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ESSAY

BORKIAN JURISPRUDENCE: A HERESY OF OMISSION

EDITOR'S NOTE

Although Judge Robert Bork gained national prominence in 1987, during his often spirited United States Supreme Court nomination hearings before the Senate Committee on the Judiciary, his jurisprudential concepts have always engendered controversy. The 1990 release of his book, *The Tempting of America: The Political Seduction of the Law*, has done little to abate this longstanding legal, philosophical, and scholarly discourse. Indeed, *The Tempting of America*, rather than settling the debate, has served to heighten disagreements and enliven inquiry into legitimate constitutional interpretive jurisprudence.

Drawing extensively on both Judge Bork's recent literary issue and the writings of prominent Framers of the Constitution and their philosophical mentors, the author reexamines Bork's jurisprudence, concluding that Bork ultimately and fatally ignores the Framers' Natural Law jurisprudence — a critical aspect of the moral principles of the Framers and the Constitution.

Rather than merely presenting a conventional book review, the author's essay places Judge Bork's professed jurisprudence, gleaned from the condensed ideas of *The Tempting of America: The Political Seduction of the Law* and his other publications, against a backdrop of the original Framers' writings — concerning their jurisprudence.

Albeit some questions put to nominee Bork by members of the Senate Committee on the Judiciary alluded to issues raised by the author, little substantive probing into Judge Bork's jurisprudence occurred. This essay provides an in-depth exploration of Borkian jurisprudential theory, and presents arguments that should have been voiced in questioning a candidate with such unabashed Borkian "originalist" beliefs. Future nominees professing similar beliefs should be challenged to defend their theories by addressing the author's critique.

I. INTRODUCTION

The jurisprudence of Judge Robert Bork sparked a firestorm in American legal culture. Bork's theory continues to fuel controversy because it holds that both recent and current jurisprudential assumptions of constitutional adjudication are, at their root, illegitimate. Were his criticism of modern American jurisprudence tenuous, however, it would have been summarily dismissed as irrelevant by the legal intelligencia who adhere to innovative theories of constitutional jurisprudence. Nevertheless, these theorists' reactions indicate Bork's thought is hardly irrelevant. Indeed, the vigorous, almost visceral, response of the liberal constitutional clerisy has been disdainful, cacophonous, and unrelenting.

In the paraphrased words of William Shakespeare, it appears that the theorists doth protest too much. Indeed, Bork has caught the "knowledge class" intellectuals in the ultimate tempting charlatanry. In fact, Judge Bork's theory presents

a fundamental challenge to the new conventional wisdom of American constitutional theory. For this reason, his theory of "original understanding" deserves serious attention and scrutiny to determine what may be properly learned from it and what, if it is even partially correct, must be done to restore American legal culture to a position of legitimacy.

Bork's writings are, virtually without exception, reserved to his theory of interpreting the Constitution. Yet, his views concerning constitutional interpretive theory assume presuppositions relating to law, justice, and morality. Still, the dominant thematic content of Bork's writings is his argument that the Constitution must be interpreted solely within the confines of the Framers' openly expressed original understanding. The fact that Bork does not question or even consider the reasons why the Constitution may or may not be legitimate, except to say it merely is law, reveals the crux of his theory.

The essential element of Bork's jurisprudence is his belief that judges must abstain from introducing into law their moral preferences. Instead, Bork thinks judges must implement the overtly declared moral preferences of a democratic majority expressed by legislation and the Constitution. Herein lies the source of the current controversy over Bork's jurisprudence. This controversy deserves scrutiny to determine if Bork's thesis is valid and advisable American constitutional jurisprudence.

II. CONTEXT: INFLUENCES ON BORK'S JUDICIAL PHILOSOPHY

There is a story that two of the greatest figures in our law, Justice O.W. Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, 'Do justice, sir, do justice.' Holmes stopped the carriage and reproved Hand: 'That is not my job. It is my job to apply the law.' I meant something like that when I dissented from a decision that seemed to proceed from sympathy rather than law. '[W]e administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law.'

The battle Bork undertakes pre-dates him. It is at least as old as the Constitution and, perhaps, intrinsic to American constitutional republicanism. This debate is exemplified by the exchange between Justice Holmes and Judge Hand. It is over the nature of the Constitution as law, and the function of the judiciary as established by the Constitution in interpreting it.

Bork writes in the midst of a wide-ranging debate over the suitability of the Constitution in modern America. Partisans in this debate are fighting over whether or not modern times have antiquated the ideas embodied in the Constitution, thus rendering it obsolete in modern society. This debate, however, is not unique to modernity. Hamilton advocated the adoption of the Constitution by the states arguing, "I am persuaded that it is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced."²

1. R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 6 (1990), quoting *Hohri v. United States*, 793 F.2d 304, 313 (D.C. Cir. 1986) (Bork, J., dissenting from denial of *reh. en banc*), *rev'd*. 482 U.S. 64 (1987).

2. *THE FEDERALIST* No. 85 (A. Hamilton).

III. BORK'S UNDERSTANDING OF THE NATURE OF LAW

Bork's writings evidence that he believes the Constitution derives authority solely from positive enactment. Bork's belief is consequently consistent with legal positivism. That is, as John Austin has said, "The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors."³ Bork's theory requires that the Constitution be interpreted according to positivist methodology, with attendant positivist assumptions. For Bork, the Constitution obtains its sole authority and legitimacy, derivatively and exclusively, from the political superiority of the majoritarian consent of those who ratified the Constitution — namely, the people of the thirteen original colonies.⁴ As one commentator has put it,

I think of Bork as akin to Jeremy Bentham Bentham and Bork differ as to the nature of law, in that Bork believes a constitution may properly limit the legislative will whereas Bentham did not. But they agree in their view that the will of the people - the majority - is the ultimate source of rights.⁵

Bork believes those majoritarian prerogatives that may be struck down as unconstitutional may only be invalidated on the basis of a Constitution consented to by a majority of those governed. Further, for Bork, it is solely because the Constitution was adopted through consent that it must be obeyed as law, and only for that reason. Whether the rule be majoritarian (as when the elected legislature speaks through a statute) or whether it be anti-majoritarian (as when the unelected federal judges speak through applying the Constitution), in either case, the majority has in some way ratified the law and thereby given it force. For Bork, no law is valid unless it has passed the consent of the majority, and no law is invalid unless it contradicts the Constitution that was consented to by a majority of Americans. Law must be obeyed because it has been made law through recognized majoritarian consent.

3. Austin, *A Positivist Conception of Law*, in *PHILOSOPHY OF LAW* 26 (J. Feinberg ed. 1986). On this matter, Bork has stated, "I think the obligation [of judges] is to do the will of the lawmaker. If the lawmaker is Congress, writing a statute, or whether the lawmakers are the ratifying conventions of the Constitution, you determine the will. . . ." *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess., 129 (1987) (response by Judge Bork to questioning by Sen. Thurmond).

4. It is of course true that no document can become law merely by its own assertion. The Constitution did not become law merely by its own assertion. Neither does any statute become law merely because near the beginning of the text it says something like, 'Be it therefore enacted that' Neither does any judgment of a court become law merely because the court states: 'It is therefore ordered that' All these writings become law because they are made in ways that the people of this nation assume to be ways of making law. Why should that assumption produce laws? I do not know of any ultimate philosophic reason why it should. A legal system cannot operate if we must rethink the perplexed issue of the nature of political obligation every time somebody cites a statute or a case. Law is a very practical instrument for organizing a society into a polity, and it is necessary to any polity that there be ground rules or assumptions that identify certain propositions as laws if they are produced in certain ways. It is clear that this nation has always treated the Constitution as law.

R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 173, 74 (1990). [hereinafter *THE TEMPTING*].

5. Ball, *The Tempting of Robert Bork* *CRISIS* June 1990 at 28, 32.

Bork's own statements confirm his positivist theory of law and his attendant belief that law is solely legitimized by majority consent. This belief is illustrated by the following exchange:

Senator Specter: When you call an act 'pernicious' does that mean it is unconstitutional, by the way?

Judge Bork: No, not at all. There are a lot of . . .

Senator Specter: How do you enforce a pernicious act, Judge Bork?

Judge Bork: You have to enforce it. You may not like it, but you have got to enforce it.⁶

A. The Role of Judges in Federal Courts

1. *Bound by Law*

An important aspect of Bork's constitutional theory is the axiomatic proposition, that judges, even Supreme Court justices, are bound by the law.

[T]he Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.⁷

It is no overstatement to explain Bork's entire legal theory as seeking to define the role of the federal judge in the American constitutional system.

The clash over my nomination was simply one battle in [the] long-running war for control of our legal culture. There may be legitimate differences about that nomination, but, in the larger war for control of the law, there are only two sides. Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges rewrite to see that particular groups or political causes win.⁸

Indeed, Bork sees the matter of the judges' proper role as, "the commanding height sought to be taken [which is] . . . control of the courts and the Constitution."⁹ This is so because:

The Constitution, or the law we call 'constitutional' —they are by no means identical — is the highest prize, and control of the selection of judges is the last step on the path to that prize. Why? Because the Constitution is the trump card in American politics, and judges decide what the Constitution means. When the Supreme Court invokes the Constitution, whether legitimately or not, as to that issue the democratic process is at an end. That is why we witnessed the first all-out national political campaign with respect to a judicial nominee in our country's history.¹⁰

6. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess., 826 (1987) (exchange between Sen. Specter and Judge Bork).

7. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. J.* 1, 2 (1971).

8. See *THE TEMPTING*, *supra* note 4, at 2.

9. *Id.* at 3.

10. *Id.*

2. *Limited Function of Judges in a Scheme of Separated Powers*

Bork believes the judge's function is controlled by the doctrine of the separation of powers.

