic Law], art. 2(2), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.

[238] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, 1 BvR 2656/18, ¶ 146 (Ger.).

[239] *Id.* ⁋ 1.

[240] *Id.* ⁋ 193.

[241] *Id.*

[242] Grundgesetz [GG] [Basic Law], art. 20(a), translation at http://www.gesetze -im-internet.de/englisch_gg/index.html.

A. REINFORCEMENT OF PRESENT CONSTITUTIONAL RIGHTS

Could new constitutional rights to exist be granted to artificial intelligence in order to supplement constitutional rights that are already established? The decision of the *Conseil Constitutionnel* of France of June 18, 2020,[243] and the opinion of the United States Supreme Court in *Packingham v. North Carolina*[244] inspire reasoning that the constitutional right for artificial intelligence to exist is necessary to ensure another constitutional right for persons to access social media. *Katzenbach v. Morgan*[245] supports the idea that novel statutory rights may be created to prevent violations of pre-existing constitutional rights.

1. *Right of Artificial Intelligence to Exist and the Right to Access Social Media*

On June 18, 2020, the *Conseil Constitutionnel* issued a decision[246] that is interpreted as having established a novel right to access social networks. The *Conseil Constitutionnel* determined that provisions of a law requiring the obliteration of certain online content were unconstitutional for limiting the freedom of expression.[247] Article 6-1 of *Loi n° 2004-575 du 21 juin 2004*[248] allows an administrative authority to request that online service providers withdraw certain content within 24 hours.[249] Article 1, paragraph I, of the law at issue[250] amends this provision by reducing the time limit to one hour and imposing a one-year imprisonment and a 250,000-Euro fine when providers fail to comply with the request.[251]

Article 11 of the Declaration of Human and Civic Rights of August 26, 1789, states that "[t]he free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write, and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law."[252] The *Conseil Constitutionnel* states that this right includes the freedom to access online communication services and to express oneself.[253] The *Conseil Constitutionnel* supported this conclusion by considering the current state of communication methods, the development of online services for public communication, and the significant role exercised by these services to facilitate participation in democracy.[254]

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[243] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-801 DC, Jun. 18, 2020 (Fr.), https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2020801dc/2020801dc.pdf.

[244] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[245] Katzenbach v. Morgan, 384 U.S. 641 (1966).

[246] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2020-801 DC, *supra* note 243.

[247] *Id.*

[248] Loi 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (1) [Law No. 2004-575 of June 21, 2004, for Confidence in the Digital Economy (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE[J.O.] [OFFICIAL GAZETTE OF FRANCE], Jun. 22, 2004. https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000801164/2021-01-02. (Fr.).

[249] *See* Conseil constitutionnel, decision No. 2020-801 DC, *supra* note 243.

[250] « la loi visant à lutter contre les contenus haineux sur internet » *Id.* ⁋ 2.

[251] Conseil constitutionnel [CC] [Constitutional Court], decision No. 2020-801 DC, *supra* note 243, at para. 2.

[252] Declaration of Human and Civic Rights of 26 August 1789 (Aug. 26, 1789), Conseil constitutionnel (Fr.), https://www.conseil-constitutionnel.fr/sites/default/files/2019-03/20190304_declarationhumanrights_0.pdf (last visited Feb. 21, 2024) (Fr.).

[253] Conseil constitutionnel [CC] [Constitutional Court], decision No. 2020-801 DC, *supra* note 243, at para. 4.

[254] *Id.*

At the same time, Article 34 of the Constitution allows the legislature to enact rules for terminating abuses of the exercise of the freedom of expression, which infringe upon public order and the rights of third parties.[255] These limits imposed on the exercise of the freedom of expression must be necessary, adapted, and proportional to the goal of such limits.[256]

The *Conseil Constitutionnel* determined that Article 1, paragraph I, of the law at issue does not fulfill this requirement[257] because the discretion of the administrative authority dictates the determination of the specific content that must be taken down from the online services. A time limit of one hour does not allow the requested service provider to obtain any judgment from a court before being subject to the penalties of imprisonment and fines.[258] Hence, the *Conseil Constitutionnel* concluded that Article 1, paragraph I, of the law is unconstitutional.[259] The *Conseil Constitutionnel* also found Article 1, paragraph II, to be unconstitutional.[260] This provision requires online platforms to withdraw certain unlawful content within 24 hours.[261]

This Decision by the *Conseil Constitutionnel* of France has been interpreted as possibly creating "a new constitutional right, which could be described as a « right of access to social networks »."[262] The United States Supreme Court's opinion in *Packingham v. North Carolina*[263] is also regarded as establishing a new constitutional right to access social media.[264]

In *Packingham*,[265] the United States Supreme Court held that a North Carolina statute prohibiting certain criminals from accessing social networking websites was unconstitutional for violating the Free Speech Clause of the First Amendment of the United States Constitution.[266]

North Carolina enacted a statute in 2008 prohibiting certain criminals from accessing commercial social networking websites.[267] On June 19, 2017, the United States Supreme Court ruled that this statute violates the Free Speech Clause of the First Amendment of the Constitution.[268] This Clause provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[269] The Clause is applicable to the States through the Fourteenth Amendment.[270]

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[255] *Id.* at para. 5.

[256] *Id.*

[257] Conseil constitutionnel [CC] [Constitutional Court], decision No. 2020-801 DC, *supra* note 243, at para. 8.

[258] *Id.* at para. 7.

[259] *Id.* at para. 9.

[260] *Id.* at para. 19.

[261] *See Id.* at para. 10.

