BOOK REVIEW

The Temptation and Fall of Original Understanding

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A Review of

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW, by Robert H. Bork (Free Press, 1989).

INTRODUCTION

On Friday, June 26, 1987, Lewis Powell announced his resignation from the Supreme Court of the United States.[1] Five days later, President Reagan announced his intention to nominate United States Court of Appeals Judge Robert H. Bork to fill the vacancy.[2] The nomination set the scene for the most heated and prolonged campaign for a Supreme Court vacancy in recent history. When the smoke cleared from the battleground of the Senate Caucus Room of the Russell Senate Office Building, nearly four months after President Reagan's ringing endorsement, the Senate had rejected Judge Bork's nomination. The fierce, politically-charged battle captured the attention of the American public.

Senator Edward Kennedy set the tone of the debate in a nationally televised statement that warned of the disastrous implications of a Bork confirmation: "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters [and] rogue police could break down citizens' doors in midnight raids . . . ."[3] Interlocutors waged much of the ensuing struggle on ideological turf, characterizing Judge Bork's judicial philosophy as either flowing with or sailing against the values of the American mainstream. Judge Bork attempted to situate himself between both ideological camps and instead characterized his philosophy as "neither liberal nor con-

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1. Taylor, *Powell Leaves High Court; Took Key Role on Abortion and on Affirmative Action*, N.Y. Times, June 27, 1987, § 1, at 1, col. 6.

2. Boyd, *Bork Picked for High Court; Reagan Cites His "Restraint;" Confirmation Fight Looms*, N.Y. Times, July 2, 1987, at A1, col. 6.

3. 133 CONG. REC. S9188 (daily ed. July 1, 1987) (statement of Sen. Edward Kennedy).

servative [but] simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the President, the legislatures and executives of the 50 states, and to the American people" (p. 300; footnote omitted).

These protestations of neutrality did not shield Judge Bork from the probing inquiries of Senators who questioned whether his interpretation of the Constitution was, in the final assessment, a full and fair one. Judge Bork's first principle of judicial philosophy is that "[t]he judge's authority [must] deriv[e] entirely from the fact that he is applying the law and not his personal values" (p. 300). But could Bork be seduced by the very temptations against which he so avidly counseled resistance? In other words, was his judicial philosophy of original understanding no more than an artifice for imposing his own political vision on 20th century America? Did he first "locate" that vision in the *common understandings* of 18th and 19th century Framers and then simply contend that because the vision was not his own, his decisions were laudable examples of judges *applying* rather than *making* law? The doubts raised about Bork's approach to judging, and its ramifications in American society, doomed his nomination to the United States Supreme Court.

With *The Tempting of America,* Robert Bork answers the criticisms his judicial philosophy raised during this heated campaign. This Essay summarizes and critiques his response in three parts. Part I provides an overview of the book and conveys a sense of its tone and central themes, with primary attention given to Bork's theoretical point of departure, the Madisonian dilemma. I outline the major points of his argument by situating his judicial philosophy of original understanding within this theoretical framework, elucidating how and why Bork believes his philosophy provides the only plausible solution to the Madisonian dilemma.

Part II argues that Bork's philosophy collapses under the weight of its own demanding standards and is unduly overinclusive and underinclusive. That is, given the central premise—that judges must decide cases by reference to the common understanding of constitutional and statutory texts at the time those texts were framed by the authors—the theory cannot coherently explain why the results reached in certain cases are acceptable and others unacceptable. This internal critique explains how Bork's jurisprudence does not and cannot satisfy its own goals. In Part III, I discuss how the problems with Bork's analysis are related to a larger dilemma explored in the current debates in legal hermeneutics, primarily whether an interpreter of a text can ever *discover* as opposed to *produce* meaning in her engagement with that text. This external cri-

Fi182

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Quoting Justice Story, Bork contends that "[t]he 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."[5] Bork concludes that "[o]nly by following that rule can our unelected guardians save us from themselves. Only in that way can the foundation of our freedoms, the separation of powers, be kept intact. Only so can judicial supremacy be democratically legitimate" (p. 6). With regard to the dichotomy between law and politics, the bottom line for judges engaged in constitutional interpretation is that they must "demonstrate that [they] began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to [their] result" (p. 2).

When judges fail to act in this politically neutral fashion, they engage in what Bork refers to as constitutional "revisionism" (p. 15), the process of rewriting the Constitution by deciding cases in accordance with their own values, rather than those embodied in the Constitution. Part one of his book traces some of the most obvious revisions of the Constitution, identifies the social values the revisions served and evaluates the justifications offered in their support. Bork attempts to establish the legitimacy of his own judicial philosophy by criticizing both liberal and conservative judges who have strayed improperly from the standard of neutrality:

> The Supreme Court that struck down economic regulation designed to protect workers is, judged as a judicial body, indistinguishable from the Court that struck down abortion laws. Neither Court gave anything resembling an adequate reason derived from the Constitution for frustrating the democratic outcome. So far as one can tell from the opinions written, each Court denied majority morality for no better reason than that elite opinion ran the other way. [p. 17]

In part three of his book, Bork turns from a discussion of constitutional history and theory to examine the nomination, hearings, and charges made against him. He responds in cursory fashion to the charges that confirmation meant a vote against the civil rights of racial minorities (p. 324) and women (p. 326); for government, except when it opposed big business; against small business and labor (p. 331); and against freedom of speech under the first amendment (p. 333).

By responding to these charges, although not in great depth, Bork attempts to "demonstrate that key charges were not only false but should have been, must have been, known to be false by the individuals and groups that made them and repeated them even after they were answered

5. P. 6 (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES at vi (R. Rotunda & J. Nowak rev. ed. 1987) (1833)) (footnote omitted).

with facts."[6] According to Bork, the techniques used in the campaign against him provide further proof of "the way the war for control of our legal culture is being fought" (p. 336), and how certain factions have politicized the law and threatened the future of our constitutional system of government.

The most interesting dimension of the work and by far the most significant for constitutional theory is part two. Simply entitled "The Theorists," this part begins with a description of the Madisonian dilemma and then moves to a discussion of how various constitutional theorists have attempted to resolve the conflict. Bork contrasts the "clear, to the point, self-confident, and accessible to the nonprofessional reader" theory of original understanding to the more "abstruse," "philosophical," "convoluted" and "complex style" of contemporary constitutional theorists (p. 134). The latter, in his estimation, is a style, as Justice Story put it, addressed not " 'to the common sense of the people' but . . . to a specialized and sophisticated clerisy of judicial power."[7] It is principally this clerisy whose "enterprise involves nothing less than the subversion of the law's foundations" (p. 136).

Rather than analyze the strengths and weaknesses of Bork's treatment of liberal and conservative constitutional revisionism (pp. 187-240) and his response to the critiques of original understanding (pp. 161-85), I explore his judicial philosophy in greater detail and—given its presuppositions and aspirations— critique its internal coherency and practicality. Examining Bork's theory on its own terms, this critique exposes the extent to which the theory falls short of the standards of neutrality it articulates as the *sine qua non* of legitimate constitutional interpretation. Specifically, I use Bork's adoption of the concept of the "color-blind Constitution" as an example of how the "neutral principles" he derives are, in reality, *political* choices about how to interpret the Constitution. It is the choice of this "neutral principle" in particular that I critique in Part IV and to which I present an alternative in Part V.[8]

II. A CRITIQUE

A. *The Madisonian Dilemma and the Original Understanding*

Like all constitutional theorists, Bork's point of departure for interpreting the Constitution is the Madisonian dilemma. Generally speak-

6. P. 336. Bork never details, however, how these charges "should have been, must have been, known to be false" (p. 336). He simply recounts his positions as obviously and irrefutably correct (pp. 323-36).

7. P. 134 (quoting J. STORY, *supra* note 5, at vi).

8. *See infra* text accompanying notes 76-98.

ing, the Madisonian dilemma underscores the difficulty of balancing the principle of minority rights with that of majority rule. More specifically, it poses the dilemma in liberalism of how to justify the countermajoritarian power of courts to declare the acts of democratic bodies unconstitutional.[9] If the power to govern is left in the hands of the people themselves, what need is there for a "higher" authority to rule on the actions of the majority?

The transition from medievalism to liberalism embodied a skepticism about the power of human reason to deduce laws that reflected the common good from the universal and immutable principles of God or Nature. If the common good was not some intelligible essence waiting to be discovered by the high priests of religion and law, officials could only know the "good" by reference to the aggregated subjective desires of those who comprise the community. The articulation of market and political institutions—premised on the pursuit of individual self-interest—supported and promoted epistemological skepticism as to the existence of a common good that was independent of the aggregation of individual desires.[10]

Liberalism's epistemological skepticism raises an interesting dilemma, however, with respect to the legitimacy of majoritarian governance. If there is no teleology of values and desires by which the interests of some can be preferred to others, then by what authority does even a majority subjugate the subjective needs of the minority? One reply to this question builds on what some perceive to be the nature of pluralism. Pluralism suggests that individuals' conception of their self-interest is not static. Because individuals organize into a multiplicity of groups with varying agendas, majorities born of the processes of negotiation and compromise also are not static. The idea of shifting majorities suggests that there are no permanent losers and that majority rule is thus compatible with liberalism's individualist conception of the good. The individual can defer to majority rule because her subjective conception of the good is either ever-changing or multidimensional. In the game of give and take, she wins some and loses others, and finds this outcome preferable to the Hobbesian alternative of a state of perpetual war[11] in which she stands to lose all. Thus, deference to majority rule is compatible with the idea of an individual who defers immediate gratification of a desire be-

9. *See generally* R. UNGER, KNOWLEDGE AND POLITICS 88-100 (1984) (no coherent theory of adjudication is possible within liberal political thought, thus the judge, in effect, subsumes the role of the lawmaker instead of applying the law).

10. For a discussion of medieval thought and the role of intelligible essences, see *id.* at 31-32.

11. *See* T. HOBBES, LEVIATHAN ch. 13 (M. Oakeshott ed. 1963) (1653).

cause of an enlightened self-interest that values security over the uncertain attainment of a subjective good.