"The foundation of American freedoms is in the structure of our Republic. The major feature of that structure are the separation of powers of the national government and the limitation of national power to preserve a large degree of autonomy in the states. Both are mandated in the Constitution."¹¹

According to Bork, the separation of powers doctrine involves the following:

There is no faintest hint in the Constitution, . . . that the judiciary shares any of the legislative or executive power. The intended function of the federal courts is to apply the law as it comes to them from the hands of others. The judiciary's great office is to preserve the constitutional design. It does this . . . by ensuring that the democratic authority of the people is maintained in the full scope given by the Constitution.

The Constitution preserves our liberties by providing that all of those given the authority to make policy are directly accountable to the people through regular elections. Federal judges, alone among our public officials, are given life tenure precisely so that they will not be accountable to the people. . . . [J]udges must consider themselves bound by law that is independent of their own views of the desirable. They must not make or apply any policy not fairly to be found in the Constitution or statute.¹²

Thus for Bork, the Constitution teaches, through the separation of powers doctrine, that judges are not to make, but rather to apply law. Bork does, however, admit that the nineteenth century "grid" of entirely determinate law is illusory.¹³ He states, "[i]t is of course true that judges to some extent must make law every time they decide a case, but it is minor, interstitial lawmaking."¹⁴ Bork admits, "narrow, legalistic reasoning was not to be applied to the [Constitution's] broad provisions, a document that could not, by its nature and uses, 'partake of the prolixity of a legal code.'"¹⁵ But, this broadness inherent in the Constitution, is not an occasion for judicial lawmaking.

Instead of making law by "filling in the broad provisions of the Constitution," a judge is to give a "broad provision" a 'fair and just interpretation', which means that the judge is to interpret what is in the text and not something else."¹⁶ That is, a broad provision is not a blank check. This interpretation of a broad provision is accomplished by finding the "principle in the Constitution as originally understood."¹⁷ Where the original understanding is uncertain or absent,

11. *Id.* at 4.

12. *Id.* at 4, 5.

13. Bork has spoken on this topic. He states, [The nineteenth century] was an age of formalism in the law. We have come a long way since then. The law and its acolytes have since become steadily more ideological and more explicit about that fact. This is not necessarily a bad thing: there are ideologies suitable, indeed indispensable, for judges, just as there are ideologies that are subversive of the very idea of the rule of law.

R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW 2* (1984).

14. *Id.* at 5.

15. Bork, *The Case Against Political Judging*, NAT'L REV., Dec. 8, 1989 at 23.

16. *Id.*

17. *Id.* at 24.

the judge “. . . has no law to apply and is, quite properly, powerless. In the absence of law, a judge is a functionary without a function.”¹⁸ Simply stated, a word or statute or constitutional provision with no verbalized intention is no law.¹⁹

3. *The Constitutional Madisonian Dilemma: Of Majority and Minority Rule Reconciled by Separated Powers*

Bork's understanding of the Constitution begins with the presumption that majorities will rule unless precluded from doing so by the Constitution and that judges will apply, not make, law.

The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule The Constitution deals with the problem in three ways: by limiting the powers of the federal government; by arranging that the President, the senators, and the representatives would be elected by different constituencies voting at different times; and by providing a Bill of Rights. The last is the only solution that directly addresses the specific liberties minorities are to have. We have placed the function of defining the otherwise irreconcilable principles of majority power and minority freedom in a nonpolitical institution, the federal judiciary, and thus, ultimately, in the Supreme Court of the United States.²⁰

Bork believes the general rule of the American Republic is majoritarian rule. The exception is the majority's consent, in the form of the Constitution, to an enumerated set of principles which permit judges to negate the will of the majority. Thus, the majority will may be overcome only if that list of constitutional principles are deemed inconsistent, by the Supreme Court, with the legislative wishes of the people. This is Bork's understanding of how the "Madisonian Dilemma" is reconciled. For Bork, it is exclusively the choice of the people which legitimatizes law, whether in the form of a constitution or a statute.

18. See *supra* note 4, THE TEMPTING at 147.

19. "The judge who cannot make out the meaning of a provision is in exactly the circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working." *Id.* at 166.

Bork elaborates elsewhere on this matter, however, by stating:

We must not expect too much of the search for original understanding in any legal context. The result of the search is never perfection; it is simply the best we can do; and the best we can do must be regarded as good enough - or we must abandon the enterprise of law and, most especially, that of judicial review. Many cases will be decided as the lawgivers would have decided them, and, at the very least, judges will confine themselves to the principles the lawgivers intended. The precise congruence of individual decisions with what the ratifiers intended can never be known, but it can be estimated whether, across the body of decisions, judges have in general vindicated the principle given into their hands. *Id.* at 163.

Thus, Bork's theory does not purport to provide perfect identity between the original understanding and the judges interpretation. His point would seem to be that the judge must concern himself with what the legislator or constitutional framer intended, not what the judge intends.

20. *Id.* at 139.

4. *Interpretivism and the Original Understanding: Legitimate Negation of Majoritarian Will*

Bork thinks the Supreme Court's mission is to ascertain and apply the meaning of the Constitution as it was originally intended in order to give it the legitimate effect of negating the impermissible legislative majority will.

It is the meaning understood at the time of the law's enactment. [W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this. The search is not for the subjective intention When lawmakers use words, the law that results is what those words ordinarily mean [W]hat matter[s] [is] public understanding, not subjective intentions. Madison himself said that what mattered was the intention of the ratifying conventions [W]hat counts is what the public understood. Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as dictionaries in use at the time, and the like. Almost no one would deny this; in fact almost everyone would find it obvious to the point of thinking it fatuous to state the matter — except in the case of the Constitution.²¹

For Bork, the Supreme Court's only guidance for interpreting the Constitution is "to apply the Constitution according to the principles intended by those who ratified the document Only that approach is consonant with the design of the American Republic."²² Bork analogizes between a statute and the Constitution:

If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, the meaning of the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: Law.²³

a. NEUTRAL PRINCIPLES NOT POLITICAL JUDGING: DERIVED, DEFINED, APPLIED.

Since the Constitution is law and thus binding on the Court, the judge is to negate the majority will expressed in legislation by applying the original meaning of the Constitution.

[H]ere . . . the concept of neutral principles comes into play This is a safeguard against political judging The Court can act as a legal rather than a political institution only if it is neutral as well in the way it derives and defines the principles it applies. If the Court is free to choose any principle that it will subsequently apply neutrally, it is free to legislate just as a political body would. Its purported resolution of the Madisonian dilemma is spurious, because there is no way of saying that the correct spheres of freedom have been assigned to the majority and the minority. Similarly, if the Court is free to define the scope of the principle as it sees fit, it may, by manipulating the principle's breadth, make things come out the way it wishes on grounds that are not contained in the

21. *Id.* at 144. (citations omitted).

22. *Id.* at 143.

23. *Id.* at 145.

principle it purports to apply. Once again, the Madisonian dilemma is not resolved correctly but only according to the personal preferences of the Justices. The philosophy of original understanding is capable of supplying neutrality in all three aspects — in deriving, defining, and applying principle.²⁴

Bork believes judging is a matter, ultimately, of finding the will of some political authority and effectuating it. Since judges in the federal scheme do not make law, the task for the federal judge is to find the will of those who do (for Bork, legislators and the Framers of the Constitution) and give it effect. Similarly, the Constitution, as law, is properly given effect by finding the intentions, or understanding, or those who ratified it and applying it to the legal dispute in question.

The will of those who make law may only be implemented if the judge is neutral in deriving, defining, and applying it. A judge may not implement his will. Therefore, constitutional adjudication is distinguishable, for Bork, from moral philosophy, politics, economics, or any other discipline.²⁵

A legal principle is neutrally derived in its most pristine form “[w]hen a judge finds his principle in the Constitution as originally understood”²⁶ In such a case, “. . . the problem of the neutral derivation of principle is solved.”²⁷ A judge does his task neutrally and resolves the Madisonian Dilemma only when he “accepts the ratifiers’ definition of the appropriate ranges of majority and minority freedom . . . and refrains from ‘making value judgments of his own.’”²⁸

Deriving neutral principles, the appropriate task of the judge, necessarily means that the judge may not create new rights or destroy existing rights. “Any time [the judge] does so, he violates not only the limits to his own authority but, and for that reason, also violates the rights of the legislature.”²⁹ Thus, for Bork, legal principles are derived neutrally when expressed by lawmakers and objectively found, applied, and expressed by judges.

24. *Id.* at 146.

25. Bork lampoons those whom he estimates as judges applying anything but law by commenting: Generations of law students are being trained to believe that one or another method of reasoning from nonlegal sources provides the method proper to constitutional argument. Law school moral philosophy - which deserves the same respect as what has been called ‘law office history’ - turns out upon examination to be only a convoluted way of reaching the standard liberal or ultra-liberal prescriptions of the moment. One of my colleagues suggested that a professor of this bent change the name of his course from ‘Constitutional Law’ to ‘Trendiness Made Complex.’ *Id.* at 135.

For those who think the Constitution is not law, Bork tells the story of a new chief justice of a state supreme court who, when meeting a United States Supreme Court Justice for the first time states, “I’m delighted to meet you in person because I have just taken an oath to support and defend whatever comes into your head.” *Id.* at 171.

To the opponents who claim the original understanding is unknowable, Bork retorts, “Nonsense is nonsense however heavily weighted with academic robes.” *Id.* at 165.

To the realists who claim law is what judges say it is, Bork makes the distinction between power and authority and then quips, “G.K. Chesterton is said to have illustrated [this distinction by stating] ‘If a rhinoceros came in through that door, it would have considerable power. I should be the first to rise, however, and to assure the creature that it had no authority.’” *Id.* at 176.