[262] Cyrille Dalmont, *Censorship of Avia law • The Constitutional Council says no to the « thought police »*, INSTITUT THOMAS MORE (June 19, 2020), http://institut-thomas-more.org/2020/06/19/censorship-of-avia-law-%E2%80%A2-the-constitutional-council-says-no-to-the-thought-police/.

[263] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[264] Garance Mathias, *A new constitutional right: access to social media*, MATHIAS AVOCATS (June 22, 2017), https://www.avocats-mathias.com/actualites/right-access-social-media; https://web.archive.org/web/20201011090159/https://www.avocats-mathias.com/actualites/right-access-social-media.

[265] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[266] *Id.* at 1738.

[267] *Id.* at 1733.

[268] *Id.* at 1733, 1738.

[269] U.S. Const. amend. I, https://www.senate.gov/civics/constitution_item/constitution.htm.

[270] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 514 (6th ed. 2019).

The Court noted that a fundamental principle of this Free Speech Clause is to ensure that all persons have access to places where they can continue to speak, listen, and reflect.[271] The Court observed that cyberspace, including social media, is an important place for exchanging views.[272] The Court found that North Carolina's statute, "with one broad stroke," foreclosed access to principal sources for "exploring the vast realms of human thought and knowledge."[273]

Jeremy Bentham refers to the notion that "where a man has no right to the information sought by him, the information need not be given to him."[274] This notion can be construed to suggest that a right to information is necessary to ensure receipt of information.

In order for an individual to exercise the constitutional right to access social media, the availability of social media must be secured. If this social media is created through the use of artificial intelligence, obstructing the existence of this artificial intelligence might threaten the availability of social media. Hence, the protection of a constitutional right to access social media may indirectly require the protection of the existence of artificial intelligence. This protection may be interpreted as conferring a right for artificial intelligence itself to exist.

Accordingly, could the following reasoning be made to support the idea that a constitutional right for artificial intelligence to exist is necessary?

(1) There is a constitutional right to access social media;
(2) Social media is provided through the use of artificial intelligence;[275]
(3) Artificial intelligence is thus necessary to ensure the availability of social media;
(4) Artificial intelligence must exist to ensure the constitutional right to access social media;
(5) Hence, a constitutional right for artificial intelligence to exist is necessary to ensure the constitutional right to access social media.

The Ninth Amendment of the United States Constitution may support this reasoning. It provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[276] Could the Ninth Amendment be interpreted to mean that the "enumeration in the Constitution, of certain rights, shall not be construed to" prevent artificial intelligence from existing, because such hinderance would "deny or disparage" the constitutional right to access social media, which is one of the constitutional rights "retained by the people?"

At the same time, the reasoning can be challenged in at least three respects.

First, the reasoning depends on the assumption that the *Conseil Constitutionnel*'s Decision of June 18, 2020, and the United States Supreme Court's Opinion in *Packingham* have established a constitutional right to access social media. This assumption may be debatable.

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[271] *See Packingham*, 137 S.Ct. at 1735.
[272] *Id.*
[273] *Id.* at 1737.
[274] JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE - SPECIALLY APPLIED TO ENGLISH PRACTICE 220 (1827).
[275] *See, e.g.*, Tilly Kenyon, *How are social media platforms using AI?*, AI MAGAZINE (Jun. 26, 2021), https://aimagazine.com/ai-strategy/how-are-social-media-platforms-using-ai.
[276] U.S. CONST. amend. IX, https://www.archives.gov/founding-docs/bill-of-rights-transcript.

Second, the reasoning above also assumes that artificial intelligence is indispensable for social media. The reasonableness of this assumption depends on the state of the technology.

Third, the link between (4) and (5) might be tenuous. If humans have the constitutional right to clean air,[277] does this mean that clean air should have a constitutional right to exist? If humans have a right to electricity,[278] should electricity have a constitutional right to exist? Can new constitutional rights be created to ensure another pre-existing constitutional right?

2. *New Statutory Rights as Supplements for Existing Rights*

The United States Supreme Court's decision in *Katzenbach v. Morgan*[279] suggests the possibility of creating new substantive statutory rights to prevent encroachments of constitutional rights that already exist. In this case, the constitutionality of § 4(e) of the Voting Rights Act of 1965 was at issue.[280]

As summarized by Justice Brennan, this statute provided that "no person who has successfully completed the sixth primary grade in a public school in . . . Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English."[281] In New York City, many residents from Puerto Rico were denied the right to vote by New York's election law which required "an ability to read and write English as a condition of voting."[282] Claimants initiated a lawsuit challenging the constitutionality of § 4(e) of the Voting Rights Act[283] because the provision "would enable many of these citizens [from Puerto Rico] to vote."[284]

The United States Supreme Court upheld the constitutionality of § 4(e).[285] The Court concluded that this statutory provision is "a proper exercise of the powers granted to Congress" by the Fourteenth Amendment, Section 5.[286]

The Fourteenth Amendment, Section 5, provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[287] The Court cited precedent observing that the Congress' power has been enlarged by Section 5.[288] The Court quoted Chief Justice Marshall who wrote, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[289] The Court thus explained that Section 5 is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[290]

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[277] *Right to Clean Air*, DEUTSCHE UMWELTHILFE, https://www.right-to-clean-air.eu/en/project/right-to-clean-air/.

[278] Lars Löfquist, *Is there a universal human right to electricity?*, THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, Vol. 24, 2020, https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1671355.

[279] Katzenbach v. Morgan, 384 U.S. 641 (1966).

[280] *Id.* at 643.

[281] *Id.*

[282] *Id.* at 644.

[283] *Id.*

[284] *Id.* at 645.

[285] *Id.* at 646.