A pluralist defense of liberalism is problematic for two reasons. First, from the standpoint of liberalism's deontological presuppositions, there is no validity to the argument that members of the minority may someday subjugate the individual goods of members of the majority as well. For example, we would not think permissible a legislative act that confiscated private property for public use without just compensation simply because the victims could seek revenge in the next legislative session. Second, the assumption that there are no permanent minorities may well be overstated. Perhaps some groups are insular, discrete, and held in such contempt by majorities that they remain largely unprotected by normal democratic processes.[12]

Liberalism requires for its legitimation some assurance that the majority's present conception of the "good" will not be imposed on others, that alternate notions of the good will be permitted to exist. Liberalism offers constitutional democracy as an answer to the deficiencies of democratic pluralism. Ratification of the Constitution and recognition of the lawmaking process that cloaks legislative pronouncements with the institutional legitimacy of law compensate the individual's acquiescence to majority rule: Submission is granted in exchange for the maintenance of this process and the protection of individual rights from the decisions of majorities.

The judiciary stands between the majority and the minority, entrusted with the responsibility of protecting the rights of the latter from the impermissible coercive acts of the former. Thus, a countermajoritarian institution capable of invalidating the acts of majorities is vital to the legitimacy of liberal democracy. The central question then becomes how to check the power of unelected judges even as they purport to check the powers of majorities. How are individuals to be protected from an abuse of judicial power, the imposition of judges' conception of the common good over that of the majority's? In other words, how should judges be prevented from destroying the republican form of government envisioned by the Framers in the name of protecting individual rights? These are the questions to which Bork contends that the judicial philosophy of original understanding provides the best possible answer.

12. *See* Justice Stone's discussion of "discrete and insular minorities" in United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

Original understanding is a form of legal positivism.[13] The core of underlying assumptions share a common denominator: The countermajoritarian posture of the court is not inconsistent with the principles of democracy when judges *judge* rather than *will* the results of constitutional disputes—when, in other words, they act on *neutral* principles. The neutral act of "judging" does not allow the judge to read into the law her own conception of morality. According to Bork, the philosophy of original understanding permits neutral adjudication because judges are able to engage in a multi-step process of *deriving, defining,* and *applying* principles of law (p. 146).

First, judges who embrace original understanding as a judicial philosophy can neutrally adjudicate constitutional disputes because they neutrally *derive* the principles of law they apply: The judge "finds his principle in the Constitution as originally understood" (p. 146). Judges do not impose their own values, only those accepted by the public at the time of ratification. The process of judging is different from the legislator's task of making law and the moralist's task of deciding policy values by which to live in that subjective values and perspectives should not influence the neutral decisionmaking processes of the judge.

Second, judges can neutrally *define* and *apply* the law because at least some constitutional provisions have a definitive meaning. To discover that meaning, judges need only refer to the texts, convention debates, public discussion, newspaper articles, and dictionaries in use at the time of ratification (p. 144). The level of abstraction at which general values like equality and liberty—to take two rather vague concepts found in the Coustitution—are to be applied should not depend upon value choices made by the judges, but rather should be determined by the value choices of the ratifiers (pp. 147-50).

Bork contends that the philosophy of original understanding is the only way to respond adequately to the Madisonian dilemma.[14] We can trust judges not to abuse their power as guardians of individual rights when they understand and act on the premise that they are bound by the law as much as those whose disputes they adjudicate. They must be faithful to the original understanding of the clauses they interpret and thereby resist the temptation to make rather than apply the law. It is this central premise of Bork's philosophy of original understanding—that

13. *See, e.g.,* H.L.A. HART, THE CONCEPT OF LAW 181-82 (1961) ("Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.").

14. In fact, Bork entitles Chapter 12 of *The Tempting of America,* "The Impossibility of All Theories that Depart from Original Understanding" (pp. 251-59).

judges can neutrally derive, define, and apply the law—that the next Section evaluates and critiques.

B. *A Critique of Original Understanding*

Rationality in the law is often measured by the degree to which the means utilized to reach a permissible end fit that end.[15] A great degree of ill-fit (either the means underreaching or overreaching the end) raises serious concerns about the reasonableness of those means and whether they should be given constitutional approbation. This means-end analysis is a useful analogy in evaluating Bork's judicial philosophy, espeeially because much of his argument involves fourteenth amendment equal protection analysis.

There can be little question that Bork's end of articulating the boundaries of judicial action is legitimate. Few of us would earnestly contend that an unelected judiciary should have unfettered discretion to say what the law is, even if we believe that such discretion, for all practical purposes, already exists. Even Bork admits that "[i]t is of course true that judges to some extent must make law every time they deeide a case," but if done correctly, "it is ouly minor, interstitial lawmaking" (p. 5). Along with Bork, we tenaciously cling to the distinction between good and bad judging and the prerogative of criticizing certain judicial pronouncements as "right" or "wrong." This assumes that there are, at least in our own minds, rather clear boundaries that demarcate the legitimate sphere of judicial activity.

The real source of the problem is the means Bork selects to implement his goal of articulating the parameters of adjudicative legitimacy—a commitment to original understanding. If the end is to limit the potential abuse of judicial discretion, then Bork's use of original understanding misses the mark: It validates cases its premises should invalidate (overinclusiveness) and invalidates those cases that its premises should validate (underinclusiveness). Bork, however, hedges on the most important point when he says that lawyers and judges should seek "the original meaning of the words" even while he puts aside the "questions of breadth of approach or of room for play in the joints" (p. 145). Bork refuses to

15. *See* Loving v. Virginia, 386 U.S. 1, 11 (1967) (equal protection clause permits racial classification only if it is necessary to accomplish a permissible state objective); United States v. O'Brien, 391 U.S. 367, 377 (1987) (government regulation is justified if it furthers an important government interest); Moore v. City of East Cleveland, 431 U.S. 494, 547 (1977) (statutes that restrict liberty must have an ascertainable purpose and provide a reasonable means to achieve that purpose); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (liberty may not be infringed upon by legislation that is arbitrary or without a rationale relation to a state interest); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1944) (government's classification scheme must bear a reasonable relation to the objectives of the law).

deal with these crucial questions. And, in fact, Bork's method of deriving principles and "finding" their level of generality (p. 148) makes for significant indeterminacy and exacerbates the potential for abuse of judicial discretion.

1. *Original Understanding and the Problem of Overinclusiveness.* Bork's discussion of *Brown v. Board of Education* [16] provides an illustration of his theory's overinclusiveness. According to Bork, the result in *Brown* was correct, but the Court wrongly rejected reliance on the original understanding of the fourteenth amendment in favor of amassed psychological evidence on the harm of segregation (pp. 75-76). To reconcile his contention that *Brown* was correctly decided with his judicial philosophy of original understanding, Bork argues that judges are to interpret the equal protection clause of the fourteenth amendment by reference to the original understanding of that clause, that is, what "the public of that time would have understood" the word "equality" to mean (p. 144). This argument assumes, however, that only one clear, definitive meaning of that term existed. At least one historian has questioned whether language like "equality" and "liberty" had any fixed meaning around the time of ratification.[17] Furthermore, the society of that time also saw little inconsistency between the norm of constitutional equality and state imposed segregation of the races.[18] Indeed, the pronouncement in *Plessy v. Ferguson* [19] of the "separate but equal" doctrine was little more than the

16. 347 U.S. 483 (1954).

17. *See* W. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 21 (1988). William Nelson argues that:

> The concept of equality, in short, had quite different meanings for different groups in the antislavery movement. Indeed, the concept of equality had an even larger number of meanings for different groups in mid-nineteenth-century American society at large. Some of these meanings, moreover, were not consistent with each other. To some mid-nineteenth-century Americans equality had reference only to political rights. To others, in contrast, the concept had reference to economic power and social place; to some of these others, equality was associated with an old antimonopoly tradition. To Southerners, the concept of equality was a weapon for use in the defense of slavery, whereas for advocates of antislavery in the North it was the principal bulwark of their movement. To some within the antislavery movement, blacks would gain only legal rights once they received the equal protection of the laws. But to others, equal protection would bring in its wake political, economic, and ultimately social equality.
>
> Equality was thus a vague, perhaps even an empty idea in mid-nineteenth-century America. But it was the very emptiness and vagueness of the concept that made it so useful and popular. Equality could mean almost anything, and hence it could be used by almost any group in antebellum America to defend almost any position. The use of more precise arguments in support of a political program might tend to drive off potential support, but no one could be driven away by an argument for equality, since everyone believed in it.

Id. (footnote omitted).

18. *See* Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 59-65 (1955).

19. 163 U.S. 537 (1896).

legal enshrinement of a widely-held assumption that legal separation was quite compatible with constitutional equality.[20] To rely on original meanings would appear to commit Bork to a *Plessy*-like account of equality.

Bork acknowledges this problem and simply concludes that the Framers and ratifiers of the fourteenth amendment had it wrong: Legal separation of the races could not be equal and *Brown*'s acknowledgement of that fact was long overdue. Bork, however, decries the Court's reliance on psychological data (p. 75). In his view, the Court would have stood on more legitimate ground had it simply given primacy to the language of equality found in the Constitution, rather than looking outside the text for substantiation of its position.

It is difficult to see, however, how the Court could have depended exclusively on the language of the text, given its own precedent and the original understanding of the word "equality." Under either Bork's approach or that of the *Brown* Court, the Justices would have been compelled to conclude that the Framers and subsequent interpreters had it wrong. Both approaches constitute a revolution in the interpretation of the concept of "equality."

Given that original understanding may be insufficient, and that one can conclude that the Framers and ratifiers may simply have had it wrong, it is fair to ask how judges will read the Constitution to gain a more accurate interpretation. Bork makes clear that the values selected can be neither the subjective values of the judge nor community values that reflect societal changes in racial relations because such assessments take the judge outside the permissible boundaries of interpreting the Constitution. But how else is one to find its meaning?