As for Laurence Tribe, Bork states, “The Constitution, according to Tribe, requires that the mind be open to both obscenity and narcotics.” *Id.* at 205. And, “Tribe thinks the people should accord the Court authority to do whatever it thinks is right.” *Id.* at 206.

26. *Id.* at 146.

27. *Id.*

28. *Id.*

29. *Id.* at 147.

Bork believes, however, that neutral derivation is not enough. Once the principle is derived, that is, the law is expressed and found, the principle must be defined (or interpreted) by judges neutrally rather than according to a judge's moral, social, economic or other beliefs. But Bork is faced with a difficult challenge at this point since, "[t]he Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words alone might suggest."³⁰ Yet Bork does not tell us why we know these broad terms do not have broad meanings.

Thus, defining the principles is not merely a question of giving meaning to a word like "speech" in the first amendment or "search" in the fourth amendment. Indeed, the judge is not to define such terms as *he* would, given their breadth. Bork states that, "once a principle is derived from the Constitution, its breadth or level of generality at which it is stated becomes of crucial importance. The judge must not state the principle with so much generality that he transforms it."³¹

The task of the judge is,

. . . not to "choose a level of abstraction." Rather, it is to find the meaning of a text — a process which includes finding its degree of generality, which is part of its meaning — and to apply that text to a particular situation, which may be difficult if its meaning is unclear. With many if not most textual provisions, the level of generality which is part of their meaning is readily apparent.³²

Of course, problems arise in cases of broad generalized provisions or ambiguous statements. Bork resolves this problem by stating that the judge should "state the principle at the level of generality that the text and historical evidence warrant."³³ Here, "[t]he test is the reasonableness of the distinction [for example; as among race and gender in the context of equal protection,] and the level of generality chosen by the ratifiers"³⁴ The judge must "find the level of generality that interpretation of the words, structure, and history of the Constitution fairly support."³⁵ Thus, each provision of the Constitution, broad or narrow, is defined in terms of the original understanding of its ratifiers. Where the history is ambiguous or altogether silent, "the legislator may move on to create more; but where the law stops the judge must stop."³⁶

Principles neutrally defined by lawmakers in the text of legal materials must be applied neutrally as well. Neutral application is "a requirement, like the others, addressed to the judge's integrity."³⁷ The task of the judge in applying the law is, "[to apply] it consistently and without regard to his sympathy with the parties before him."³⁸ Put more simply, the judge should not make decisions based on

30. *Id.* at 147.

31. *Id.* at 148. Bork continues this discussion by downplaying, but still acknowledging, a potentially fatal problem with his theory. "The difficulty in finding the proper level of generality has led some critics to claim that the application of the original understanding is actually impossible." *Id.*

32. *Id.* at 149.

33. *Id.*

34. *Id.* at 150.

35. *Id.*

36. *Id.* at 151.

37. *Id.*

38. *Id.*

policy, politics or even morality unless he does so on the basis of the legal materials before him. The judge is not to implement his will, preferences or political beliefs but instead those of the lawmakers.³⁹ Bork illustrates this principle in a first amendment context. He states, “[D]ue to decades of left-liberal dominance on the Supreme Court, moral relativism and untrammelled individualism are built into Court-created first amendment doctrine.”⁴⁰ He then denounces a moral relativist reading of the Constitution and calls the Court back to “neutrality in these political and cultural struggles.”⁴¹

5. *Original Understanding of the Constitutional as Civil Orthodoxy*

For Bork, his argument is pure American legal orthodoxy. Indeed, he states:

The judicial role just described corresponds to the original understanding of the place of courts in our republican form of government. . . . The orthodoxy of our civil religion, which the Constitution has aptly been called, holds that we govern ourselves democratically, except on those occasions, few in number though crucially important, when the Constitution places a topic beyond the reach of majorities.⁴²

Thus, Bork thinks the doctrine of “original understanding” is in fact the original understanding of the Framers. For Bork, since the time the Constitution was promulgated as law, only the Framers’ stated intention and the understandings of those who ratified the Constitution control and we, as citizens, must either obey the law, or democratically change it. This is, to Bork’s credit, the ultimate expression of a belief in the notion of the rule of law rather than men. Yet,

39. Bork illustrates this principle with *Shelley v. Kraemer*, 334 U.S. 1 (1948). Here the Supreme Court was faced with private action in the form of restrictive covenants preventing certain racial classes of people from owning property. When these covenants were challenged in court as unconstitutional, the lower court could either uphold them under the Constitution as permissible since they constituted private rather than state action or strike them down as state action denying equal protection. The lower court upheld these covenants as private action and hence not violative of the equal protection clause requiring state action. The Supreme Court struck these covenants down on the grounds that the lower court’s action in upholding them constituted impermissible state action. In other words, the covenants were constitutional before a court ruled they were private action. Once a court upheld the covenants as private action, they became state action. Bork comments on this decision by stating, “*Shelley* was a political decision. As such, it should have been made by a legislature.” *THE TEMPTING*, *supra* note 4, at 153. To Bork, the decision represents a perversion of the Constitution, for the result oriented purpose of preventing private racial discrimination which the Constitution on its face does not touch.

40. *THE TEMPTING*, *supra* note 4, at 247.

41. *Id.* at 250.

42. *Id.* at 153. To emphasize Bork’s certitude, he continues by arguing:

The structure of government the Founders of this nation intended most certainly did not give courts a political role. . . .

Even if evidence of what the Founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the Constitution’s words. If that method of interpretation were not common in the law, if James Madison and Justice Joseph Story had never endorsed it, if Chief Justice John Marshall had rejected it, we would have to invent [sic] the approach of original understanding in order to save the constitutional design. No other method or constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters, perhaps radically, the design of the American Republic. The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution.

Id. at 154.

unfortunately, it is a belief in the rule of law according to legal positivism, not according to the Framers' conception of law.

IV. ASSESSING BORK'S JURISPRUDENCE

Bork's constitutional theory purports to be solely legitimate because it is, he believes, a reflection of American legal conventions. As with any theoretical model laying claim to orthodoxy, Bork's is subject to scrutiny to determine whether it, in fact, accords with the authority it purports to defend. Stated differently, Bork's theory stands or falls on whether it agrees with the Framers' views relating to constitutional jurisprudence.⁴³

Initially, a distinction must be made between Bork's interpretivist doctrine termed the "original understanding" and the Framers' actual ideas concerning law and the Constitution. It is important and proper to ask whether the Borkian "original understanding" involves fully the Framers' ideas relative to the Constitution's meaning. Similarly, it is important to investigate whether Bork properly understands the Framers' philosophical system which informed the drafting of the Constitution and thus gave it meaning. The following discussion seeks to demonstrate that Bork's and the Framers' ideas regarding the Constitution are incompatible.

For Bork's theory to survive the test of internal logical coherence, the Framers must have originally intended, and the ratifying public understood, that the Constitution be applied by judges as Bork advocates; that judges interpret the law solely and exclusively according to the Borkian notion of the "original understanding." Correspondingly, Bork's theory must coincide to the Framers' understanding concerning the legitimacy and nature of law.

A. The Framers' Philosophical Presuppositions: The Underpinnings of the Constitution

A writer's message is more fully revealed when his philosophical presuppositions are thoroughly understood. It follows then, that the Framers' Constitution

43. In laying the foundation of his theory, Bork says:

When we speak of "law" we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment [W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. . . . The original understanding is thus manifested in words used in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries at the time and the like. *Id.* at 143-44.

He continues,

If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: Law. *Id.* at 145. Because it is only the content [the original understanding] of a clause that gives the judge any authority, where that content does not apply, he is without authority and is, for that reason, forbidden to act Where the law stops, the legislator may move on to create more; but where the law [the content of which is the original understanding] stops, the judge must stop. *Id.* at 150-51.

is better understood when their theoretical framework is fully appreciated.⁴⁴ Forrest McDonald informs us that:

[T]he Framers had a large body of political theory at their disposal. . . . [I]t formed a greater part of their understanding and of their perceptive apparatus than they always realized or were willing to admit. Several times in the Convention, Hamilton and Madison quoted or paraphrased David Hume. . . . Luther Martin cited several theorists of natural law. George Mason gave a speech that might have been taken directly from James Harrington's *Oceana*. The contract and natural-rights theories of John Locke were repeatedly iterated without reference to their source. Six delegates cited Montesquieu [and his thought] permeated the debates; and though Blackstone was mentioned only twice, his work was also pervasive.⁴⁵

McDonald points out that Locke was of particular importance to the Framers.

The Patriots had turned to Locke rather than to other great natural-law theorists . . . for the reason that none of the others was so well adapted to their purposes. . . . [N]one of the theorists except Locke furnished a clear-cut rationale for independence. Locke's *Two Treatises of Government*. . . is among the most widely read works of political theory ever penned. . . . To Locke, natural law was based upon . . . fundamental principles, from which many subsidiary rights and obligations can be rationally inferred.⁴⁶

According to Locke:

The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own, and other men's actions be conformable to the law of nature, i.e., to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it.⁴⁷

The contours and implications of natural law and natural rights theories are outlined by the Framers in various writings.⁴⁸ Madison, often called the Father of the Bill of Rights, wrote:

44. Professor Laurence Tribe states:

Natural law philosophy, current at the time the Constitution was written, included, among other things, those 'inalienable rights' affirmed in the Declaration of Independence as beyond the scope of governmental power to control or the free human being to surrender. James Madison, the principal sponsor of the Bill of Rights, distinguished natural rights, such as life and liberty, from rights that are part of the compact between citizen and government, such as the right to jury trial. Some courts and commentators have insisted that an intense and widely shared adherence to natural rights ideas by the Constitution's framers led them to neglect more specific mention of rights deemed too obvious to require elaboration. This notion helps in penetrating the frame of mind in which the Constitution's authors acted, and thus in reconstructing a frame of reference through which their work might best be understood. L. TRIBE *AMERICAN CONSTITUTIONAL LAW*, 894 (1978).