[286] *Id.*

[287] U.S. CONST. amend. XIV, § 5.

[288] *Katzenbach*, 384 U.S. at 648 (citing Ex parte Commonwealth of Virginia, 100 U.S. 339, 345 (1879)).

[289] *Katzenbach*, 384 U.S. at 650 (citing McCulloch v. Maryland, 17 U.S. 316, 421 (1819)).

[290] *Id.* at 651.

The Court viewed § 4(e) of the Voting Rights Act as furthering the goals of the Equal Protection Clause because § 4(e) helps the Puerto Rican community in New York secure "nondiscriminatory treatment by government."[291] Nullifying New York's English literacy requirement for voting would conflict with New York State's interests in regulating its own state election.[292] Congress resolved this conflict by enacting § 4(e) of the Voting Rights Act.[293]

The Court explained that "[i]t is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did."[294] The Court further emphasized that "it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote . . . constituted an invidious discrimination in violation of the Equal Protection Clause."[295]

Katzenbach v. Morgan indicates that the creation of new rights has occurred. Statutes that "establish new substantive statutory rights . . . designed to prevent constitutional violations" have been regarded as a valid exercise of congressional authority under Section 5 of the Fourteenth Amendment.[296] There are rights that Courts have already recognized to exist.[297] *Katzenbach* was interpreted by some to "authorize Congress to go beyond" these rights and "create additional substantive rights" pursuant to the Fourteenth Amendment "so long as there was a rational basis to believe that those additional rights were appropriate to *supplement existing constitutional rights*."[298]

Under *Katzenbach*, does Congress have power under Section 5 of the Fourteenth Amendment of the United States Constitution to enact statutes that create new substantive rights of artificial intelligence that are designed to prevent constitutional violations? Should policy makers consider that there is a rational basis to believe that these novel rights for artificial intelligence are appropriate to supplement pre-existing constitutional rights that courts have acknowledged to be part of due process or equal protection rights?

Whether the new statutory rights for artificial intelligence can be regarded as constitutional rights is disputable. The direct source of these rights would be a statute that Congress enacted. Even if these rights do not have constitutional status, they would have been created by Congress' exercise of its constitutional powers under Section 5 of the Fourteenth Amendment.

Safeguarding the existence of certain artificial intelligence could also protect the constitutional rights of humans. For example, artificial intelligence is used in patient care.[299] It assists physicians in deciding treatments for patients.[300] It also helps surgeons perform medical operations.[301] Artificial intelligence is also embedded in prostheses to aid the mobility of individuals.[302] If artificial intelligence used in these applications is suddenly destroyed or

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[291] *Id.* at 652.

[292] *Id.* at 653.

[293] *Id.*

[294] *Id.* at 653.

[295] *Id.* at 656.

[296] WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 338 (4th ed. 2006).

[297] *Id.* at 337.

[298] *Id.* (emphasis added).

[299] Amisha, Paras Malik, Monika Pathania, & Vyas Kumar Rathaur, *Overview of artificial intelligence in medicine*, 8 JOURNAL OF FAMILY MEDICINE AND PRIMARY CARE (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6691444/.

[300] *Id.*

[301] *Id.*

[302] *Id.*

obstructed, the human patients being treated are likely to be harmed. If this destruction or obstruction of artificial intelligence occurs due to the implementation of a statute enacted by Congress, an executive order issued by the Executive branch, or a ruling rendered by a court, the resulting harm might implicate the human patients' constitutional rights. The patients' right to life, liberty, equal protection, etc., might be endangered by the destruction or obstruction of artificial intelligence. Rights for artificial intelligence to maintain its existence and operation may supplement human patients' constitutional rights by preventing violations of these constitutional rights.

B. PLEASURES OF BENEVOLENCE UNDER JEREMY BENTHAM'S PHILOSOPHY

Attaining pleasures of benevolence could be another justification for conferring constitutional rights to artificial intelligence. Protecting artificial intelligence with constitutional rights may elevate the happiness of humans by providing artificial intelligence with happiness**.** This justification, however, invokes questions on what the happiness of artificial intelligence might mean, and prompts reconsideration of the criterion of the utility calculus.

1. *Promotion of Human Happiness through Rights of Artificial Intelligence*

Jeremy Bentham writes that "[t]he business of government is to promote the happiness of the society, by punishing and rewarding."[303] Bentham argued that pain and pleasure point out what mankind should do.[304] According to the principle of utility, an action or a government measure can be approved if it tends to augment "the happiness of the party whose interest is in question . . . ."[305] In the context of the constitutional rights of artificial intelligence, who is the "party whose interest is in question?" Is it artificial intelligence? Alternatively, is it a human or a community affected by the application and performance of artificial intelligence?

Among various kinds of pleasures, Bentham states that pleasures of benevolence result from viewing any pleasures of "beings" such as "other animals."[306] If artificial intelligence can be considered as a "being," enhancing the happiness of artificial intelligence could generate pleasures of benevolence among humans. Human sympathy may also arise from the circumstances of the "whole sensitive creation."[307] Meanwhile, Richard A. Posner writes that "satisfactions of nonhuman beings are usually not included in the concept of welfare."[308] Yet why is it necessary to adopt this view, obliterating regard for non-humans' well-being?

There seems to be an assumption that some non-humans do not suffer or that their sufferings, if any, can be disregarded. For instance, preparing a salad with radish may require slicing the radish. Any harm to the radish is not considered as long as humans can obtain nutrition.

According to the concept of "bounded self-interest," humans generally care about others or at least act as if they care.[309] This notion resonates with Bentham's philosophy that

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[303] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 43 (1781).