Bork seems to believe that words such as "equality" possess a hidden meaning that eluded the Framers and ratifiers, as well as the *Plessy* Court—a meaning finally and accurately discovered by the *Brown* Court. Hidden meanings are always problematic, however, because we never know if the "found" meaning is the real one or just another aberration. The enterprise of original understanding cannot be at all determinative of what judges should and should not decide when the clauses and concepts they would interpret are susceptible to such varying interpretations, each claiming that it has unlocked the true meaning of the clause. If the Framers were wrong about legal separation being compatible with constitutional equality, what else have we read wrongly? We could be wrong, for instance, about our insistence on discriminatory purpose rather than discriminatory impact being conclusive of an equal protection viola-

20. *See id.* at 544-49; *see also* W. NELSON, *supra* note 17, at 185-87.

tion.[21] To the extent that discriminatory purpose is viewed as consistent with the original understanding, it is possible that the Framers and ratifiers simply had it wrong once again.

Some commentators have argued that strict adherence to Bork's original understanding doctrine would require a reversal of much established precedent, including the *Legal Tender Cases*[22] and much of this century's New Deal jurisprudence.[23] In an attempt to deflect these criticisms, Bork acknowledges that it may be too late in the constitutional day to retrieve a purely interpretivist Constitution.[24] This acknowledgement requires Bork to explain the role of precedent in his theory.

According to Bork's theory, even if a judge is faced with a precedent that was wrongly decided—from an originalist perspective—he must proceed cautiously. The judge must first determine whether the erroneous ruling has become so embedded in the fabric of our nation and in the expectations of individual behavior that the inertial mass of societal reliance and the nced for certainty in the law preclude reversal. "There are times when we cannot recover the transgressions of the past, when the best we can do is say to the Court, 'Go and sin no more' " (p. 159). But Bork's theory, when understood in this fashion, provides no guidance in a *Brown*-like situation. Judges may reasonably disagree not only on whether the Framers' interpretation was wrong, but also on whether the interpretation has altered so substantially the expectations and reliance of the society that it would be imprudent to overrule prior decisions.

Bork also notes that in the neutral application of principle, the judge *must* consider the impact of technologieal change or evolutions in the dynamics of the legal environment on the constitutional principle at issue (pp. 168-69). Such assessments may well lead originalist judges to apply an old principle according to a new understanding of a social situation:

> A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty. That duty . . . is to ensure that the powers and freedoms the founders specified are made effective in today's altered world. The evolution of

21. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring a showing of discriminatory purpose to establish the unconstitutionality of a facially race-neutral hiring practice alleged to have a discriminatory impact against blacks).

22. 79 U.S. (12 Wall.) 457, 545 (1871) (allowing Congress to issue treasury notes and to make them legal tender in satisfaction of antecedent debts). By rejecting the argument that the Framers intended the issue of metallic money and not paper money, the Court, in effect, adopted a more flexible approach than what appeared to be the original understanding.

23. *See* Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235, 278-82 (1989).

24. Pp. 159-60. In fact, Bork can point to no one on the Supreme Court from John Marshall to William Rehnquist, liberal or conservative, who has ever interpreted the Constitution correctly.

> doctrine to accomplish that end contravenes no postulate of judicial restraint. [p. 149]

Bork maintains that there is a difference between an "evolution of doctrine to maintain the vigor of an existing principle" and the "creation of new constitutional principles" (p. 169). In his view, *Ollman v. Evans*[25] and *New York Times v. Sullivan*[26] correctly took account of the evolution of the relationship between libel law and the first amendment. *Griswold v. Connecticut*,[27] on the other hand, was "not an adjustment of an old principle to a new reality but the creation of a new principle by *tour de force* or, less politely, by sleight of hand" (p. 169). Bork admits that "there is a spectrum along which the adjustments of doctrine to take account of new social, technological, and legal developments may gradually become so great as to amount to the creation of a new principle" (p. 169), but these are the decisions that the judge must make along the slippery slope. However, as a result of this judicious weighing of societal reliance, as well as technological and institutional change, the Borkian interpretivist makes what are essentially political and policy decisions—the very type of decisions for which Bork criticizes those he calls "revisionists" (pp. 16-18; 130-36). In essence, the Borkian judge finds that the attempt to "apply old values to new circumstances" inevitably mires her in political choices and dissolves the illusory distinctions between law and politics.

2. *Original Understanding and the Problem of Underinclusiveness.* In contrast to his reading of *Brown*, Bork characterizes the Supreme Court decision in *Shelley v. Kraemer*[28] as "a political decision" that "should have been made by a legislature" (p. 153)—a "nonneutral application of principle in the service of a good cause" (p. 151). His analysis of this case illustrates the underinclusiveness of his theory. Accepting for the moment the central tenets of his judicial philosophy, I see no reason why the case's holding cannot be viewed as the explication of a neutral principle amenable to future neutral application.

The case involved whites who had signed agreements—racially restrictive covenants—promising not to sell their homes to nonwhites. Despite the covenants, some whites sold to blacks and the other property

25. 750 F.2d 970 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (holding that statements set forth in an opinion page of a newspaper are constitutionally protected expressions, and hence not actionable in a defamation claim).

26. 376 U.S. 254 (1964) (holding that a non-commercial advertisement allegedly defaming a public official was entitled to constitutional protection unless the statement is made with "actual malice").

27. 381 U.S. 479 (1965).

28. 334 U.S. 1 (1948).

owners brought suit to enforce the covenants. The state court enforced the covenant and enjoined the blacks from taking possession. In the Supreme Court, the black petitioners argued that the enforcement of racially restrictive covenants deprived them of their equal protection rights under the fourteenth amendment. The problem was that the Constitution only restricts action by the state, not private individuals.[29] Thus, the issue was whether there was the requisite state action needed to invoke the protection of the amendment.

Bork contends that the answer is clearly no, and that the *Shelley* principle, which allows a court to find state action in purely private acts, was not derived neutrally. He notes that "[t]he problem for the Supreme Court was that the Constitution restricts only action by the state, not actions by private individuals" (p. 151). In this case, "state courts were not the source of the racial discrimination, they merely enforced private agreements according to the terms of those agreements" (pp. 151-52). Therefore, the courts acted neutrally: "The racial discrimination involved was not the policy of the state courts but the desire of private individuals, which the courts enforced pursuant to normal, and neutral, rules of enforcing private agreements" (p. 152). In Bork's view, to extend the reach of the anti-discrimination principle embodied in the fourteenth amendment to private parties conflicts with "the ratifiers' definition of the appropriate ranges of majority and minority freedom" (p. 146).

According to Bork, the *Shelley* principle was not neutrally derived, nor can it be neutrally applied, which largely accounts for why courts have refused to extend it beyond the original case. To illustrate the problem of neutral application, Bork provides a hypothetical. He contends that there is no distinction between the state action found in *Shelley* and state enforcement of trespass laws at the request of a private property owner to remove from his household a guest who becomes abusive with regard to political issues the property owner deems offensive. Bork contends that the rule of *Shelley,* applied neutrally, would preclude enforcement of trespass laws in the latter instance because the guest's free speech rights would be subjected to impermissible state interference (pp. 151-52).

Bork fails to recognize two important distinctions between *Shelley* and his hypothetical that may satisfy his demand for neutral principles. First, it is not merely the fact of state enforcement of private discrimination that created state action, but the fact that, with the exception of racially restrictive covenants, state common and statutory law tradition-

29. *Id.* at 19.

ally had disfavored restrictive covenants that imposed restraints on the alienability of property.[30] The lack of consistency in the treatment of such covenants means that the state court's enforcement of racially restrictive covenants violated Bork's own standard of neutral application of principle.

Second, state enforcement of the covenants in *Shelley* would have necessitated the employment of the coercive power of the state to force a party not wishing to discriminate on the basis of race to do so—a practice that runs counter to the notion that the fourteenth amendment demands state neutrality on the issue of race.[31] By contrast, the narrow-minded property owner in Bork's hypothetical is not compelled by the state to engage in racially discriminatory activity.[32]

Furthermore, Bork's argument by analogy to the first amendment context rings false because far more state limitations are permitted in the first amendment right to free speech context than are permitted in discriminatory acts that involve racial classifications. For instance, the state may impose time, place, and manner restrictions on first amendment-protected speech.[33] To extend Bork's analogy, we might view the state common law rules that give primacy to state trespass laws over the guest's political speech as a common law time, place, and manner restriction that raises no compelling constitutional objections. Thus, unlike the enforcement of racially restrictive covenants, the state court's enforcement of state trespass laws would not violate Bork's principle of neutrality.

As we found when examining the overinclusiveness of original understanding, we can only understand its underinclusiveness as the result of the judge's political choices about, for example, the definition and limits of state action. The judge must choose, determine for herself, where

30. *See* L. TRIBE, CONSTITUTIONAL CHOICES 260 (1985) ("[T]he issue is . . . whether a state may *choose* automatically to enforce restrictive covenants that discriminate against blacks *while generally regarding alienability restraints as anathema.*").

31. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (holding that the exclusion of black patrons from a privately-owned restaurant operating in a building leased from the State of Delaware was discriminatory state action; the failure of the state to require the restaurant owner to serve all persons "made itself a party to the refusal of service"); *see also* Nixon v. Herndon, 273 U.S. 536 (1927) (statute barring blacks from voting in primary elections was direct and obvious violation of the fourteenth amendment).

32. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1497-99 (1986) [hereinafter G. STONE].

33. *See, e.g.*, Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (high-school student's use of explicit sexual metaphors in student election speech held during school hours was not protected by the first amendment); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding zoning ordinance characterized as a "time, place, and manner regulation," which restricted the locations of adult theatres); Young v. American Mini Theatres, Inc., 427 U.S. 50, 72-73 (1976) (same).

the line between state and private action is drawn in each case. And each judge brings to each case presumptions and assumptions about where to draw the line.[34]

Bork's search for neutral principles, "how the words used in the Constitution would have been understood at the time" (p. 144), is misguided. He confuses the discovery of someone else's meaning with the production of his own. Thus, the question of "breadth of approach or of room for play in the joints" (p. 145) that he wishes to put aside ultimately corrupts his theory and blurs, if not obliterates, the line he draws between law and politics. In the following Part, I situate Bork's interpretivist project of original understanding within the broader debate of legal hermeneutics and suggest why the search for neutral principles, at least as he defines them, is an exercise in futility.