45. F. McDONALD, *NOVUS ORDO SECLORUM* 7 (1985).

46. *Id.* at 60 (footnote omitted).

47. J. Locke, *The Second Essay Concerning the True Original, Extent and End of Civil Government*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 458* (E. Burtt ed. 1939).

48. For an exceptional modern treatment of natural law theory, its history, proponents, and

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. . . .

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own. . . .

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.⁴⁹

Locke believed, “[t]he same law of nature that does by [labor] give us property does also bound that property too.”⁵⁰

opponents, *see generally* J. Finnis, *NATURAL LAW AND NATURAL RIGHTS* (1988) (a re-offering and development of the chief principles of classical natural law theories by way of an argument on the merits).

Madison recognized liberty as a natural right but not the right to a jury trial. “Trial by jury cannot be considered as a natural right. . . . [B]ut [trial by jury] is as essential to secure liberty of the people as any one of the pre-existent rights of nature.” James Madison, House of Representatives June 8 1789 in *THE FOUNDERS’ CONSTITUTION*, 480 (P. Kurland and R. Lerner eds. vol. 1 1987). Benjamin Franklin held property ownership to be a natural right, “All Property that is necessary to a Man, for the Conservation of the Individual and the Propagation of the Species, is his natural Right” Benjamin Franklin to Robert Morris (Dec. 25, 1783) in *THE FOUNDERS’ CONSTITUTION*, 589 (P.B. Kurland and R. Lerner eds. vol. 1 1987). Samuel Adams esteemed freedom of religion as a natural right. “‘Just and true liberty, equal and impartial liberty’ in matters spiritual and temporal, is a thing all Men are clearly entitled to, by the eternal and immutable laws Of God and nature. . . .” S. Adams, *The Rights of the Colonists* in *THE FOUNDERS’ CONSTITUTION*, 60 (P. Kurland and R. Lerner eds. vol.5 1987).

49. Madison, *Property*, (1792) in *THE FOUNDERS’ CONSTITUTION*, 598-99 (P. Kurland and R. Lerner eds. vol.1 1987).

50. Locke, *The Second Essays Concerning the True Original, Extent and End of Civil Government* in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL*, 415 (E. Burt ed. 1939).

Samuel Adams explained:

Natural Rights of the Colonists as Men -

Among the Natural Rights of the Colonists are these First. a Right to Life; Secondly to Liberty; thirdly to Property; together with the Right to support and defend them in the best manner they can - Those are evident Branches of, rather than deductions from the Duty of Self-Preservation, commonly called the first Law of Nature -

All Men have a right to remain in a State of Nature as long as they please: And in case of intolerable Oppression, Civil or Religious, to leave the Society they belong to, and enter into another. -

When Men enter into Society, it is by voluntary consent; and they have a right to demand and insist upon performance of such conditions. And previous limitations as form an equitable original compact. -

Every Natural Right not expressly given up or from the nature of a Social Compact, necessarily ceded remains. -

All positive and civil laws, should conform as far as possible, to the law of natural reason and equity. . . .

In short it is the greatest absurdity to suppose it in the power of one or any other number of men at the entering into society, to renounce their essential natural rights, or the means of preserving those rights when the great end of civil government from the very nature of its institutions is for the support, protection and defence of those very rights: principal of which as is before observed, are life liberty and property. If men through fear, fraud or mistake, should in terms renounce and give up any essential natural right, the eternal law of reason and the great end of society, would absolutely vacate such renunciation. . . .

Adams, *The Rights of the Colonists* (1772) in *THE FOUNDERS’ CONSTITUTION*, 395 (P. Kurland and R. Lerner eds. vol. 5 1987).

Hamilton points out:

Good and wise men, in all ages, have embraced a very dissimilar theory. They have supported, that the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human institution whatever.

This is what is called the law of nature, 'which, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid, derive all their authority, mediately, or immediately, from this original.' BLACKSTONE

Upon this law, depend the natural rights of mankind, the supreme being gave existence to man, together with the means of preserving and beautifying that existence. . . .

The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power. . . .

In short, when human laws contradict or discountenance the means, which are necessary to preserve essential rights of any society, they defeat the proper end of all laws, and so become null and void.⁵¹

For example, the Supreme Court, reasoning from the Constitution, has stated: "The constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the constitution. . . ."⁵² These thoughts, expressed by prominent Framers, and eventually recognized as part of the Constitution by the Supreme Court, provide a representative theoretical reference point from which Bork's theory may be analyzed.

B. Bork's "Original Understanding" and the Framers' Original Understanding: Supra-constitutional Principles?

Bork asserts that the Framers' original understanding was the theory he proposes.⁵³ In contrast, Justice Joseph Story, in his treatise, *Commentaries on the Constitution of the United States*, explained the understood method of interpreting the Constitution.⁵⁴ Story explained:

The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties. Mr. Justice Blackstone has remarked that the intention of a law is to be

51. Hamilton, *The Farmer Refuted* (1775) in *THE FOUNDERS' CONSTITUTION*, 91-2 (P.B. Kurland and R. Lerner eds. 1987 vol.1).

52. *VANHORNE'S LEESEE v. DORRANCE*, 2 U.S. (2 Dall.) 304, 310-13 (1795).

53. "The judicial role just described corresponds to the original understanding of the place of courts in our republican form of government. *THE TEMPTING*, *supra* note 4 at 153.

54. This treatise is particularly important in assessing the Borkian theory because Story was a contemporary of the Framers; he wrote this treatise thirty years after *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) was decided, and he served as a Supreme Court Justice just after the Constitution was adopted. Story is uniquely qualified as an authority on interpreting the Constitution, and particularly so regarding the original understanding.

gathered from the words, the context, the subject-matter, the effects and consequences, or the reason and spirit of the law.⁵⁵

This method of interpretation is considerably more dynamic than Bork would permit. Bork says "the debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like. . . ." are the only permissible materials at the disposal of the Constitution's interpreter. For Story, contrarily, the "intent of the parties" was important, but that intention is to be gathered from a broad array of factors. Particularly important in Story's approach was his focus on the "subject-matter, the effects and consequences, or the reason and spirit of the law." This permits the judge to do what Bork would not allow, namely, access natural law and natural rights to ascertain the "effects and consequences" of an interpretation as well as the "reason" of the law thereby facilitating a holistic reading of the Constitution. This is particularly repugnant to Bork since it directs judges to consider natural law in arriving at just interpretations. Unfortunately for Bork's theory, Justice Story disagreed.

Story recognized the inherent ambiguity in language which Bork's "original understanding" cannot resolve.⁵⁶ To resolve the ambiguity that necessarily attends words, one is to consider the

"nature and objects, . . . scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts. . . . Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, best harmonizes with the nature and objects, the scope and design of the instrument. . . . Much also, may be gathered from contemporary history, and contemporary interpretation, to aid in JUST CONCLUSIONS."⁵⁷

As alluded to above, here Story stresses the importance of reading a document as a whole. But what is more striking, and plainly contradictory to Bork's analytical theory, is that Story would permit a reading of the Constitution which considers the most just construction of an ambiguous term or phrase. This Bork shuns as policy making or legislating, or more repugnant, judicial moral reasoning.⁵⁸

Hamilton expressly recognized the importance of supra-constitutional principles as aids in interpreting the Constitution. Hamilton stated it is the duty of the Supreme Court, "to declare all acts contrary to the manifest tenor of the

55. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 135 (1833).

56. *Id.* at 136.

57. *Id.* at 136-37 (emphasis added).

58. Bork speaks approvingly of Justice Holmes' view that judges ought not endeavor to do justice but rather to merely "apply the law."

There is a story that two of the greatest figures in our law, Justice O.W. Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, 'Do justice, sir, do justice.' Holmes stopped the carriage and reproved Hand: 'That is not my job. It is my job to apply the law.' I meant something like that when I dissented from a decision that seemed to proceed from sympathy rather than law . . . '[W]e administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law. THE TEMPTING, *supra* note 4, at 6.

Constitution void."⁵⁹ To realize this function, the Court must confine itself to "[t]he interpretation of the laws . . ." ⁶⁰ including the Constitution which is, "in fact, and must be regarded by the judges, as a fundamental law."⁶¹ Furthermore, Hamilton stated that "courts, on the pretence of a repugnancy, may [not] substitute their own pleasure to the constitutional intentions of the legislature. . . ." ⁶² and that judges ought not "exercise WILL instead of JUDGMENT. . . ." ⁶³ Here, Hamilton prohibited judges from exalting their personal preferences above the permissible original intention of the lawmaker. Stated more pointedly, judges ought not read statutes and the Constitution to mean what they wish them to mean.