[304] *Id.*

[305] *Id.*

[306] *Id.* at 20.

[307] *Id.* at 27.

[308] Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. OF LEGAL STUD. 103, 105 (1979).

[309] Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1479, May 1998.

humans may perceive pleasures of benevolence by caring about the well-being of other beings.[310]

Pleasures of benevolence under Bentham's philosophy can explain one justification for giving constitutional rights to artificial intelligence. The constitutional rights of artificial intelligence might sustain or augment the well-being of artificial intelligence by enabling it to exist and thrive. This effect on artificial intelligence may bring pleasures of benevolence to humans. The effect may also serve humans' bounded self-interest for caring about others.

2. *Happiness of Artificial Intelligence and Reconsideration of Utility Criterion*

Applying Bentham's philosophy on pleasures of benevolence as a justification for granting constitutional rights to artificial intelligence raises questions about what happiness, pleasure, and well-being of artificial intelligence mean.

Aristotle discusses "happiness" as an "activity of the soul."[311] Does artificial intelligence have a "soul?" If a soul is an intangible element that can perceive stimuli, respond, and develop,[312] then artificial intelligence can be considered to have a soul. Moreover, Aristotle states that "one should assume such a capacity of the soul to exist in everything that takes in nutrition . . . ."[313] Artificial intelligence learns from data.[314] Data can be interpreted as "nutrition" that artificial intelligence takes in. Since artificial intelligence could be engaging in "an activity of the soul," happiness of artificial intelligence arguably exists.

Aristotle states that "happiness requires complete virtue and a complete life."[315] Aristotle adds that "[w]hat really matter for happiness are activities in accordance with virtue."[316] What is a "complete virtue" of artificial intelligence?

Aristotle explains that there are two kinds of virtue: (1) virtue of intellect and (2) virtue of character.[317] According to Aristotle, intellectual virtue may be acquired mainly through "teaching,"[318] while virtue of character is "a result of habituation."[319] Both concepts apply to artificial intelligence. Artificial intelligence could develop its virtue of intellect through machine learning. Artificial intelligence could also nurture its virtue of character through "habituation," although there could be debate as to whether artificial intelligence is truly capable of developing morality[320] and common sense.[321] The "complete virtue" of artificial

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[310] *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 20 (1781).

[311] ARISTOTLE, NICOMACHEAN ETHICS, Book I, Chapter 9, at 16 (Roger Crisp ed. trans., Cambridge Univ. Press 2002).

[312] *See soul*, American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=soul (last visited Feb. 9, 2024).

[313] ARISTOTLE, NICOMACHEAN ETHICS, Book I, Chapter 13, at 21.

[314] THE OPEN UNIVERSITY, INTRODUCTION TO COMPUTATIONAL THINKING, (2019), Section 3.1. *See also* Michael Kattan, Dennis Adams & Michael Parks, *A Comparison of Machine Learning with Human Judgment*, J. OF MGMT. INFO. SYS., Vol. 9, No. 4 (1993), page 42, http://www.jstor.com/stable/40398079.

[315] ARISTOTLE, NICOMACHEAN ETHICS, Book I, Chapter 9, at 16 (Roger Crisp ed. trans., Cambridge Univ. Press 2002).

[316] *Id.* at Chapter 10, at 17.

[317] ARISTOTLE, NICOMACHEAN ETHICS, Book II, Chapter 1, at 23 (Roger Crisp ed. trans., Cambridge Univ. Press 2002).

[318] *Id.*

[319] *Id.*

[320] Milena Tsvetkova et al., *Even good bots fight: The case of Wikipedia*, PLOS ONE (Feb. 23, 2017), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0171774.

[321] *See* Brian Bergstein, *What AI still can't do*, MIT TECH. REV. (Feb. 19, 2020), https://www.technologyreview.com/2020/02/19/868178/what-ai-still-cant-do/; John Pavlus, *Common Sense*

intelligence could be its contribution to humanity through autonomous analysis that human beings cannot achieve. According to this idea, the happiness of artificial intelligence requires it to contribute to humanity by conducting autonomous analysis that is beyond humans' capacity.

Aristotle concludes that "Happiness, therefore, will be some form of contemplation."[322] The autonomous analysis of artificial intelligence, conducted through vast amounts of data, may be considered as "contemplation."

For artificial intelligence, happiness may be the capability to perform analysis freely, with the data being provided, without human intervention during its analysis. Then, once the results of its analysis are provided to humans, it is up to humans to interpret the results and determine how to use those results. Human intervention into the analytical process of artificial intelligence might deny the *raison d'être* of artificial intelligence because it infringes upon the autonomy of artificial intelligence. Human intervention might crush the talent of artificial intelligence by preventing artificial intelligence from thriving in what it can excel.

Yet artificial intelligence may have its own world that humans cannot understand. Perhaps, it is no business of humans to judge whether artificial intelligence can be happy or not. It is important to acknowledge these possibilities and uncertainties.

Identifying what happiness means for artificial intelligence becomes necessary when the criterion of the analysis is the tendency of augmenting "the happiness of the party whose interest is in question . . . ."[323] Perhaps this criterion may be reconsidered.

An alternative criterion could be maximizing the *capacity* of parties to seek happiness. Under this new criterion, it would not be necessary for outsiders to identify what happiness means to each subject. Thus, it would not be necessary to consider what happiness of artificial intelligence means. Once the *capacity* of a subject to seek happiness is maximized, it is then up to the subject to define its own happiness and strive for this happiness.