III. ORIGINAL UNDERSTANDING AND PRODUCTION OF MEANING: THE POSSIBILITY OF LEGAL HERMENEUTICS

Hermeneutics is the philosophical inquiry into processes of understanding and interpretation.[35] Because the judicial philosophy of original understanding posits a theory of understanding and interpretation, it is a hermeneutical theory of law and participates in this broader philosophical tradition. The question I want to pursue here is whether such theories permit us, as Bork claims, to *discover* meaning and thereby restrain judges from engaging in policymaking, or whether such theories are processes through which we *produce* meaning and thus require the judge to be the policy-maker Bork so dreadfully fears.[36]

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34. Bork does not escape this phenomenon either. He makes a step toward acknowledging this reality in his analysis of the first amendment, when he admits that:

> The Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words might suggest. . . . [N]o one has ever supposed that Congress could not make some speech unlawful or that it could not make all speech illegal in certain places, at certain times, and under certain circumstances. [p. 147]

35. For general sources on philosophical, literary, and legal hermeneutics, see D. HOY, THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS (1978); THE HERMENEUTICS READER: TEXTS OF THE GERMAN TRADITION FROM THE ENLIGHTENMENT TO THE PRESENT (K. Mueller-Vollmer ed. 1985); INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (S. Levinson & S. Mailloux eds. 1988); Dworkin, *Law as Interpretation*, in THE POLITICS OF INTERPRETATION 249 (W. Mitchell ed. 1983); Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379 (1982); Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985) [hereinafter Hoy, *Interpreting the Law*]; McIntosh, *Legal Hermeneutics: A Philosophical Critique*, 35 OKLA. L. REV. 1 (1982); White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982).

36. At least since Descartes' attempt to provide philosophy with a solid scientific foundation, philosophers have posed central epistemological and metaphysical questions about the basis of knowledge and the nature of being. Descartes' grand proclamation, "I think, therefore I am," predicated "being" on "understanding." That is, through objective and scientific methods of inquiry, the

Although I do not intend to provide a detailed survey of legal hermeneutics, certain observations might assist in assessing the nature of Bork's contribution to the themes this tradition addresses. For purposes of convenience, I categorize the interlocutors into three groups: interpretivists, noninterpretivists, and deconstructionists (a group that stands outside the formal debate and critiques the other two approaches).[37] As I will make clear, the distinctions among these groups at times blur, if not disappear, making the differences often seem more a matter of degree

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observer could understand the nature of being and grasp the fundamental truths about the human condition. *See* R. DESCARTES, *Discourse On Method* (1637), in 1 THE PHILOSOPHICAL WORKS OF DESCARTES 101 (E. Haldane & G. Ross trans. 1973).

The belief that science consisted of applying objective laws of nature fell into disfavor, however, and what observers once believed to be universal, neutral, and objective laws of nature were seen as conventious chosen from among the various ways of describing the world. *See* R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 22-25 (1983); T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970). This critique of natural science methodologies has had far-reaching implications for human and social sciences such as philosophy and law, not the least of which has been the development of different ways of knowing the world that compete with the formerly privileged scientific narratives.

Hermeneutics is one method that deprivileges the methodologies of natural science and contends that there are different ways of knowing the world. The hermeneutics of Martin Heidegger, for instance, turned on its head the philosophical tradition initiated by Descartes and enshrined by Kant. "Being" is not just "understanding," claimed Heidegger, understanding also is being. Thus, our understanding of the world can never fully escape our context, the historicity of our being in the world. That is, we are *thrown* into a world that shapes and preconditions our understanding of that world. Therefore, the classical dichotomies between subject and object, reason and value, the interpreter and the text are illusory and misleading. The interpreter's understanding of the text always is preconditioned by the preunderstandings she brings to the interpretive act. *See* M. HEIDEGGER, BEING AND TIME 32-33 (J. Macquarrie & E. Robinson trans. 1962). As one scholar of hermeneutics has put it:

> [A] fundamental hermeneutical tenet is that there is no such thing as the "text-in-itself," independent of any particular reading or interpretation. As a result, hermeneutics does not have the same problem as epistemology with the question whether there are mind-independent "things-in-themselves." A text only comes to be in a reading, that is, in an act of understanding and interpretation.

Hoy, Interpreting the Law, *supra* note 35, at 143.

The various hermeneutical theories of Hans-Georg Gadamer, Jacques Derrida, and Paul de Man drawn upon in this Essay have evolved from these basic insights into the way we understand and interpret the world. For a general discussion, see Weisberg, *Text Into Theory: A Literary Approach to the Constitution,* 22 GA. L. REV. 939 (1986).

37. The interpretivist/noninterpretivists dichotomy can be traced to the work of John Hart Ely in J. ELY, DEMOCRACY AND DISTRUST 1 (1980) ("[W]e are likely to call the contending sides 'interpretivism' and 'noninterpretivism' . . . .").

For an example of the deconstructionist approach that stands outside this formal debate and critiques the assumptious of each, see S. FISH, IS THERE A TEXT IN THIS CLASS? 338-55 (1980) ("Strictly speaking, 'getting back-to-the-text' is not a move one can perform, because the text one gets back to will be the text demanded by some other interpretation and that interpretation will be presiding over its production."). *See also* Levinson, *Law as Literature,* 60 TEX. L. REV. 373, 380 (1982).

than kind.[38] By illustrating the strengths and weaknesses of each hermeneutical approach, I argue that each contains probing insights as well as profound blindnesses. Taken together, however, they provide a partial solution to the Madisonian dilemma and promise to deal more effectively with one of the perennial problems of our history—the race and class-based domination of African Americans.

A. *Interpretivists*

Interpretivists contend that the Coustitution is law and that hermeneutical theories, such as intentionalism and original understanding, discover rather than create the meaning of constitutional provisions.[39] The intentionalist branch of interpretivism requires that interpreters be faithful to the intent of the authors of the constitutional provision in question.[40] Intentionalists see no reason why we should accept the intent of the drafters of a statute, contract, or will as binding and not respect the intent of the constitutional framers as controlling as well. Intentionalists argue, therefore, that fidelity to the Framers' intentions must be central to the meaning of law. Democracy would be threatened if judges customarily ignored the manifest intentions of parties and imposed their own system of values[41] on the instruments they interpreted. If interpre-

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38. Ronald Dworkin has argued, for instance, that:

> [A]ny recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document, and also aims to integrate the Constitution into our constitutional and legal practice as a whole. . . . So the thesis that a useful distinction can be made between theories that insist on and those that reject interpretation . . . is more confusing than helpful.

Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 472 (1981).

39. The belief that a text will yield its inherent and objective truth through application of a quasi-scientific hermeneutical method of inquiry has been forcefully critiqued in H.-G. GADAMER, TRUTH AND METHOD 173-242 (J. Weinsheimer & D. Marshall trans. 2d rev. ed. 1989).

40. Literary theorists like Emilio Betti and E.D. Hirsch have argued that authorial intent is the only objectively verifiable measure of a text's meaning. Any other measure of meaning mires the interpreter in the muck of relativism and subjectivism that immobilizes any attempt to reach a common understanding of the text. *See* E. BETTI, DIE HERMENEUTIK ALS ALLGEMEINE METHODIK DER GEISTESWISSENSCHAFTEN 43-46 (1962); E.D. HIRSCH, THE AIMS OF INTERPRETATION (1976); E.D. HIRSCH, VALIDITY IN INTERPRETATION (1967). *See also* Knapp & Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982); Knapp & Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 CRITICAL INQUIRY 49 (1987).

41. "Intentionalism" amounts to the contention that interpretation can be saved from the Heideggerian fate of being "dissolved" into the text, *see supra* note 36, by reference to the intent of the authors. Emilio Betti and E.D. Hirsch, in developing an intentionalist approach, distinguish among three operations of interpretation. The cognitive act of understanding a text's meaning by reference to the author's intent is distinguishable from the normative interpretation of a text's significance, which in turn is distinguishable from the practical application of that significance to a specific situation. It is the first of these operations that gives interpretation its objectivity and saves hermeneutics from the criticisms of relativism and subjectivism. *See* Hoy, *Interpreting the Law*, *supra* note 35, at 137.

tation depended on the subjective values of interpreters, there would be no certainty or continuity in interpretation.

Although Bork is an interpretivist, he seeks to avoid the label of crass intentionalist.[42] He contends that original understanding does not speak to the subjective psychological intent of the Framers of the Constitution, but rather to "what the public of that time would have understood the words to mean."[43] The question is whether, given this distinction, his theory of interpretation is any less a creation of constitutional meaning.

It is important to observe that Bork's clarification of his position was undoubtedly prompted by the prolific criticism of intentionalism as an untenable judicial philosophy.[44] If the subjective intent of the Framers provides the standard of objectivity, the impracticality is clear. The open-endedness of such an inquiry permits interpreters to read their personal values into the provision by positing what is in most instances an unknowable, subjective intent.[45] First, what people say and what they intend to say are often different.[46] Second, they may intend several

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This three-tiered approach bears a close resemblance to Bork's hermeneutics, which seeks to neutrally derive, define, and apply principles of law. However, whereas Betti may tie authorial intent to subjective psychological meaning, Bork depends on textual meaning discerned by reference to the public understandings of the time. This meaning in some circumstances may be the same as the subjective psychological intent of the author (p. 144).

42. Bork follows Professor Henry Monaghan of Columbia, who has written that "the relevant inquiry must focus on the *public* understanding of the language when the Constitution was developed." Monaghan, *Stare Decisis and Constitutional Adjudication,* 88 COLUM. L. REV. 723, 725 (1988).