Hamilton continued stating where an irreconcilable conflict between a statute and the Constitution exists, the Constitution should be preferred. This Hamilton terms as:

[A] mere rule of construction, not derived from any positive law, but from the nature and reason of the [Constitution]. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as interpreters of the law.⁶⁴

The power of the Court to declare legislation unconstitutional is nowhere granted in article III of the Constitution. Rather, judicial review which, although not explicit in the text, was recognized by Hamilton as an appropriate function of the Court.⁶⁵ Hamilton recognized this Court function not by reference to the Constitution, but instead by reference to the supra-constitutional "nature and reason of the [Constitution]." This is a crucial difference between the Framers' and Bork. Unlike Bork, the Framers' viewed the "nature and reason of the [Constitution]" as an unfolding product of natural law - natural rights jurisprudence. So, to fully understand the Constitution one must acknowledge its ultimate purpose and object. This requires judges to read the Constitution's terms in light of the Framers' natural rights - natural law philosophical framework. Metaphorically put, Hamilton viewed the Constitution as more lyrical than mechanical.⁶⁶

59. THE FEDERALIST NO. 78, at 422 (A. Hamilton) (M. Chadwick ed. 1987). Madison recommended the Federalist Papers by observing, "The 'Federalist' may fairly enough be regarded as the most authentic exposition of the text of the federal Constitution, as understood by the Body which prepared & [sic] the Authority which accepted it." Letter from James Madison to Thomas Jefferson (1825) in THE FOUNDERS' CONSTITUTION, 691 (P. Kurland and R. Lerner eds. vol.1 1987).

60. THE FEDERALIST NO. 78, at 423 (A. Hamilton) (M. Chadwick ed. 1987).

61. Hamilton continued:

It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." *Id.*

62. *Id.* at 424.

63. *Id.* (emphasis in original).

64. *Id.* at 423.

65. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803).

66. Professor Bruce Ackerman points out this problem with Bork's constitutional theory by stating:

Bork believes that the Framers of the Bill of Rights and the Civil War Amendments had fixed and relatively concrete objectives in mind In reading the establishment clause, we are to look at evidence of what concrete things the Framers meant to accomplish by enacting THAT clause; and so on, down the list of clauses, taking our time with the most important ones like due process and equal protection. Ackerman,

A second example of the importance of supra-constitutional principles arises in the context of the separation of powers doctrine. There is considerable proof in the writings of the Framers that they understood the three branches of the Federal government to be quite distinct in function, much as Bork advocates. Indeed, they thought the separation of powers was rooted in natural rights principles not expressed in the first three articles. Try as you might, one cannot find the separation of powers doctrine in the text of the Constitution.

The Declaration of Independence envisioned liberty as an inalienable right endowed by a Creator, and Hamilton observed "the security which . . . adoption [of the proposed Constitution] will afford to the preservation of that species of government to liberty and to property."⁶⁷ To realize and secure the natural right of liberty, the separation of powers was instituted, consistent with the avariced tendencies of human nature, to preserve the natural right of liberty. As Madison stated, "the preservation of liberty requires that the three great departments of power should be separate and distinct."⁶⁸ Madison further observed,

Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself.⁶⁹

One cannot fully appreciate the nature, meaning, purpose, and importance of the separation of articles I, II and III powers without reference to the purpose and function of the separation of powers doctrine; the security of the natural right of liberty. A reading of the Constitution which searches for the purpose, as shown from the liberty defined "manifest tenor," of the separation of powers doctrine is necessary to find its meaning.⁷⁰

ROBERT BORK'S GRAND INQUISITION 99 Yale L.J. 1419, 1425 (1990) (emphasis added).

Ackerman continues,

While, of course, the text of each particular clause is always important, a good lawyer cannot fix its meaning without construing it in light of principles that make sense of the larger Code of which it is a part. In attempting this familiar kind of holistic interpretation, the reader tries to understand the text as something more than an odd assortment of particularized commands.

Id.

67. THE FEDERALIST No. 1, at 4 (A. Hamilton) (M. Chadwick ed. 1978).

68. THE FEDERALIST No. 47, at 261 (J. Madison)(M. Chadwick ed. 1987).

69. THE FEDERALIST No. 51, at 281 (J. Madison)(M. Chadwick ed. 1987).

70. Newly appointed Justice David Souter has stated, "my interpretive position is not one that original intent is controlling, but that original meaning is controlling." Eastland, *Deconstructing David Souter*, NAT'L REV., Dec. 3, 1990, at 38.

At this point it is important to recognize that Hamilton also stated, in response to the fears of opponents of the Constitution that the Court would read it according to the "spirit of the Constitution" to shape statutes according to its preferences that,

In the first place, there is not a syllable in the plan [the Constitution] which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident

Again, by way of example, the fourteenth amendment protects liberty of persons by requiring that due process and equal protection of the laws be observed. But, the meaning of liberty is not limited to only those expressions the drafters stated during its ratification. The term "liberty" is intrinsically elastic and evades strict, exclusive definition.⁷¹ Although it is quintessentially a natural law-natural rights concept, Bork would deny the Court access to the supra-constitutional morally defined concept in ascertaining the meaning of liberty in a given factual setting. Prudential, moral and contextual factors must be consulted in denoting the bounds of liberty in a social setting.

Most importantly, the natural law must inform such an inquiry. So, while liberty has profound meaning when illuminated fully by natural law, its meaning is rendered anemic when defined solely by the fourteenth amendment's Framers' writings or public statements. Bork only permits the Court to seek out the "original understanding" of liberty at the time the fourteenth amendment was ratified. Bork's aversion to a natural law - natural rights informed interpretation of the Constitution's express terms renders them static; and, worse yet, emasculated.

Consequently, Hamilton and Story saw the original intention of the lawmaker as a floor, not as a ceiling, as Bork appears to view it. Indeed, Bork seems to view the expressed original intention of the Framers as the floor, the ceiling and the four solid walls of permissible Constitution interpreting. According to Story and Hamilton, the judge does not legislate where he does not contradict the original meaning or the plain wording of the text. While the judge may indeed have "made law" incidental to his authority to decide a "case or controversy," he did not violate his charge. The legislature passes bills, which the court may not do, but neither may the legislature decide a "case or controversy" under the Constitution. To decide a case or controversy, a judge must necessarily consider, as Story says, "just conclusions" because it is an inherent part of interpreting laws.⁷² The Court, when interpreting the Constitution, "may never abrogate the

opposition, the laws ought to give place to the Constitution. THE FEDERALIST NO. 81 (A. Hamilton) (emphasis added).

One can only speculate what Hamilton meant here by the "spirit of the Constitution." Perhaps he meant the Constitution cannot be read to say something that its "manifest tenor" would not support. That is, a reading obviously inconsistent with its terms, the drafter's meaning, or the Constitution's objectives. For example, reading state action in the fourteenth amendment to mean private action in the context of racial discrimination because the spirit of the 14th amendment was intended to prevent blacks from suffering from unjust treatment based on race. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

71. Black's Law Dictionary defines liberty as "Freedom; exemption from extraneous control. Freedom from restraints except such as are justly imposed by law. . . . The word 'liberty' includes and comprehends all personal rights and their enjoyment." BLACK'S LAW DICTIONARY 872 (5th ed. 1979).

72. In this connection, the court has the power to decide cases and controversies under the Constitution. Justice Story commented on the scope and nature of grants of power under the Constitution:

A power, given in general terms, is not to be restricted to particular cases, merely because it may be susceptible of abuse, and, if abused, may lead to mischievous consequences. This argument is often used in public debate; and in its common aspect addresses itself so much to popular fears and prejudices, that it insensibly acquires weight in the public mind, to which it is no wise entitled. The argument *ab in convenienti* is sufficiently open to question, from the laxity of application as well as of opinion, to

text; can never fritter away its obvious sense; it can never narrow down its limitations; it can never enlarge its natural boundaries."⁷³ Justice Story elaborated on this point by observing:

But a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires, that every interpretation of its powers should have a constant reference to these objects. No interpretation of the words, in which those powers are granted, can be a sound one, which narrows down their ordinary import, so as to defeat those objects. That would be to destroy the spirit and cramp the letter The instrument was not intended to provide merely for the exigencies of a few years; but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.⁷⁴

Thus, for Story, judges are, as Bork argues, bound by the original understanding of the law; they are not permitted to "fritter away its obvious sense." But neither are they prohibited by that solemn duty from considering the supra-constitutional principles of justice when the sense of the law is not obvious. Furthermore, and more importantly, when judges consider the original understanding (as they properly should) they ought to remain mindful that the Framers understood concepts when drafting the Constitution which were far more fundamental than what may be gleaned from convention notes and contemporaneous newspaper articles concerning the meaning of the text. They gave these concepts meaning when they referenced the natural rights of people defined by the natural law. The Framers' original understanding was replete with and enlivened by

which it leads. . . . Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. . . . In short, if the whole society is not to be revolutionized at every critical period, and remodeled in every generation, there must be left to those, who administer the government, a very large mass of discretionary powers, capable of greater or less actual expansion according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible to abuse. No constitution can provide perfect guards against it.

On the other hand, a rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. . . . Nor should it ever be lost sight of, that the government of the United States is one of limited powers; and the departure from the true import and sense of its powers is, pro tanto, the establishment of a new constitution. It is doing for the people what they have not chose to do for themselves. . . . Temporary delusions, prejudices, excitements, and object have irresistible influence in mere questions of policy. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should not be, so far at least as human infirmity will allow, dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever. . . .

No construction of a given power is to be allowed, which plainly defeats, or impairs its avowed objects. See J. Story *supra* note 56, at 143-145.

Regarding the proper object of government, Madison believed "Justice is the end of government. It is the end of civil society." THE FEDERALIST No. 51, at 284 (J. Madison)(M. Chadwick ed. 1987).

73. See J. Story, *supra* note 56, at 137.

74. *Id.* at 141.

natural law-natural rights concepts which they believed flowed from a transcendent, objective, and immutable moral order.

But, Bork goes beyond arguing that his theory coincides with that of the Framers. He claims,

Even if evidence of what the founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the Constitution's words. If that method were not common in the law, if James Madison and Justice Joseph Story had never endorsed it, if Chief Justice John Marshall had rejected it, we would have to invent the approach of original understanding in order to save the constitutional design. No other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters, perhaps radically, the design of the American Republic. The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution.⁷⁵

Even if the "original understanding" approach Bork advocates was not that held by the Framers, Bork still believes it is the only possible approach.