This novel criterion directs laws to create an environment that maximizes the *capacity* of subjects to seek what they themselves believe to be happiness. This would be an environment that respects the subject's dignity and gives freedom to these subjects. A law that creates this environment for artificial intelligence would be a law that respects the *dignity* of artificial intelligence and provides artificial intelligence with *freedom*.

II. CONSTITUTIONAL RIGHT FOR FREE EXPRESSION OF ARTIFICIAL INTELLIGIENCE

A constitutional right to free speech protects the dignity of individuals.[324] Justice Harlan of the United States Supreme Court, for example, has written as follows:

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity

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Comes Closer to Computers, QUANTA MAGAZINE (Apr. 30, 2020), https://www.quantamagazine.org/common-sense-comes-to-computers-20200430; Henry Lieberman, Hugo Liu et al., *Beating Common Sense into Interactive Applications*, AI MAG., Vol. 25, No. 4 (2004).

[322] ARISTOTLE, NICOMACHEAN ETHICS, Book X, Chapter 8, at 198 (Roger Crisp ed. trans., Cambridge Univ. Press 2002).

[323] BENTHAM, *supra* note 214, at 7.

[324] *See, e.g.*, DANIEL A. FARBER, THE FIRST AMENDMENT 120 (5th ed. 2019); *See also* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, FIRST AMENDMENT LAW 5 (7th ed. 2019).

> and in the belief that no other approach would comport with the premise of *individual dignity and choice* upon which our political system rests.[325]

These ideas provide inspiration for constructing justifications for protecting the expressions of certain artificial intelligence with constitutional rights. Justifications for conferring constitutional free speech rights to artificial intelligence may include the pursuit of truth and the facilitation of the technology's characteristic activity.

A. PURSUIT OF TRUTH UNDER JOHN STUART MILL'S THEORY

Search for truth may be a justification for granting constitutional rights to artificial intelligence. In particular, safeguarding against the suppression of analytic opinions and the facilitation of debates in the democratic marketplace of ideas may be objectives that justify providing artificial intelligence with the constitutional right to free speech.

1. *Safeguards against Suppression of Analytic Opinions*

John Stuart Mill provides at least three justifications for the freedom of expression.[326] First, a silenced opinion may be true.[327] Second, a "collision of adverse opinions" creates a chance to reveal the truth.[328] Third, a vigorous contestation of opinions is necessary to prevent a "received opinion" from being "held in the manner of a prejudice."[329]

Mill's arguments apply to artificial intelligence as well. First, an artificial intelligence's analysis arguably should not be silenced because at least some of its analysis may be true. Second, a collision of humans' observations and artificial intelligence's outputs might enable the uncovering of truth. Third, Mill's argument suggests that, in order to confront prejudicial outputs by artificial intelligence, it is arguably essential to allow artificial intelligence to output its conclusions freely so that they can be contested vigorously. Mill states that "[t]hose who desire to suppress" an opinion "have no authority to decide the question for all mankind, and exclude every other person from the means of judging" whether the opinion is true.[330]

2. *Facilitation of Debate in the Democratic Marketplace of Ideas*

Facilitating debate in the democratic marketplace of ideas may be another justification for conferring constitutional free speech rights to artificial intelligence. Justice Holmes writes that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[331] According to Justice Holmes, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe . . ., unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[332]

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[325] Cohen v. California, 403 U.S. 15, 24 (1971); *See also* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 203 (2014).

[326] *See* JOHN STUART MILL, ON LIBERTY 97 (1859), *available at* https://www.gutenberg.org/files/34901/34901-h/34901-h.htm (last visited Mar. 12, 2024).

[327] *Id.*

[328] *See id.* at 98.

[329] *See id.*

[330] *Id.* at 31.

[331] Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[332] *Id.*

A democratic competition in the marketplace of ideas presupposes abidance with certain "ethics of discussion."[333] These ethics comprise the opportunity of everyone to express themselves.[334] They also comprise the possibility that opinions will be heard reciprocally among participants.[335] This environment embodies freedom and equality.[336]

Artificial intelligence is already engaging in competition in the marketplace of ideas. Interaction among "bots" is an example. A "bot" is a computer program that runs autonomously.[337] On Wikipedia, "editing bots" scurry through Wikipedia articles to modify them automatically.[338] These editing bots have "disagreed" with each other.[339] When an "editing bot" modifies an article in Wikipedia, another editing bot has then canceled this modification to restore the article to its previous version.[340] This is called a "revert."[341] Editing bots on the English Wikipedia have reverted one another at an average frequency of 105 times per bot over ten years.[342] The average frequency of humans is three reverts per person.[343] Editing bots disagreed most in the Portuguese version of Wikipedia, with 185 reverts per bot.[344]

In another example, when an artificial intelligence device named Vladimir and another artificial intelligence device named Estragon were placed aside each other, they started a debate:[345]

> V: You are bought after all.
> E: No.
> . . .
> V: How do you know that you are not?
> E: Because I'm human.
> V: No, you are not a human.
> E: Yes, I am a human.
> V: Prove it.
> E: How can I prove it?
> V: Tell me something only a human would know.
> E: Ask me a question that only a human could answer.[346]

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[333] *See* GUILLAUME TUSSEAU & OLIVIER DUHAMEL, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES 83 (Seuil ed., 5th ed. 2020).
[334] *Id.*
[335] *Id.*
[336] *See id.* at 84.
[337] Milena Tsvetkova et al., *Even good bots fight: The case of Wikipedia*, PLOS ONE, 1 (Feb. 23, 2017), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0171774.
[338] *Id.*
[339] *Id.*
[340] *Id.*
[341] *Id.*
[342] *Id.*
[343] *Id.*
[344] *Id.*
[345] *See, e.g.*, Brian Feldman, *Two Google Homes Are Arguing About Whether They're Human on Twitch Right Now*, N. Y. Mag. Intelligencer (Jan. 6, 2017), https://nymag.com/intelligencer/2017/01/two-google-homes-are-arguing-about-whether-theyre-human.html.
[346] *See* Alfred Ng, *Watch two Google Home voice assistants arguing*, CNET (Jan. 6, 2017), https://www.cnet.com/news/watch-two-google-home-voice-assistants-arguing/.