43. P. 144. Bork explains this revision in his theory in some detail. The argument bears repeating in full:

> Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what 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 a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything. [p. 144]

44. *See* Bennett, *Objectivity in Constitutional Law,* 132 U. PA. L. REV. 445 (1984); Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204 (1980); Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985).

45. *But see* McIntosh, *supra* note 35, at 1 (defending intentionalism against many of the arguments presented here).

46. *But see* R. POSNER, LAW AND LITERATURE 211-14 (1988). Posner discusses orthodox language theory and its assertion that our ability to convey certain concepts through the medium of language is an imperfect one. The relationship between the signified (the concept the speaker or writer has in mind) and the signifier (the language used to convey that concept) is not a fixed one. The signifier lacks universality (does not mean the same thing in different societies and at different times) and is overdetermined (contains more information than is necessary for communicating the concept). This "noise" within the communication channel illustrates the problem with intentional-

things simultaneously.[47] Third, even if they say what they intend, and intend only one thing, application of that intent in a different context may be impractical and necessitate that the interpreter adjust the intent to changed circumstances.[48] If any or all of these assertions is true, then the interpreter cannot extract an intent untainted by her values and subjectivities. Any act of looking to the past is thoroughly infected with present concerns, predispositions, and values.[49]

Even if the interpreter clears the hurdle of discerning a specific intent, it is unlikely that there will be only one specific intent. The question is whose intent should control: the drafters, the Congressmen voting for the measure, the ratifiers in the various states, or the opponents of the provision who may have influenced its proponents at various levels of deliberation and passage are all possibilities. Assuming that the interpreter could extract a sufficiently specific intent and we agree that it should control our contemporary decisions, at what level of abstraction should we interpret and apply that intention? Are we, for instance, concerned with "the framers' view of equality generally or in their view of racial segregation in the schools?"[50] The issue of the level of generality is crucial, as Bork himself realizes (p. 148). In fact, the shape of the question frequently determines the shape of the answer.[51]

Bork attempts to answer the generality question by shifting from an impractical subjectivism to a feigned socio-historical objectivism that looks to "what the public of that time would have understood the words to mean" (p. 144). This answer is intended to rebuff the criticism that the search for subjective intent requires the reader to read his subjective values into words that the intentionalist claims have definite and knowa-

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ism. Intentionalism assumes more of a connection between that which is signified and the language used to signify it than can plausibly exist: It assumes a fixed relation between the signifier and signified such that one can arrive at a determinate account of the signified by analyzing the signifier.

47. *See* Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 624-25 (1990) (discussing the indeterminate nature of authorial intent; an author may possess different levels of intent: a specific intent as applied to a particular case; a general intent as to the principles underlying the text; and a meta-intent of which the author may not be aware).

48. Indeed, Bork recognizes this when he writes:

> When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges and certainly no office for a philosophy of judging—if the boundaries of every constitutional provision were self-evident. They are not. It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application. [pp. 167-68]

49. *See* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784-85 (1983).

50. G. STONE, *supra* note 32, at 693.

51. *See* Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1371-75 (1984).

ble meaning. But Bork's move is subject to similar questions: Who is the relevant public? Do we include in our inquiries members of the "public" who are largely excluded from and/or subordinated within the social structure (Native Americans, women, white males who did not hold property and were not permitted to vote, disenfranchised citizens of the Confederacy, and those of African descent)?

Even if one narrowly limited the relevant public to those involved in the ratification, would the members of the group have a universal conception of the meaning of the provision in question? Finally, even if most individuals agreed to the meaning of equality at some level of abstraction, would there be any consensus at various levels of concreteness that would limit the judge's discretion in the way Bork envisions? In other words, it seems doubtful that the level of abstraction required to demonstrate unanimity of understanding would provide practical guidance to judges on specific questions, such as whether the fourteenth amendment value of equality is consistent with permitting a white student's challenge to a public institution's affirmative action program.[52]

Bork defines the relevant public by informing us that "[t]he original understanding is . . . manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, [and] dictionaries in use at the time . . . " (p. 144). Because those who participated in and controlled these institutions and events were predominantly elite white males, Bork's supposedly neutral judicial philosophy becomes a proxy for the reproduction of a universe that privileged the narrative and interests of an elite group. But this does not concern him. Indeed, Bork derides those who believe his conclusion preposterous, and claims that "[a]lmost no one would deny this [that the sources of original understanding must be as he describes them] . . . in fact almost everyone would find it obvious to the point of thinking it fatuous to state the matter . . ." (p. 144). Many theorists have not found this so obvious, however. Consider the following criticism:

> Interpretivism . . . [is] designed to remedy a central problem of liberal theory by constraining the judiciary sufficiently to prevent judicial tyranny. . . . [It] attempts to implement the rule of law by assuming that

52. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In the *Bakke* case, the Court reached no consensus on the ability of the University of California to use affirmative action to increase the number of minorities in its medical school. Justice Powell wrote the plurality opinion, which was joined in parts I & V-C by Justices Brennan, White, Marshall, and Blackmun. Justices Marshall and Blackmun joined part II; Justice White joined part III-C. Justice Stevens wrote an opinion concurring in part and dissenting in part, which was joined by Justices Burger, Stewart, and Rehnquist. *See also* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091-92 (1981) (discussing Bork's choices on the level of generality to use in articulating constitutional principles and the inherent non-neutrality of such choices).

> the meanings of words and rules are stable over extended periods. . . . [But in] imaginatively entering the world of the past, we not only reconstruct it, but . . . we also creatively construct it. For such creativity is the only way to bridge the gaps between that world and ours.[53]

Bork's search for an original understanding must unavoidably incorporate his own understanding, which thereby calls into question any reading thought to rest definitively on an objective historical meaning.

B. *Noninterpretivists*

Noninterpretivists, like interpretivists, are not a monolithic group.[54] Generally, however, they contend that the Framers' intent is not binding, even if interpreters can accurately discern that intent.[55] More fundamentally, in the process of interpretation, interpretivists necessarily create meaning that is independent of the Framers' intent—no matter how the notion of "intent" is understood.[56] As a theory of understanding and interpreting the Constitution, original understanding thus creates—rather than discovers—constitutional meaning in two ways. First, it permits the judge to make a host of value choices in his examination of "what the public of that time would have understood the words to mean" (p. 144). Second, it articulates a standard and permits judges to determine when that standard should and should not apply. This leads to the argument of over- and underinclusiveness, the necessary play in the joints, that was discussed in the previous Part.[57]

Although noninterpretivists believe that interpretivism, when stripped of its pretensions of neutrality and objectivity, is noninterpretivism as well, they share with the interpretivists the belief that the Constitution has authoritative meaning. Because the process of interpretation is necessarily a process that gives meaning to the word, judges, and scholars should explicitly acknowledge the nature of the values that inform meaning and explore their implications for the role of judges. Indeed, it is often paradoxically contended that this conception of the judicial role

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53. Tushnet, *supra* note 49, at 784-85, 800.

54. For a brief synopsis of noninterpretive approaches that draw on natural law, moral philosophy, tradition, consensus, and representation-reinforcement, see G. STONE, *supra* note 32, at 694.

55. There are important exceptions even to this statement, however. Michael Perry, for instance, defends originalism as a theory of interpretation, but argues that his noninterpretivist view simply is a better theory. According to Perry, constitutional provisions often contain an aspirational meaning in addition to their original meaning. Original meaning should control when there is no aspirational meaning or when there is such a meaning, but it does not prohibit the legislative act in question. But when an aspirational meaning is present and relevant, the judge should apply it. Because fundamental aspirational meanings are so highly indeterminate, in the final assessment, "the judge should rely on *her own beliefs* as to what the aspiration requires." M. PERRY, MORALITY, POLITICS, AND LAW 149 (1988).

56. *See supra* text accompanying note 53.

57. *See supra* text accompanying notes 15-34.

conforms more closely to the Framers' intentions. That is, they argue that the Framers understood the relationship between words and meaning, that abstract terms were susceptible to varying interpretations that permit society to adapt to changing social contexts. Madison's hermeneutic theory is most vividly expressed in *The Federalist* No. 37:

> The use of words is to express ideas. Perspicuity therefore requires, not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas. Heuce it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be conceived, the definition of them may be rendered inaccurate, by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.[58]

If Madison understood that words exist without a fixed meaning, the argument follows that those who interpret in the name of fidelity to his intent or the original understanding of his time should also factor the inadequacy of language into their analyses.

Interpretivism's claim of neutrality is predicated on the contention that judges apply the law in accordance with values that are not their own, but rather those of the Framers or the public at the time of ratification. Noninterpretivists claim that interpreters are equally neutral when they derive and apply values from sources other than their own subjective preferences. The argument against noninterpretivism—that in looking to other sources to elucidate the meaning of the Constitution, it necessarily encourages judges to read their own values into the Constitution—loses force because the play in the joints of interpretivism permits similar abuse. Ultimately we must depend, under either model, on the integrity, intellectual honesty, and practical reasoning of those who are the guardians of our rights.[59]

Noninterpretivists use theories about tradition, consensus, representation-reinforcement, and moral philosophy to determine their values, link those values to the Constitution, and attempt to demonstrate how

58. THE FEDERALIST No. 37, at 229 (J. Madison) (C. Rossiter ed. 1961).

59. *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (discussing the possibilities of bounded interpretation).

their theories can guide judges in decisionmaking.[60] In the words of one noninterpretivist, Michael Perry,

> [N]oninterpretive review [serves] an important, even indispensable, function. It [enables] us, as a people, to keep faith with . . . [our commitment] to struggle incessantly to see beyond, and then to live beyond, the imperfections of whatever happens at the moment to be the established moral conventions. . . . [It] enables us to take seriously . . . the possibility that there are right answers to political-moral problems.[61]

In contrast, from Bork's perspective, the important question is whether the noninterpretivist's appropriation of values from various sources opens the door to judicial tyranny. Should we be comfortable with the noninterpretivist reconciliation of the Madisonian dilemma? Although the judicial philosophy of original understanding may allow considerable discretion, might it not be preferable to a more open-ended noninterpretivist hermeneutics? Consider the limits to judicial discretion articulated by one noninterpretivist:

> As we confront the multiple language-meanings permitted by many of the open-textured provisions of the Constitution, the only apparent standard we can bring to bear in evaluating competing arguments for one or another interpretative methodology . . . is the extent to which they promote a good and just society
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> . . . .
>
> . . . I want to claim that the source or basis of our Constitution's authority is in what might be described either as a shared moral consciousness or identity, or as a deeply-layered and shared consensual attitude toward certain stories about and norms of political morality that are understood by a sizable number of our people as representational of the value and importance of the Constitution.[62]

Interpretivists claim that the text of the Constitution provides the necessary boundaries to judicial discretion. Noninterpretivists claim that judges must go beyond this limited source and look to moral philosophy, tradition, and consensus to find the proper limits. Both groups, however, claim that these limits can be found. Both groups are also vulnerable to the powerful accusations of indeterminacy leveled by the deconstructionists.