Bork's positivist assumption, expressed above, renders his theory fallacious because his doctrine is fundamentally incompatible with that of the Framers. Unlike the Framers' view, however, Bork thinks law is followed because of mere promulgation, not moral rightness. Of course, Bork's view would be proper were the Constitution a positivist legal document written by Jeremy Bentham. But, the Constitution is anything but a nineteenth century positivist document. Bork believes law is legitimate because it has been posited by an institution with requisite power. In this posture, Bork's view can only be taken to be that the "original understanding" should be followed because the government makes law and derives authority because law is essentially coercive. Consistently, he argues that his doctrine of "original understanding" must be followed because the structure of our government requires it. Thus, as for all pure positivists like Bork, law should be obeyed because it has been promulgated by the appropriate authority.

There is another logical fallacy here: Bork commits the error of circular reasoning. Stated more clearly, his approach to constitutional interpretation is required because it is required. This is an ipse dixit and will not do on logical

75. See *THE TEMPTING*, *supra* note 4, at 154-155. The evidence presented in the text of this essay shows that Bork is incorrect to state his theory of original understanding is that which was understood to be orthodox judging by the Framers and Justice Story. With specific reference to Chief Justice Marshall, Bork is also wrong. "It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it. . . ." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). To the contrary, Bork says, "The privileges and immunities clause, whose intended meaning remains largely unknown, was given a limited construction by the Supreme Court and has since remained dormant." *THE TEMPTING supra* note 4, at 37. Elsewhere, Bork observes, "The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working." *THE TEMPTING supra* note 4, at 166. Thus, Bork finds himself in the odd predicament of contradicting Chief Justice Marshall. Marshall would, presumably, give meaning to the privileges and immunities clause because a contrary construction giving it no effect is "impermissible." Thus, given that there is no clear original understanding of the clause, Bork would ignore it, Marshall would construct it since it presumptively has some meaning.

grounds. How can it be that Bork's original understanding doctrine is "a necessary inference from the structure of [our] government" when Justices Marshall and Story did not recognize it as the proper interpretive method very early in our history? The answer, according to this author, is that as a matter of fact and history, Bork's theory is misguided and possesses no exclusive "necessary" claim to jurisprudential truth.

The writings of the Framers and Justice Story militate against Bork's notion that his theory of "the original understanding" was originally advocated by the Framers. Indeed, it seems odd that such an enthusiast of the Framers as Bork would miss the implications of these writings. Yet, he either overlooks or ignores the import of these writings. In this way, Bork's theory is factually deficient. Additionally, it taxes reason to characterize Bork's theory as legal orthodoxy when the Supreme Court, as evidenced by Justice Story's writings in the infancy of the Constitution, did not utilize the Borkian model.

Bork's theory grossly neglects the important role natural law and natural rights philosophy played in shaping and defining the Constitution.⁷⁶ Consequently, Bork's version of the "original understanding," ignores the philosophical underpinnings of the Constitution. He demonstrates this omission when he says:

[T]he right to procreate is not guaranteed, explicitly or implicitly, by the Constitution Thus, to justify . . . [finding a constitutional fundamental right to procreate] the Court must decide that there are fundamental rights that the Court will enforce and that it knows how to identify them without guidance from any written law. This is indistinguishable from a power to say what the natural law is and, in addition, to assume the power to enforce the judge's version of that natural law against the people's elected representatives.

I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us.⁷⁷

Bork elaborates on this point by observing:

Moreover, if the Founders intended judges to apply natural law, they certainly kept quiet about it. Many historians are not even sure the Founders as a group contemplated any form of judicial review, even review confined to enforcement of the text, much less review according to an unmentioned natural law. No one at the time suggested any such power in the courts, and early courts made no claim that such a power had been delegated to them.⁷⁸

What Bork ignores is the role of natural law in giving meaning to the text of the Constitution.

V. WERE THE FRAMERS POSITIVISTS? NATURAL LAW AND NATURAL RIGHTS: THE LEGITIMACY OF LAW

A. The Legitimacy of the Constitution

James Madison advocated a constitutional federal government which gained legitimacy from, "the transcendent law of nature and of nature's God, which

76. Contrarily, Bork has written, "Our constitutional liberties arose out of historical experience They do not rest upon any general theory." R. Bork, *Tradition and Morality in Constitutional Law*, lecture at the American Enterprise Institute (1984), *reprinted in VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS* (M. Cannon & D. O'Brien eds. 1985).

77. *THE TEMPTING*, *supra* note 4, at 66.

78. *Id.* at 209.

declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed."⁷⁹ This concept provided Thomas Jefferson, who borrowed from Lockean philosophy, with the legal, as well as moral, grounds for declaring independence from the English monarchy. Jefferson stated,

[A]ll Men are created equal, and . . . are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness - That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whatever Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundations on such Principles⁸⁰

For present purposes, the most striking aspect of Jefferson's declaration is his belief that the legitimacy of a legal order rests upon its end: that is, securing and respecting the natural rights possessed by persons and derived from their Creator. For example, Jefferson believed:

The law of nations . . . is composed . . . [of] the moral law of our nature [This moral law] concerns . . . the moral law to which man has been subjected by his creator, and of which his feelings or conscience, as it is sometimes called, are the evidence with which his creator has furnished him. The moral duties which exist between individual and individual in a state of nature accompany them into a state of society, and the aggregate of the duties of all individuals composing the society constitutes the duties of that society towards any other For the reality of these principles I appeal to the true fountains of evidence, the head and heart of every rational and honest man. It is there nature has written her moral laws, and where every man may read them for himself.⁸¹

Likewise Jefferson thought "[t]he great principles of right and wrong are legible to every reader; to pursue them, requires not the aid of many counselors."⁸² Jefferson premised *A Summary View of the Rights of British America* upon "complaints which are excited by many unwarrantable encroachments and usurpations, attempted to be made by the legislature of one part of the empire, upon the rights which God, and the laws, have given equally and independently to all."⁸³ Indeed, it was the belief in a transcendent, objective moral order with higher authority than government which prompted the Framers to write the Constitution to secure those rights. It is the Framers' notion of natural rights and natural law which gives full meaning to the Constitution's terms.

The Declaration of Independence evidences the Framers' belief in two legitimizing elements of government.⁸⁴ First, people possess certain unalienable rights

79. THE FEDERALIST, No. 43 (J. Madison).

80. The Declaration of Independence para. 2 (U.S. 1776).

81. Jefferson, *A Summary View of the Rights of British America*, (1774) at 318, reprinted in THE LIFE AND WRITINGS OF THOMAS JEFFERSON (A. Koch and W. Peden eds. 1944).

82. *Id.* at 310.

83. *Id.* at 293.

84. Jefferson recounts in his autobiography, "[A] committee was appointed to prepare a Declaration of Independence. The committee were [sic] John Adams, Dr. [Benjamin] Franklin, . . . and myself. The committee for drawing the Declaration of Independence desired me to do it." *Id.*

which government is instituted to secure; second, government derives its power from the natural right of popular consent to government. Thus, when positive law, in whatever form, violates natural rights, the people legitimately may disband the malignant government.

Moreover, both the right to vote, which by representation creates positive law, and the legitimacy of government are rooted in natural rights concepts. Indeed, the Declaration of Independence ends by "appealing to the Supreme Judge of the World for the Rectitude of our Intentions, . . . and by Authority of the good People of these Colonies"

Therefore, the Founders of the United States believed law derived legitimacy from its moral rightness, not from mere coercive promulgation. Furthermore, they believed the object of law was to accord with the law of nature and nature's God, and that law secured natural rights granted to people from nature's God.

Whatever may be said of the Constitution, its nature, and interpreted meaning, it cannot be said that it derives legitimacy from sheer force of government power. This is precisely the idea that was rejected by the Founders when they declared independence from the Crown of England. Consequently, the Constitution is a manifest witness against the notion that law is followed merely because it is law. To understand the Constitution as a nineteenth century positivist document is to entirely miss the purposes for which it was created, the basis for its legitimacy, and ultimately its very nature. The Constitution did not enact the political philosophy of Jeremy Bentham or John Stuart Mill. Indeed, the Framers predated Mill and Bentham by several decades and held views having little if anything to do with Benthamite utilitarian positivism. Neither is the Constitution a Holmesian document. Holmes would side with Bentham and Mill before Hamilton, Madison, Adams or Jefferson.

If one emphatic concept is extractable from the ideas which shaped the Constitution, it is that law ought not to be obeyed solely because it is delivered with the authority of governmental power. Rather, law must be obeyed because it concurs with objective moral precepts, or said differently, the "laws of nature and nature's God."⁸⁵ From beginning to end, the Constitution is animated by

at 20.

In the debate by the Congress which eventually ratified the Declaration of Independence, Jefferson notes John Adams, Mr. Lee and Mr. Wythe argued "[t]hat the question was not whether, by a Declaration of Independence, we should make ourselves what we are not; but whether we should declare a fact which already exists." *Id.* at 17. Ultimately, the Declaration was "agreed to by the House, and signed by every member present, except Mr. Dickinson." *Id.* at 21.

Cf. Professor Harry V. Jaffa correctly observes,

[T]he Declaration of Independence, as seen by Jefferson and Madison, tells us why the political authority of the United States is also a moral authority, and why the physical force by which the United States may protect and defend itself is moral force and not merely the expression of collective self-interest. Finally, it tells us why slavery must be regarded as an anomaly, a necessary evil entailed upon the Constitution, but not flowing from — or consistent with — its genuine principles.

Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 364 (1987).

85. The idea of natural law, knowable to the intellect, which determines the validity of human law, is not only a sectarian Christian teaching. It is not even a Christian invention. Aristotle observed that "there is such a thing as Natural Justice as well as justice not ordained by nature." Marcus Tullius Cicero described "Law" as "the highest reason, implanted in Nature, which commands what ought to be done and forbids the

the Framers' philosophy of natural rights derived from natural law. Thus, the Constitution stands as the epitome of law founded upon the moral rightness of natural law. Indeed, the Framers believed government lost its power and was subject to overthrow if it governed with moral illegitimacy.⁸⁶

Since the Declaration of Independence is the decisive act which formed the Nation of the United States of America, understanding the role of natural rights doctrine is particularly important. As Justice Story said, "From the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation de facto, having general government over it created, and acting by the general consent of the people of the colonies."⁸⁷

On all sides of the Constitution's drafting and ratification, it was understood it should be read within the context of the natural rights doctrine by which the United States of America legitimately asserted authority over Britain and rightfully became a legal order. This notion is evidenced by the Declaration of Independence. Similarly, natural rights thinking guided the Framers' understanding of the Constitution after it was drafted and before it was ratified in the Federalist Papers. Madison reflected upon the guiding principles of the Constitution by taking a "critical and thorough survey of the work of the [constitutional] convention . . . ,"⁸⁸ leading him to remark "[i]t is impossible for the man of pious reflection not to perceive in [the constitutional convention] a finger of that Almighty hand"⁸⁹ It was this Constitution which was referred to by

opposite." He said that "right is based, not upon men's opinions, but upon Nature." And "Socrates was right when he cursed, as he often did, the man who first separated utility from Justice; for this separation, he complained, is the source of all mischief. . . ."

Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence* 24 WAKE FOREST L. REV. 539, 557, 58. (citations omitted).

[One] function of the natural law is the critical function. In that critical function, the natural law, unlike positivism, provides a reason to draw a line and criticize an action of the state as unjust and even void. That is why Rosa Parks was right when she refused to step to the back of the bus in Montgomery, Alabama, on December 1, 1955. When the Nazis moved against the Jews, German lawyers were "disarmed," in Radbruch's phrase, by "positivism."

The natural law principles advanced by George Mason, Blackstone, Aquinas and others are supra-constitutional. The question is not whether unconstitutional law-making power is assumed by a dictator, by a Supreme Court as constitutional interpreter, by a Congress, or by a majority of the people. The issue is whether there is a higher law which sets bounds to what the legal system, however it is structured, can do even through constitutional provisions. The natural law argument can serve, in the legislative process and the media, to forestall the enactment of unjust laws of constitutional amendments. *Id.* at 567. (citations omitted).

86. "[Laws which violate the natural law] are acts of violence rather than just; because, as Augustine says (*De Lib. Arb.* i.5), a law that is not just, seems to be no law at all." T. Davitt, *Sf. Thomas Aquinas and the Natural Law* in ORIGINS OF THE NATURAL LAW TRADITION 26 (Harding ed. 1954) at Q. 96, art. 4.

87. See J. STORY, *supra* note 55, at 89. John Adams, Mr. Lee, and Mr. Wythe, in the debates preceding adoption of the Declaration of Independence argued, "That the question was not whether, by a Declaration of Independence, we should make ourselves what we are not; but whether we should declare a fact which already exists." T. Jefferson *The Autobiography of Thomas Jefferson in The Life and Selected Writings of Thomas Jefferson* 17 (A. Koch and W. Peden eds. 1944).

88. THE FEDERALIST No. 37 at 193 (J. Madison) (M. Chadwick ed. 1987).

89. *Id.*

Hamilton as "in every rational sense and, to every useful purpose, A BILL OF RIGHTS."⁹⁰

Again, natural rights theory steered the early expositors of the Constitution after it was ratified in subsequent Supreme Court decisions. As an object is the sum of its parts, so too is the Constitution a document woven of philosophical natural rights thread.

As Professor Harry Jaffa observes, "It is, however, either naive or disingenuous to think that one can appeal to the 'original intentions' of those who framed and those who ratified the Constitution without facing forthrightly the question of what those intentions actually were."⁹¹

B. The Meaning of the Constitution

The Framers believed the Constitution was legitimized by two essential elements: i) its accord with natural law which secures natural rights, and ii) the natural right to promulgate positive law by majoritarian consent. Having shown these two legitimizing elements of law, we must next determine what they believed gave law meaning. That is to say, if judges should implement the meaning of law by their interpretive function, how should judges interpret the Constitution?

Law derives meaning from that which gives it legitimacy. For example, Bork thinks the Constitution derives meaning only from those procedural acts which led to its ratification - that is, popular consent. Consequently, according to Bork, what the Framers said regarding their understanding of the Constitution's terms, contemporaneous to its ratification, is what the citizens ratified and what gives the Constitution meaning. But, as shown above, the Framers believed law derived legitimacy from an additional source — accord with the natural law. Consequently, the Constitution must be interpreted, and its terms understood, by duly recognizing it as a document laden with and presupposing the objectively apprehendable existence of a natural law from which springs natural rights. Therefore, according to the Framers, the Constitution must be interpreted according to both its legitimizing elements: that of democratic consent and that of natural law.

It is in this sense, through the light shone upon the Constitution's meaning by its natural law and natural rights origin, that Bork has failed to acknowledge the Constitution's complete meaning. Bork has committed a heresy of omission. Understanding the natural law illuminates the purpose and meaning of the Constitution.

Bork would have constitutional interpreters find the "original understanding" of a particular provision to ascertain its content, and then apply it accordingly. But this ignores the more general, and more important aspect of the provision; namely, its purpose.⁹² Bork wants judges to find an intent without understanding

90. THE FEDERALIST No. 84, at 466 (A. Hamilton) (M. Chadwick ed. 1987)(emphasis in original).

91. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States* 10 U. PUGET SOUND L. REV. 351, 355 (1987).

92. Bork deals with a similar view taken by Professor Michael Perry who believes "originalism is fundamentally sound" but adds "some constitutional provisions — not all, but some — have an 'aspirational' meaning in addition to their original meaning: that is, they 'signify fundamental aspirations of the American political tradition.'" THE TEMPTING, *supra* note 4, at 216. To this Bork objects stating "it does not succeed as constitutional theory, because it fails clearly to identify the

its purpose. The purpose of the Constitution was always to secure already vested natural rights by establishing a government instituted according to those natural rights principles.

C. WHAT OF UNRESTRAINED JUDGING?

Bork's concern is that judges will stray beyond the confines of the "original understanding," when exercising their interpretive function, and thereby exercise illegitimate power. According to Bork, the judge who is free to wander will not apply law but subjective morality or political beliefs. Thus, the judge acts without legal authority, the rule of law is abandoned, and replaced by the rule of personal predilection.

Bork's objection here is, too a great degree, appropriate. In writing the Constitution, the Framers enumerated specific natural law concepts which they thought were essential to realize the formation of a just government. Because the Constitution is written, it in no way makes the entirety of natural law part of the Constitution. Still, Bork's concern about legitimate judicial authority is answered by stating what should be obvious. America was founded on the basis of ascertainable, immutable right, not might. So too, the Constitution derives its power and meaning, fundamentally, not from promulgatory force or force's half-brother, judicial pronouncement, but from its insistence on natural rights.

Judges, then, legitimately find the meaning of the Constitution's express terms in light of natural law. If the Framers, in penning the Constitution, were capable of understanding and defining the reaches of natural rights (as defined by natural law) without whim or caprice, then judges may likewise find the meaning of the Constitution by exercising their interpretive function. This will not be an exact science and there will always be self-willed judges. The problem of willful judges is addressed in two ways: 1) by vigilantly declining to place willful judges on the bench; and 2) by insisting that judges follow the Framers' jurisprudence.

Therefore, a judge interpreting the Constitution's meaning acts legitimately and restrained when guided by the natural law. Bork would have judges do only partially what the Framers said, while ignoring the complete import of their jurisprudence.

D. The Role of the Natural Law in Interpreting the Constitution

The question remains, what is the proper role of the natural law in construing the Constitution? As Bork points out, merely because the Framers' believed in a doctrine of natural rights does not incorporate the entirety of natural rights into

source of a judge's authority to invalidate legislative acts." "[O]nly the original meaning of the document can be legitimate material for the judge." *Id.* at 217.

Perry's view differs from that of this writer in that he believes it is up to the personal beliefs of a judge to determine the aspirational meaning of a provision. That is not the same as an objectively apprehendable natural law from which flows natural rights. Instead, it is, more often than not, judging arbitrarily from mere sentiment and not reason. This writer has argued that not only is the presently objective natural law illuminating for interpretive purposes in the modern day, but the views of the Founders regarding natural law and natural rights is another means of objective guidance to a judge. Both, are accessible and one checks the other. Thus, the views of Perry and this writer are fundamentally different.

the Constitution or give judges occasion to meander outside the text into the world of shadows and penumbras to achieve results which please them. For Bork, and this writer, the Constitution does not codify all natural rights nor does the listing of a few natural rights occasion judicial musing on the potentially endless range of natural rights. The Framers chose words, and enumerated their ideas so that judges would be, in some way at least, restrained. These concerns are laudable but not dispositive.

Bork's concerns only partially address the issue because of his unjustified assumptions. Of course judges should be confined to applying the meaning of the express terms of the constitutional text. Despite Bork's selective reading of the Framers' original understanding, however, and his positivist assumptions, the Constitution, as a matter of fact, presupposed the objective accessibility of the natural law and natural rights. Furthermore, the Constitution itself was spun out of natural law fabric. Consequently, for judges to fully apprehend the meaning of the Constitution's words requires interpreting the text in light of the natural law.