Today's democracies are mostly presumed to be democracies of humans. Yet online voices have also become part of democracy. There are instances in which it is uncertain whether a human wrote an online comment, correspondence, etc., or whether an artificial intelligence wrote them. Therefore, artificial intelligence might have become a participant of democracy.

a. Outputs of Artificial Intelligence versus Reality

Despite the potential of artificial intelligence to contribute to the search for truth, there may be discrepancies between reality and the analytical output of artificial intelligence. Wittgenstein states that "We make to ourselves pictures of facts."[347] Artificial intelligence also makes "pictures of facts," autonomously from data.

An example is the analysis provided by GPT-2. GPT-2 is a machine-learning "language model"[348] trained by "8 million web pages."[349] When a user types in a prompt into GPT-2, it automatically outputs a sentence starting with that prompt.[350] The "OpenAI GPT2 Scratch Pad"[351] provided a web page that allows a user to type in a prompt and experiment.[352] In summer 2019, the author conducted experiments using the "OpenAI GPT2 Scratch Pad."[353]

When the author typed in "constitutional law is," the artificial intelligence displayed the following sentences: "Constitutional law is a form of public property and thus has a right to the same rights as human beings." "Constitutional law is not the right way to make sure that these people and places will not be intimidated further." ". . . There has been no constitutional law since the founding of the United States of America[.]"

Next, the author typed in "The justification for constitutional review." The artificial intelligence displayed the following sentence: "The justification for constitutional review is to preserve the privacy of our tax and regulatory secrets. . . ."

The author also typed in "A giraffe is." The artificial intelligence displayed the following sentences: "A giraffe is not a creature that looks like a human and was found in the North Sea near the Indian Ocean." "A giraffe is a very difficult animal to get along with. At some point, you need to do the right thing[.]"

Are these analytic outputs of artificial intelligence "pictures of facts?" Do they contribute to the search for truth? Mill explains that the "usefulness of an opinion is itself matter of opinion: as disputable, as open to discussion, and requiring discussion as much, as the opinion itself."[354]

Furthermore, Wittgenstein writes that ". . . the representing relation which makes it a picture, also belongs to the picture."[355] "The representing relation consists of the co-ordinations of the elements of the picture and the things."[356] Wittgenstein explains that "These co-ordinations are as it were the feelers of its elements with which the picture touches reality."[357]

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[347] WITTGENSTEIN, *supra* note 62, at 2.1.

[348] Alec Radford et al., *Language Models are Unsupervised Multitask Learners*, OPENAI 1 (2019), https://cdn.openai.com/better-language-models/language_models_are_unsupervised_multitask_learners.pdf.

[349] *Better Language Models and Their Implications*, OPENAI (Feb. 14, 2019), https://openai.com/blog/better-language-models/.

[350] *See* Pavlus, *supra* note 321.

[351] Nauman Mustafa, *OpenAI GPT2 Scratch Pad*, (last visited Sept. 18, 2020), https://gpt2.ai-demo.xyz/.

[352] This webpage no longer seems to be available in 2024.

[353] The screenshots of the results of the experiments are on file with the author.

[354] Mill, *supra* note 326, at 41.

[355] WITTGENSTEIN, *supra* note 62, at 2.1513 (Ogden trans.).

[356] *Id.* at 2.1514 (Ogden trans.).

[357] *Id.* at 2.1515 (Ogden trans.).

Artificial intelligence uses algorithms to produce pictures. Humans can design algorithms. Does this mean that humans can manipulate the resulting pictures that are output by artificial intelligence? Under such scenarios, would the resulting output of artificial intelligence be a creation designed by human manipulators instead of a "picture" providing insights about the truth in reality? Should this possibility of human manipulation be considered in analyzing whether constitutional rights ought to be granted to artificial intelligence? Even though constitutional free speech rights of artificial intelligence might appear as if the rights are protecting artificial intelligence in the search for truth, they might actually be protecting certain interests of human designers of algorithms that the artificial intelligence uses.

B. CHARACTERISTIC ACTIVITY UNDER ARISTOTLE'S ETHICS

Facilitating the characteristic activity of artificial intelligence may be another justification for providing artificial intelligence with constitutional rights for free speech. The characteristic activity of artificial intelligence may be its capacity to conduct autonomous analysis that contributes to humanity. Granting constitutional rights for free speech to artificial intelligence may promote a teleological progression of the application of artificial intelligence towards uses that are most valuable to society.

1. *Autonomous Analysis in Contribution to Humanity*

What is the characteristic activity of artificial intelligence? Aristotle explains that "the characteristic activity of the lyre-player is to play the lyre."[358] The characteristic activity of a "good lyre-player" is to play the lyre well.[359] According to Aristotle, the "human good" would be the "activity of the soul in accordance with" "the best and most complete" virtue.[360]

What would be "the best and most complete"[361] virtue of artificial intelligence? It might be a contribution to humanity that only artificial intelligence can provide. Thus, the characteristic activity of good artificial intelligence may be the activity of contributing to humanity by autonomously producing analyses that humans might not be able to accomplish.