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60. *See, e.g.*, Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 985, 1040-41 (1979); Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 425 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 284 (1973). For a discussion of representation reinforcement as a theory of constitutional interpretation and a critique of tradition and consensus theories, see J. ELY, *supra* note 37, at 1-11.

61. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 101-02 (1982).

62. Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 613-15 (1985).

C. *Deconstructionists*

Deconstructionists, standing outside the formal hermeneutic debate, contend that both interpretivism and noninterpretivism erroneously assume that the Constitution has objective and neutral meaning. Interpretivists claim that meaning is ascertained by reference to the intent of the Framers or the original understanding at the time of ratification. Noninterpretivists claim that meaning is ascertained by reference to sources extraneous to—but consistent with—the Constitution. These sources fill in the gaps intentionally created by the Framers. Both approaches resonate with assumptions of objectivity and neutrality, thereby leading to the conclusion that the Constitution is authoritative and binding.

Deconstructionists argue that this appearance of neutrality and objectivity in "discovering" the law is illusory. The outside theories used by noninterpretivists are no more determinative of the interpretive process than the ambiguities in the constitutional text. Thus, the dichotomy between interpretivism and noninterpretivism is illusory as well. As one deconstructionist put it:

> [W]hile there are always mechanisms for ruling out readings, their source is not the text but the presently recognized interpretive strategies for producing the text. . . . Strictly speaking, getting "back-to-the-text" is not a move one can perform, because the text one gets back to will be the text demanded by some other interpretation and that interpretation will be presiding over its production.[63]

Every interpretative act *produces* meaning. The text is susceptible to multiple interpretations and need not be seen as requiring any one determinative outcome. This is no less true of those constitutional clauses whose meaning seems unequivocal, the "hard case" for the deconstructionist. For instance, the Constitution states that "[n]o person . . . shall be eligible to the office of President . . . who shall not have attained to the Age of thirty five Years . . . ."[64] Some deconstructionists have argued that the interpretation of this clause is still a matter of producing, rather than discovering meaning. That is, the clause can be read to mean that no person shall be eligible to attain the office who does not have the "maturity" of a thirty-five year old.[65]

The deconstructionist argues that the meaning of the clause is not fixed even when the intent is determined. In other words, Bork's as-

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63. S. FISH, *supra* note 37, at 347, 354.

64. U.S. CONST. art. II, § 1, cl. 5.

65. *See* Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1174 (1985); Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686-88 (1985).

sumption that we know that those who drafted the clause intended the more "objective" numerical measure of thirty-five years, rather than the more intangible measure of "maturity" is not dispositive of the problem. The deconstructionist's argument is that the "maturity" interpretation would not be incompatible with the constellation of words that comprise this section of the Constitution. The words themselves, contrary to what Bork posits, have no fixed meaning that we might decipher by appealing to the common or original understanding of that day. There is always a gap between the words we choose to signify our concepts and the concepts signified by our words.[66]

As Madison realized, something is always lost in the translation of concepts to language.[67] There are far too few words to express the multiple variations of any given concept.[68] By necessity, we attempt to find words that best express the range of any given concept—a linguistic common denominator. Thus, the language signifier "thirty-five years," it might be argued, became a shorthand for the Framers' concerns that the weight and responsibility of such an important office could only be shouldered by those emotionally and psychologically equipped to handle its demands. In other words, looking at those individuals likely to aspire to be President during that day, the Framers thought that by the age of thirty-five, such men would have the requisite degree of education, experience, and maturity to handle the job.

Examining those individuals who might reasonably aspire to the office today, we might believe that changes in education, work experience, and the increased complexity of the office in a modern, industrial-welfare society have widened the gulf between numerical age and capacity as the Framers knew it. Perhaps the maturity of a thirty-five year old in 1789 who might aspire to the office is the functional equivalent of a forty-five year old who might aspire to that position today.

By discussing what I see as the "hard case" for the deconstructionist, I have attempted to illustrate the pervasive nature of the critique. Not even those clauses that seem to defy conflicting interpretation allow interpreters to believe that their results are somehow mandated rather

66. *See* Tushnet, *supra* note 65.

67. *See supra* text accompanying note 58.

68. We all have had the experience of writing something and having it quoted back to us with an interpretation that we had not previously considered but that we, nevertheless, recognized as consistent with the concepts we were attempting to convey. More unhappily, perhaps, we have experienced those words being quoted back to us with an interpretation we believed to be inconsistent with what we were thinking, but which on the face of the words themselves we had to concede was plausible. Because we were present to correct the interpretation, the problem did not appear to be overly troubling. It is quite troubling, however, when, as in constitutional interpretation, those whose concepts are conveyed through the medium of language cannot similarly be consulted.

than chosen. If the above argument regarding the hard case is in any way convincing, it obviates the need to demonstrate that the far more ambiguous language of the fourteenth amendment also is susceptible to multiple interpretations, all of which involve the production rather than the discovery of meaning. Indeed, we have explored much of this already with regard to Bork's rationalization of *Brown*. Notwithstanding important insights provided by the deconstructionist's critique, however, weaknesses abound in this approach.

First, the linguistic possibility of multiple interpretations does not rule out the possibility that some interpretations are more sensible than others. One critic of deconstruction has observed that:

> [D]econstruction exaggerates the theory of interpretation .... [F]rom its destruction of the ideal of determining from the author's intention the one and only appropriate reading of the text, it tends to conclude too quickly that the text could mean anything to any number of different readers. This inference is mistaken, however, since from the fact that any particular context for making sense of a text can be called into question it does not follow that no context is reasonable or justifiable. Deconstruction infers from the collapse of the ideal of absolute justification that no justification is possible.[69]

For instance, concerning the constitutional stipulation on the age of those who may seek the office of President, Judge Richard Posner has argued that "[t]o read the provision [as the deconstructionists would] is to take the words of the Constitution . . . out of their context. And words have meaning only by virtue of context."[70] According to Posner, the political and cultural context of the age thirty-five stricture includes

> a desire to establish orderly means of succession of officials, a practice of recording birth dates, and frequent use by lawmakers of arbitrary deadlines (as in statutes of limitations and in the age of majority)—makes it apparent that the framers of the Constitution wanted to lay down a flat rule as to age of eligibility, so that everyone would know in advance of the election whether the candidates were eligible. It would be absurd if, after the election of a 40-year old as President of the United States, someone (the loser, perhaps) could bring suit to void the election by showing that the winner was less mature than the average 35-year old had been in 1787. . . .[71]

Of course, deconstructionists are not concerned with the practical problems of administration raised by Posner's retort. They merely wish to illustrate the high degree of dissonance, or "noise" that exists between the concepts an author conceives in her mind when she writes provisions

69. Hoy, *Interpreting the Law*, *supra* note 35, at 169.

70. R. POSNER, *supra* note 46, at 219-20 (1988); *see also* J. SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS 80 (1979).

71. R. POSNER, *supra* note 46, at 220.

and the play in the words she chooses to convey those concepts. One cannot depend on context to escape this problem, for the very point of deconstruction is to challenge the notion that *context* is somehow more fixed than the *words* that attempt to express a concept. Thus, the concern for maturity may very well be a part of the relevant context; ignore that possibility and one finds in context what one reads into context. The deconstructionist's argument is designed to force Posner and others who argue in a similar vein to concede that their interpretations, for some set of reasons, lie outside the text itself at a more practical level. Once the interpretation is seen as based on practicality, Posnerian intentionalism is defeated. Practicality is necessarily relative and open to different outcomes when the circumstances that made the interpretation the most practical one change.

Unfortunately, however, the aim of some deconstructionists is not to force either Posner and Bork or their noninterpretivist interlocutors to this point of realization about the nature of interpretation. This brings me to the second problem of deconstruction. Taken to its extreme position, deconstruction defeats every attempt to understand a text, which is the very purpose of hermeneutics. If every text contains an infinite number of meanings, if every context can be refashioned as a merely subjective production of meaning, then there is no ground on which one interpretation may be preferred over another.

> Deconstruction (or "dissemination," as Derrida calls it) goes as far as it can with the thought that the text might be infinitely complex, and allow infinitely many readings. This thought may be well-intended in its desire to insure that the potential complexity of the text is not underestimated, but projecting it as a fundamental principle of understanding and interpretation is philosophical overkill.[72]

Deconstruction can paralyze us and leave us unable to engage in the practical requirements of interpretation.

D. *Reconciliation*

In examining these three approaches, it seems clear to me that there is something worthwhile and misleading about each. Certainly the interpretivists have the better of the argument when they urge that what we know about the intent of the Framers or the original understanding at the time of ratification is not irrelevant to the process of interpretation. They are equally as wrong, however, when they argue that reliance on original understanding is, in some manner, fully determinative of what judges in the 20th century should decide.

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72. Hoy, *Interpreting the Law*, *supra* note 35, at 169.