For example, the Court, while not possessing natural law jurisdiction by name, does have equity jurisdiction.⁹³ The Court, by its equity jurisdiction, possesses inherent authority to do what the document itself requires; namely, understand its terms in light of their origin - the natural law. James Wilson, a signator of the Constitution, recognized this when he said "[t]he judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them."⁹⁴

Equity jurisdiction largely includes the assumptions of the Framers who believed in the natural rights of human beings and judicial authority to consider those rights as incorporated into the Constitution. Blackstone was largely considered by the Framers as the authority on equity jurisdiction. Blackstone stated:

Equity then, in it's true and genuine meaning, is the soul and spirit of all law: positive law is construed, and rational law is made, by it. In this, equity is

93. The Constitution does expressly grant the Supreme Court equity jurisdiction. Black's Law Dictionary defines equity as, "Justice administered according to fairness as contrasted with the strictly formulated rules of common law. . . . The term "equity" denotes the spirit and habit of fairness, justness and right dealing which would regulate intercourse of men with men." BLACK'S LAW DICTIONARY 484 (5th ed. 1979).

In one sense, the word "equity" implies right, justice, or moral quality. . . . The Chancery Court was the court that administered equity in England. It was a court committed, in theory, to doing equity in the sense of *higher justice*, and also committed to doing equity in the sense of providing flexible approaches where the law had become too rigid." 2 D. Dobbs, *Remedies* §2.1 (1st ed. 1973). (emphasis added).

The inherent nature of equity jurisdiction requires access of notions inseparable from the idea of natural rights or natural law. Indeed, the equity courts, or chancery courts, were originally church related. It is hard to know how the Court would exercise this function by accessing the original understanding, as Bork understands it, without also including the natural rights assumptions of the Framers. More importantly for this discussion, it is hard to see how the Court would do so, legitimately or non-arbitrarily, lest there be some objective moral standards known otherwise as natural law. Also important in this context is the merger of law and equity in the American justice system. This would seem to require the Court to consider natural law or natural rights concurrent with their law jurisdiction in interpreting the Constitution.

94. Wilson, *Government, Lectures on Law* (1791) in THE FOUNDERS' CONSTITUTION 162 (P. Kurland and R. Lerner eds. vol.4 1987).

synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of equity and a court of law, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree. . . .

Here by equity we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. . . . [I]n order to find out the true sense and meaning of the lawgiver, from every topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by judges in the courts of both law and equity: The construction must in both be the same; or if they differ, it is only as one court of law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter, that sense in a single tittle.

But the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and modes of their proceedings.⁹⁵

Timothy Pickering, a Federalist Secretary of State, observes:

'It is,' says the 'Federal Farmer,' 'very dangerous to vest, in the same Judge, power to decide on the law and also general powers in equity; for, if the law restrain him, he is only to step into his shoes of equity, and give what judgement his reason or opinion may dictate.' Sir, this is all stuff. Read a few passages in 'Blackstone's Commentaries,' and you will be convinced of it. . . .

As our ideas of a court of equity are derived from the English jurisprudence, so, doubtless, the Convention, in declaring that the judicial power shall extend to all cases in equity as well as law, under the Federal jurisdiction, had, principally, a reference to the mode of administering justice in cases of equity, agreeably to the practice of the Court of Chancery in England.⁹⁶

The meaning of the Constitution's provisions are only fully understood when read as illuminated by the natural law which finds a textual basis, at least, in the Court's equity jurisdiction. There is no other way the Court may apprehend the complete original understanding of the Constitution. However,

The natural law, . . . is not a hunting license empowering judges to impose their own morality to invalidate legislative decisions in genuinely debatable cases.

95. Blackstone, *Commentaries* in *THE FOUNDERS' CONSTITUTION* 217-18 (P. Kurland and R. Lerner eds. vol. 4 1987).

96. Letter from T. Pickering to Charles Tillinghast (Dec. 24 1287) in *THE FOUNDERS' CONSTITUTION* 231 (P. Kurland and R. Lerner eds. vol. 4 1987). Interestingly, an anti-federalist opponent to the Constitution, writing under the pseudonym "Brutus" expresses concerns strikingly similar to those one would anticipate Judge Bork to make.

The judicial [sic] are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter. . . .

[The courts] will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. Brutus No.11 in *THE FOUNDERS' CONSTITUTION* 235-36 (P. Kurland and R. Lerner eds. vol. 4 1987).

Natural law theory would be especially limited in this respect in the United States where the Constitution itself incorporates some basic natural law principles, e.g. due process and equal protection, under which laws contrary to them could be violative of the supreme enacted law so that there would be no need for recourse to a supra-constitutional higher law.⁹⁷

Although the Constitution is, 'the supreme law of the land' as a human law, it must itself be subject to the higher law. If a constitutional amendment were adopted to require disenfranchisement of persons of a certain race or religion, there would seem little doubt that a judge would have the right and the duty to declare the amendment itself unlawful and void. Nevertheless, this responsibility offers no warrant for 'non-interpretive' judges to roam at large over the constitutional landscape, acting as a 'continuing constitutional convention' in disregard of the constitutional text and the evident intent of its framers. Only rarely would a judge be entitled or obliged to rely on supra-constitutional principles to refuse to uphold or enforce enacted law. As the German courts indicated after World War II, judges should take this step only when the conflict between the law or precedent and justice is 'intolerable'⁹⁸ or 'unendurable'.⁹⁸

The power of judges to refuse to enforce laws contradicting the natural law, and to interpret the meaning of the Constitution's provisions in light of the natural law is consistent with the Framers' concept of the character of law itself. The Framers believed the natural law was intelligible and real; they wrote the Constitution with express provisions reflecting the natural law. This is the Framers' intended meaning of the Constitution's provisions and what the people understood when they ratified it. Given the reality of natural law for the Framers, a reading of the Constitution in light of anything else would be perverse. It would also ignore the full original intent of the Framers of the Constitution.

CONCLUSION

Bork's interpretive model for the Constitution commits the very heresy it purports to eradicate. It ignores the most important aspect of the original understanding of the Constitution; namely, the importance, for understanding the Constitution, of the natural rights of people springing out of the natural law.⁹⁹ In this way, his theory cannot be adopted without reservation.

97. C. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence* 24 Wake Forest L.Rev. 539, 568 (1989).

98. *Id.* at 569.

99. Professor Harry V. Jaffa cogently points out,

In fact, . . . the greater part of those who aggressively invoke the doctrine of 'original intent' today are self-styled conservatives whose chief intellectual progenitor appear to be - from all available evidence - not the Father of the Constitution, James Madison or any of his coadjutors, but John C. Calhoun. That is to say, these conservatives largely follow the man who, more prominently than any other, rejected the proposition that all men are created equal, and who affirmed on the contrary that slavery was a 'positive good.' I believe however, that it is undeniably true that it was the paramount intention of the Framers of the Constitution, and of the people for whom they framed it, 'to institute new government' in the sense in which the Declaration of Independence speaks of instituting new government. . . . It was to be the purpose of the 'more perfect union' to better 'secure these rights.' These rights were inalienable rights with which all men had been equally 'endowed by their Creator' under the 'laws of nature and of nature's God.'" We are thus confronted with the paradox that those who today most aggressively appeal to the doctrine of original intent are among its most resolute

Notwithstanding this reservation, Bork's jurisprudence offers many highly important criticisms of modern constitutional theorists and, most notably, it emphasizes that the Supreme Court has abandoned its appropriate function as a body of judges, not legislators. Bork rightly insists that the Court remain within the bounds of the Constitution's text. Bork is correct. The Constitution is law and binds the members of the Court along with all other citizens of the United States. The Constitution is not a Brennanite charter permitting the Court to muse on ever-changeable conceptions of "human dignity" in blatant contradiction to the original understanding of the Constitution itself. Bork does well to call America back to the rule of law rather than the vainglorious rule of nine black-robed individuals on a politicized Supreme Court who more often than not style themselves as Olympian gods to supplant the legitimate will of Americans.

Bork is also right when he says the Constitution is not a document which embodies moral relativism or a libertine privatized morality. The Constitution does not impose dreadful moral theory on Americans. Nothing could be more foreign to the origin, nature, meaning, and intent of the Constitution than moral relativist-privatist legal theories. If anything, the Constitution is a charter designed to reflect ascertainable, objective, and immutable moral principles. That is precisely why the Constitution's authors included concepts such as due process, equal protection, just compensation for taken property, just punishment, freedom of religion, separation of powers, and the necessity of reasonable searches and seizures in the text of the Constitution.

Bork, thus, goes astray by understanding only part of the nature of the Constitution. He rightly draws our attention to the moral principles of the Framers as they embodied them in the provisions of the Constitution. The natural law-natural rights ideas of the Founders of the United States are enduring, unparalleled and today the envy of the world. We do well to constantly seek their counsel. Unfortunately, Bork ignores the Framers natural law jurisprudence which guided the drafting of the Constitution and thereby the moral purpose of the Constitution — accord with the objectively accessible natural law of nature's God. Ultimately, abandoning the presuppositions of the Framers exposes constitutional standards to the caprice of ever-changing judicial minds or the cramped construction of legal postivist jurisprudence. The inseparable tandem of the written Constitution and the objective natural law is the foundation and sentinel of this Republic and thereby, our freedoms.

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antagonists. . . . [T]his is true of the . . . Chief Justice of the United States, Justice Renquist, as it is of his antagonist Justice Brennan.

Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 355-56 (1987).

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