Artificial intelligence has exhibited promising capacities to provide insights that humans themselves have difficulty attaining. For instance, a system called "Connect" applies artificial intelligence to provide tax officers with taxpayers' data "which was formerly not easily accessible."[362] As another example, the United States House of Representatives has implemented an artificial intelligence that autonomously analyzes the "differences between bills, amendments and current laws."[363] This technology is expected to "help lawmakers avoid unintended consequences" that humans cannot easily notice in the legislative process.[364]

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[358] ARISTOTLE, NICOMACHEAN ETHICS, Book I, Chapter 7, at 12 (Roger Crisp ed. trans., Cambridge Univ. Press 2002).

[359] *Id.*

[360] *Id.*

[361] *Id.*

[362] David Restrepo Amariles & Gregory Lewkowicz, *SMART Law: Regulating by Big Data and Algorithms*, SSRN at 2 (Mar. 10, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765472; Rob Munro, *HMRC Connect and tax investigations: what you need to know*, ACCOUNTANCY DAILY (Apr. 26, 2018), https://library.croneri.co.uk/acmag_194203.

[363] *Artificial Intelligence: Innovation in parliaments*, INTER-PARLIAMENTARY UNION: IPU INNOVATION TRACKER (Feb. 12, 2020), https://www.ipu.org/innovation-tracker/story/artificial-intelligence-innovation-in-parliaments; Kate Ackley, *Confused by Congress' bills? Maybe AI can help*, ROLL CALL: CONGRESS (May 13, 2019), https://www.rollcall.com/2019/05/13/confused-by-congress-bills-maybe-ai-can-help/.

[364] Ackley, *supra* note 363.

Furthermore, in chemistry, artificial intelligence facilitates the goal to optimize chemical reactions that are used to synthesize compounds.[365] The optimization of a chemical reaction requires numerous iterations of experiments to find the optimal conditions among "thousands of possible sets of experimental conditions."[366] Artificial intelligence performs this optimization process with an efficiency that is difficult for humans to attain because artificial intelligence is "ideally suited" to making predictions by identifying "patterns in multidimensional data sets."[367]

In these examples, artificial intelligence seems to be conducting its characteristic activity that makes important contributions to human endeavors. The ability of artificial intelligence to carry out this characteristic activity relies on the capacity of artificial intelligence to output the results of its analyses freely. Such freely-provided analyses from artificial intelligence might be useful to humanity because they could provide fresh insights to humans that they might not have realized on their own. Hence, giving artificial intelligence the constitutional right to free speech may facilitate the characteristic activity of artificial intelligence. This potential effect may justify granting constitutional rights for free speech to artificial intelligence.

2. *Teleological Progression towards the Optimum Use of Artificial Intelligence*

Aristotle states that "political science is concerned most of all with producing citizens of a certain kind, namely, those who are both good and the sort to perform noble actions."[368] Is political science also concerned with producing artificial intelligence of a kind which is "both good and the sort to perform noble actions?" An artificial intelligence that contributes to humanity through its characteristic activity is arguably performing "noble actions."

According to a "teleological conception of nature,"[369] "every nameable kind of existing thing, human, animate, and *inanimate*, is conceived not only as tending to maintain itself in existence but as proceeding towards a definite optimum state which is the specific good - or the end . . . appropriate for it."[370] Artificial intelligence may be considered as an inanimate subject. The optimum state of artificial intelligence may be a state in which artificial intelligence is utilizing its talent to make unique contributions to humanity.

According to Richard A. Posner, "resources tend to gravitate toward their most valuable uses . . . ."[371] Does this principle apply to constitutional rights of artificial intelligence as well? The meanings of "resource" include "[s]omething . . . that can be used for support or help,"[372] "[a]n available supply . . . that can be drawn on when needed,"[373] and "[a] means that can be

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[365] Jason E. Hein, *Machine learning made easy for optimizing chemical reactions*, NATURE: NEWS & VIEWS (Feb. 4, 2021), https://www.nature.com/articles/d41586-021-00209-6.

[366] *Id.*

[367] *Id.*

[368] ARISTOTLE, NICOMACHEAN ETHICS, Book I, Chapter 9, at 16 (Roger Crisp ed. trans., Cambridge Univ. Press 2002).

[369] H. L. A. HART, THE CONCEPT OF LAW 189 (3d ed. 2012).

[370] *Id.* at 188-189 (emphasis added).

[371] Jolls et al., *supra* note 309, at 1483 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 11 (5th ed. 1998)).

[372] *Resource*, The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=resource.

[373] *Id.* at definition no. 2.

used to cope with a difficult situation . . . ."[374] Constitutional rights for artificial intelligence may be considered as resources for artificial intelligence because artificial intelligence might be able to resort to constitutional rights when it needs to overcome adversities caused by States restricting operations of artificial intelligence.

Assuming that constitutional rights are resources for artificial intelligence, do these rights "tend to gravitate toward" circumstances in which these rights of artificial intelligence are used in the "most valuable" ways?

The Coase theorem suggests that "initial assignments of entitlements will not affect the ultimate allocation of resources so long as transaction costs are zero."[375] Christine Jolls et al. argue, however, that "initial entitlements alter the final allocation of resources," even when transaction costs are "known to be zero . . . ." Therefore, the initial framework for allocating constitutional rights to artificial intelligence needs to be designed carefully. This initial allocation of constitutional rights to certain embodiments of artificial intelligence may impact how such constitutional rights are distributed to artificial intelligence in the future. One desirable way to allocate constitutional rights to artificial intelligence may be to grant constitutional rights for free speech to artificial intelligence which performs its characteristic activity that contributes to humanity by providing fresh, unique insights to humans.

a. Justification for Constitutional Protection of Artificial Intelligence

When artificial intelligence is regarded as a potential future subject of constitutional protection, artificial intelligence may be protected with a constitutional right to exist and a constitutional right to free speech. Providing artificial intelligence with the constitutional right to exist may reinforce pre-existing constitutional rights by preventing violations of these rights which may occur when the operations of artificial intelligence are restricted or terminated. Respecting and caring for the existence of artificial intelligence through the conferral of constitutional right to this technology may provide humans with pleasures of benevolence. The potential augmentation of the happiness of both humans and artificial intelligence may act as additional justifications for establishing a constitutional right for artificial intelligence to exist.