Certainly noninterpretivists have it right when they argue that certain constitutional provisions were intended to provide judges with the flexibility to adapt to societal changes, and that the search for the original understanding paradoxically might frustrate the Framers' intentions. They are incorrect, however, when they assume that interpretation should divorce itself from what we can know about the concerns that motivated the ratification of various provisions. Constitutional provisions are not simply abstract intellectual propositions. They are often the result of a socially transformative struggle, rare moments of democratic enlightenment in which great strides toward a more just and equitable community are made; judges should not dismiss lightly the context for such insights encapsulated in the constitutional provisions they interpret.

Finally, deconstructionists have it wrong when they claim that the effort to understand and interpret the text is impossible, and when they thoroughly undermine the authoritative nature of the Constitution. Surely they are correct, however, to bring to our attention the profound complexity of the text and the perennially troublesome nature of interpreting it. They are at least partially correct, that is, to contend that when interpretivists and noninterpretivists seek to articulate objective foundations—whether textual or extratextual—for the understandings they draw from abstract constitutional concepts, no such effort can provide a determinative understanding of that clause. If the present is conditioned by the past, then the reconstruction of the past is no less conditioned by our present. Such insights might be seen as a helpful palliative for our propensity to engage in overrationalization. It reminds us that although the Constitution must be interpreted to respond to the exigencies of our changing existence, it is *we* who are responsible for the results of those interpretations, and not 18th and 19th century Framers, contemporary moral philosophers, or legal theorists.

The question of how we begin to reconcile these important insights is a difficult one. When is original understanding important? In what context is reference to extratextual sources enabling? How can we appreciate the full complexity of the text and its interpretation, yet contend that it is in some way binding? This Essay offers only a partial solution to the dilemma of legal hermeneutics. It concerns the thirteenth, fourteenth and fifteenth amendments and the plight of African Americans under the law of the land. I suggest that in this critically important area of constitutional law, the conflict between legal interpretation as the discovery or production of meaning can be solved. Courts can commit themselves to principles of adjudication that respond to the problems raised by the Madisonian dilemma and fulfill the noble aims of adjudicating with justice and mercy.

IV. *BROWN V. BOARD OF EDUCATION*: THE "THIRD CHOICE"

As I have indicated above, Bork, in his effort to distinguish discovery of meaning from the creation of meaning, frequently confuses the two. For instance, he contends that the original understanding of the equal protection clause of the fourteenth amendment is sufficiently clear to validate the result in *Brown*[73] and to invalidate racial quotas.[74] According to him, both of these conclusions are illustrations of neutrally discovering and applying the meaning of the equal protection clause. He argues that the Framers and ratifiers may have thought equality and segregation were consistent, but they simply had it wrong. Given the choice between continued judicial support of the separate but equal doctrine set out in *Plessy*—a doctrine requiring the Court tirelessly to decide whether the state had achieved true equality of segregated facilities and programs—and abandoning the separate but equal doctrine altogether, the Court was bound by the Constitution to choose the second alternative. According to Bork,

> [T]here was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that. Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text. [p. 82]

In summarily rejecting the possibility of a third choice, Bork reads "equality" to mean "color-blind treatment," thereby curtailing the possibility of race-specific remedies.

This cursory conclusion is troubling for a number of reasons. First, Bork concedes that both concepts, segregation and equality, are part of

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73. Bork argues that although the holding in *Brown* is perfectly consistent with the original understanding of the fourteenth amendment, the rationale in that case, which depended on the baleful psychological effects of segregation, cannot be squared with the original understanding of the fourteenth amendment's framers. *See supra* text accompanying notes 16-21. Bork argues:

> The inescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life. . . . *Plessy* had recognized that segregation could have a psychological impact and found it essentially irrelevant. It is difficult to believe that those who ratified the fourteenth amendment and also passed or continued in force segregation laws did not similarly understand the psychological effects of what they did. They didn't care. [pp. 75-76]

74. For Bork's discussion of racial quotas, see pp. 101-10. *See also John McLaughlin's One on One* (PBS television broadcast July 7, 1990) (transcript available from author). In this interview, Bork characterized Metro Broadcasting, Inc. v. FCC, 110 U.S. 2997 (1990)—which upheld racial preferences in FCC policies governing the transfer of broadcast licenses—as "a terrible decision," one that will "introduce all kinds of racial preferences, gender preferences, ethnic preferences to our law, quotas, and I think that is, one, contrary to the Constitution, which as it should be, color blind, and—we thought it was color blind." *Id.* at 5.

the original understanding. If that is so, I hardly see how the Court is warranted, under his theory, in departing from either. That the Court's task in determining whether equality of facilities had been achieved is a difficult and time consuming one should not diminish its constitutional obligation to give the fullest interpretation to both norms if both are constitutionally mandated.

Second, when Bork gives primacy to the concept of equality over segregation, simply because the former actually appears in the constitutional provision, he belies his own interpretive commitment. We already have observed that interpreters must discern the original understanding of such open-ended values as equal protection by reference to a host of factors that expose the absence of any universal and intrinsic meaning. In their search for the original understanding, interpretivists cannot separate equality from segregation as neatly as Bork contends: It might be argued that the meaning of "equality" to many in the 19th century was quite consistent with the institution of Jim Crow. Indeed, this supposed consistency was enshrined in the separate but equal doctrine of *Plessy v. Ferguson*. Thus, the concept of equality depended as much on the concept of "segregation" as this concept assumed a satisfactory degree of equality. Bork contends that the Court had to privilege equality over segregation because "[t]he purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text" (p. 82). But this is a false dichotomy because, on his reading of the history, "equal" was written with "segregation" in mind. When segregation is factored out—as it was in *Brown*—it is *not* compatible with Borkian original understanding.

Thus, to argue that *Brown* was correct to give primacy to the value of equality over segregation is to assume what must be proven, that 19th century Framers and ratifiers understood equality to be incompatible with segregation. By Bork's own admission, however, this is precisely what cannot be shown. Any attempt to separate the two values in order to justify *Brown* departs from the original understanding.

Bork's acknowledgement that segregation was widely practiced at the time of the passage of the fourteenth amendment (p. 75) would seem to lead to the conclusion that the original understanding of equal protection required the Court to uphold *Plessy*'s doctrine of separate but equal. But Bork ignores this conclusion because he wants to vindicate *Brown* under his own theory. In so doing, Bork also ignores the reality of American life, which was *separate* but *unequal*. Separate but truly equal would have been a radical change—one immensely beneficial to African Americans and consistent with original understanding. Bork, in his rush to square an interpretivist position with *Brown*, fails to consider a third

choice: The Court could have required a faithful commitment to separate but equal until the latter led to the erosion of the former.

Even if we assume that Bork's oxymoronic position is correct—that although both equality and separation were part of the original understanding, the Warren Court was justified in subordinating separation to equality—we need not conclude with him that "there was no third choice" available to the *Brown* Court. If the Framers were wrong about the compatibility of segregation and equality, then they also may have been wrong to believe that a color-blind society is even possible without a substantial interim of race-specific relief designed to liberate the descendants of slaves subordinated by race-specific legal and extra-legal activity.

The choice elided by Bork—the third choice—would rule that discrimination on the basis of race, designed to deny equality to African Americans, was incompatible with the equal protection clause. The Court might have reasoned in subsequent cases that race-specific legislation and judicial decrees designed to vindicate the equality of a race made unequal by centuries of pervasive societal racism—through judicial, legislative, executive, and private practices—is a constitutional means of securing the constitutional end of protecting this class of citizens, whose subordination precipitated a civil war and necessitated the creation of the amendment at issue. In other words, the Court might have concluded that the value of equality embraeed by the amendment imposes an *affirmative duty*. It requires a commitment to the equalization of resources and opportunities of the African-American community, resources and opportunities diminished by our society's tragic history of discrimination and racism against, and pervasive subordination of, those of African descent. This is a central, although not exclusive end of the amendment. To embrace this third choice is to argne that the original understanding not only supports *Brown,* as Bork acknowledges, but also supports affirmative action quotas such as those used in *Bakke*[75] and *Croson,*[76] a remedy Bork flatly rejects as inconsistent with his selective reading of the original understanding.[77]

75. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

76. City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1988).

77. One historian has argued that a commitment to the original understanding of the fourteenth amendment would strongly support race-specific affirmative action plans and that "[w]ith one exception, [the] entire body of case law is devoid of any reference to the original intent of the framers of the fourteenth amendment." Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment,* 71 VA. L. REV. 753, 753 (1985) (footnote omitted). Schnapper argues that:

> [T]he legislative history of the fourteenth amendment is not only relevant to but dispositive of the legal dispute over the constitntional standards applicable to race-conscious affirmative action plans. Fronı the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all

Bork rejects this third choice because he has read a definitive meaning into the fourteenth amendment value of equality. He equates "equality" with "color blindness," and, thus, the thought of a *benign* racial classification is intolerably contradictory and has no place in constitutional interpretation. Understanding why Bork equates equality with color blindness is especially puzzling because of his scant discussion of the historical evidence on the original understanding of the amendment.[78]

Bork's attempt to arrive at the meaning of the fourteenth amendment reveals the weakness of his interpretivism. The text and historical evidence are either inconclusive or supportive of multiple interpretations. Thus, on the indeterminacy of the historical evidence one could conclude that Bork's approach depended on his own preferences. Professor Paul Brest critiqued Bork in this way, arguing that the "very adoption of such a principle [as original understanding] . . . demands an arbitrary choice among levels of abstraction"[79] and, therefore, cannot be thought of as neutral. In response, Bork contends that the choice is not arbitrary be-

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blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

Id. at 754.