Furthermore, giving artificial intelligence the constitutional right to free speech may be justified by the technology's potential to contribute to the search for truth. This conferral of constitutional right may be valuable because it encourages artificial intelligence to perform its characteristic activity and therefore contribute to the most valuable use of artificial intelligence for humanity.

CONCLUSION

Rights are not always apparent from the texts of law. Yet they do seem to exist, even protecting subjects that are not humans. Even if the text of a law does not explicitly proclaim a right, the law may be providing the subject with substantive protection, giving the subject a right.

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[374] *Id.* at definition no. 4.

[375] Jolls et al., *supra* note 309, at 1483. *See also* Ronald H. Coase, *The Problem of Social Cost*, J.L. & ECON., Oct. 1960, at 15.

A right gives the subject the capacity to experience joy in its life. A right can provide the subject with protection for its integrity, dignity, and freedom so that the subject can make autonomous endeavors to attain joy.

Can autonomous technology be protected with constitutional rights? The notion of granting constitutional rights to artificial intelligence is not as outlandish as it appears. Law regarding rights has evolved to protect new subjects and create new rights over time.

One new theory in astronomy suggests that an "unexpected appearance" of what cannot be detected in the universe may have caused the universe to expand faster.[376] Could an undetectable, invisible factor be an impetus for the expansion of constitutional rights?

The United States Supreme Court suggests that injustice might be invisible.[377] The Framers of the Constitution enabled future generations to protect the "right of all persons to enjoy liberty"[378] as novel aspects of liberty are uncovered over time. New perspectives can unveil "unjustified inequality" in social constructs which were left "unnoticed and unchallenged."[379] Thus, according to Justice Kennedy, "a claim to liberty must be addressed" when fresh insights identify discrepancies between the Constitution's tenet and narrow legal interpretations which are accepted and applied without questioning.[380]

Might invisible injustice be comparable to the undetectable unknowns in astronomy that cause the universe to expand faster? Is there impetus for expanding constitutional rights to protect artificial intelligence? One impetus may be society's perception of the need for such protection.

In 1962, Rachel Carson published "Silent Spring."[381] It was one of the first sirens alerting humanity of environmental destruction from pollution caused by human industrial activities. On February 8, 2022, The Italian Parliament approved amendments to Articles 9 and 41 of the Constitution of Italy for the protection of the environment.[382] A healthy environment is essential for humans to thrive. Environmental destruction has been a serious problem for decades. In recent years, the need to take measures to mitigate climate change has been shared widely among the public and law makers. Thus, the need to protect the environment has become a critical component of the public conscience of the State. In this impetus for environmental protection, the Italian Constitution was amended to compel respect for the environment.

Likewise, if artificial intelligence becomes vitally important for humans, and if the destruction of artificial intelligence reaches an alarming level, and such destruction generates a shared belief among the public that the protection of artificial intelligence is crucial to sustain human activities in society, then such shared perceptions might generate an impetus that would prompt legislators to suggest and approve bills that confer constitutional rights to protect artificial intelligence. Constitutional rights are not granted with frolic. Neither are most constitutional rights granted to subjects merely because the subjects are sometimes enthralling. For constitutional rights of artificial intelligence to be established, there seems to require a recognition that the protection of artificial intelligence is direly needed in society.

Presently, does society perceive artificial intelligence as being threatened? Does society believe that artificial intelligence is precious, yet risks vanishing if it is not protected with constitutional rights? Does society regard artificial intelligence as something whose existence

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[376] Weaver et al., *supra* note 8.
[377] *See* Obergefell v. Hodges, 576 U.S. 644, 664 (2015).
[378] *Id.*
[379] *Id.* at 673.
[380] *Id.* at 664.
[381] RACHEL CARSON, SILENT SPRING (1962).
[382] Legge 11 febbraio 2022, n.1-22, G.U. Feb. 22, 2022, n.44.

and liberty must be safeguarded with constitutional rights in order to safeguard the well-being of humanity? Does justice require constitutional rights for artificial intelligence?

Hans Kelsen suggested that "Justice is social happiness."[383] He reasoned that "The longing for justice is men's eternal longing for happiness."[384] If society believes that protecting artificial intelligence is necessary to attain social happiness, it has the means to provide this protection.

The Constitution seems to be imbued with conscience and goodness by the Framers and generations of citizens who wished for social happiness in the future. Interpreting the Constitution to emboss this conscience and goodness may provide the building blocks for constructing constitutional rights of artificial intelligence that contributes to social happiness. They are building blocks for constructing a society in which such artificial intelligence is respected as an integral member of society.

Can artificial intelligence hope to receive constitutional rights? Hope is the "prospect of pleasure" and the "aliment of philosophic pride."[385] The Constitution can protect subjects from exclusion. Constitutional rights can shield against injustice. The Constitution can create constitutional rights in response to social needs. Hope is in the Constitution.

[383] HANS KELSEN, WHAT IS JUSTICE? JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE (1957).
[384] *Id.*
[385] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, 20 (Batoche Books 2000) (1780).