78. For recent work on the history of the Reconstruction Amendments, see Schnapper, *supra* note 77 (arguing that the historical evidence conclusively demonstrates that the original understanding supports the use of benign race-conscious measures and should not be limited by the color-blind philosophies offered by many); *see also* M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 91 (1986) (concluding that "debates in the Thirty-seventh, Thirty-eighth, and Thirty-ninth Congresses show that Republicans were unhappy with the protection individual liberties had received from the states. Concern for individual liberty together with increased concern for the rights of blacks shaped the Fourteenth Amendment."). *But see* W. NELSON, *supra* note 17, at 8. Nelson raises the fundamental question of how "the Republican Party in 1866, and for that matter the bulk of the Northern electorate, [could] have been committed simultaneously to federal protection of black rights and to preservation of the existing balance of federalism." He contends that "[t]oday the protection of individual rights, typically by the judiciary, appears hopelessly at odds with the free exercise of legislative power, especially by the states." *Id.* Although this conflict may exist when the Court rules a state law unconstitutional, the two aspirations are quite consistent when states design affirmative action programs for blacks. The Court would be upholding black rights and satisfying federalism concerns by deferring to local decision makers. Yet the Court has consistently ruled such plans unconstitutional. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (minority set-aside plan for bidding on city contracts held unconstitutional); Wygant Bd. of Educ. v. Jackson, 476 U.S. 267 (1986) (invalidating program that gave preferential protection against layoffs to minority employees); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (while upholding use of racial preference system, the Court struck down set-aside program as violating equal protection).

79. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091 (1981).

cause judges are obligated to choose the level of generality that "the text and historical evidence warrant" (p. 149). Bork admits that he does not know what the historical evidence shows concerning the fourteenth amendment, yet he confidently adopts a level of abstraction—color blindness—that assumes intimate knowledge of that evidence (pp. 149-50). Bork sees the choice between the levels of abstractions—the race-specific means of black equality and the color-blind means of racial equality—as an *either/or* dilemma. I reeharacterize the choice as a *both/and* possibility that moves us toward a truly integrative jurisprudence. What follows is an outline of how this project might take shape. I will be the first to admit that what I propose is a major undertaking, but a necessary one, nevertheless. It involves a synthesis of the various insights of each approach outlined and critiqued above. It responds to the Madisonian dilemma, at least in the limited area for which I have defined it, as well as any other theory vying for jurisprudential primacy.

V. TOWARD AN INTEGRATIVE JURISPRUDENCE

Although I have provided some criticisms of deconstruction above, it is important to reiterate some of the positive insights this approach provides. First, its penchant for radical indeterminacy of the text constantly reminds us of the extent to which we as interpreters make and remake our world through the symbols and metaphors of law we embrace. Even after constitutional meaning is demystified, stripped of some of the ontological and metaphysical overlay, and exposed as a set of assumptions reflective of certain historical periods, social relations, and perspectives, a pressing question remains: Why should we give continued deference to one set of assumptions over another? When some deeonstructionists conclude, however, that because there are no right and wrong interpretations there are neither better nor worse ones, the entire project of hermeneutics is undermined and nihilism becomes the politics of choice.

Many deconstructionists, however, are neither moral relativists nor philosophical nihilists. The projeet of deconstruction is merely a weapon used in the battle to maneuver or position oneself in the counterhegemomc struggle.[80] Deconstruction is an intellectual sword nsed against the evils of oppression and hierarchy that are empowered by the unexamined political choices that limit our capacity to envision alternative social arrangements. The goal of deeonstruction is to rip the veil of objectivity and neutrality from the law, thereby exposing not ouly the

80. *See* A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 210-76 (Q. Hoare & G. Smith trans. 1971).

foundationless qualities of its contrived epistemological foundations, but also stimulating those lulled into complacency by the promises of neutrality to take control of their destinies as well. Such a project assumes an agenda, however unexpressed or undeveloped it may be.

Part of that agenda is to give voice to the voiceless. It is to contend that interpretation is the process of producing meaning, and that the materials, perspectives, values, and experiences out of which that meaning is produced should not be the exclusive province of a small group of elites. It is to believe, as Robert Cover believed, in the "jurisgenerative" quality of law, that law is narrative and is produced in insular settings throughout society, that the law issuing forth from the decrees of judges is but one narrative or voice given primacy over others through the force and authority of the state.[81] It is to pick up where Cover left off, taking on the awesome task of articulating and developing a jurisprudential framework capable of giving greater expression to suppressed narratives and articulating the conditions under which certain narratives should be subordinated to others. This is a far cry from nihilism; it is consistent with the noblest aspirations of jurisprudential endeavor.

Bork's notion of original understanding continues to frustrate this project by further obfuscating the tasks of jurisprudence and judging. By equating constitutional meaning with "what the public of that time would have understood the words to mean" (p. 144) and extracting that meaning from the plain language of the provisions, convention debates, newspaper articles, and dictionaries of that day, Bork undnly limits his notion of the "public" to elites who debated in conventions, wrote newspaper articles, and compiled dictionaries.

This is troubling for two reasons. First, many of tlie creators of this original understanding, even many Northern Republicans who supported the Reconstruction Amendments, had not themselves overcome tlie racist constructs and values that informed and defined their meaning-generating activities. To pay undue deference to their meaning would universalize and enshrine the very forms of racism and oppression that the Civil War, years of resistance, and a civil rights movement were designed to overcome. As a society, we *hopefully* have moved beyond many of the prejudices and limitations that characterized the thinking of that day. America in tlie 19tli century, however, was not even a formally

81. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative,* 97 HARV. L. REV. 4, 9 (1983) ("A legal tradition is . . . part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it."); *see also* Cover, *Violence and the Word,* 95 YALE L.J. 1601, 1609-18 (discussing limits on the commonality and coherence of meaning that can be achieved by a legal tradition based on the organization of violence).

open and democratic society. Too many voices were excluded and too many minds were shaped by the 19th century's racist context for us to accept definitively and unconditionally its original understanding of amendments that revolutionized our system of government and social relations.

Second, Bork's definition of law as public meaning at the time of ratification is so malleable that the potential for interpretive abuse should be apparent. Whose voice will he hear in convention debates? Which newspapers will he read and whose editorials will most reflect the consensus for which he searches? Whose common sense will count in discerning the plain meaning of the language and which permutation of a dictionary's definition will he endorse? In short, I fear that Bork's approach will continue to silence the voices and narratives of those whose input we should most seek, those for whose immediate benefit the Reconstruction Amendments were proposed—persons of African descent.

By concluding, however, that the fourteenth amendment requires an interpretive commitment to color-blindness, Bork obviates the need for such input. Ours is a constitutional history founded on distinctions of color and race employed to enslave and subordinate people of African descent. Bork's color-blindness inflicts an institutional amnesia, and this painful past of societal discrimination and subordination is conveniently forgotten. The clean slate of color-blindness is offered as a panacea for centuries of black oppression, and the neutrality in which laws are written today is made to appear uncounected to the pervasive state and private racism of yesterday. This approach to constitutional interpretation vindicates the past by ignoring it and denies the possibilities of the present by distorting that as well. As constitutional interpreters we might remedy this institutional amnesia by incorporating the African-American narrative through insights provided by both interpretivists and noninterpretivists.

The major proposition that I argue below is that it is important to have some sense of an amendment's meaning at the time of ratification and the meaning given to it through subsequent interpretation. Past meaning is not important simply because we believe that it is fixed and somehow determinative of what judges should decide; it is important because we are never capable of totally escaping our past and its traditions. Because tradition conditions the understandings we bring to the interpretive project[82] and because these understandings inform our interpretive

82. In developing this argument, I draw on the works of Hans Gadamer, whose hermeneutics principally relies on the interpreter's encounter with tradition:

> [T]he horizon of the past, out of which all human life lives and which exists in the form of tradition, is always in motion. When our historical consciousness transposes itself into

efforts either consciously or subconsciously, confronting the past is a way of controlling it even as it exerts its influence over our interpretations.[83] Thus, it is important to explore how we talk about the past and the substantive ends toward which we direct our knowledge of the past.

Noninterpretivism's most important contribution has been the decentering of positivist methodologies used to discern constitutional meaning. Although noninterpretivists may still see the Constitution as objectively authoritative, they extract that authoritative meaning with a plurality of analytical devices ranging from philosophy and natural law to sociological and phenomenological analysis. The methodological device[84] I prefer to use in talking about constitutional meaning is narrative and, more specifically, experiential narrative.[85]

Experiential narrative encourages a departure from abstract narrative and a move toward a more phenomenological model of judicial decisionmaking.[86] Because the past is a source of understanding the present, it is important that we talk about the past in a way that illuminates its

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> historical horizons, this does not entail passing into alien worlds unconnected in any way with our own; instead, they together constitute the one great horizon that moves from within and that, beyond the frontiers of the present, embraces the historical depths of our self-consciousness.

H.-G. GADAMER, *supra* note 39, at 304.

83. I understand that tradition is generally ambiguous. One can generally find in tradition what one seeks. *See, e.g.*, J. ELY, *supra* note 37, at 60-63 (contending that there is more than one American tradition on the question of affirmative action and that the traditions are sufficiently ambiguous to support conflicting conclusions). One scholar of Gadamer's hermeneutics has explained the role of tradition in his philosophy in methodological rather than normative terms, however. This is the understanding of tradition that I am adopting in this argument.

> The question is why tradition should be valued so highly. Even if our understanding is conditioned by a tradition of interpretation, and even if the ideal of a complete break with past traditions is merely utopian (or dystopian), there may be more point to changing than to restoring tradition. Gadamer's reply depends precisely on recognizing that to talk about change is to presuppose an understanding of the history that has led up to the need for change. This understanding must be assumed to be correct, and thus an element of the call for change will be the willingness to discuss the importance of this history for the present. Furthermore, to call for change is at the same time to have a view about how change is possible. In order for change to be practicable, and to avoid empty utopianism, it must be to some extent consistent with the tradition and the antecedent history out of which it grows.

Hoy, *Interpreting the Law*, *supra* note 35, at 156.

84. *See* J.B. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY 264-75 (1984) (discussing the way in which legal authority is formed via conversational dialogues).

85. For a particularly eloquent example of this narrative form, see D. BELL, AND WE ARE NOT SAVED (1987); Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, (1985). *See generally* Elkins, *On the Emergence of Narrative Jurisprudence: The Humanistic Perspective Finds a New Path*, 9 LEGAL STUD. F. 123 (1985); West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

86. *See* Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

richness and poverty, its problems and possibilities. Experiential narrative requires judges to disclose their value choices[87] and explain their holdings in terms of people, places and times, rather than in vacuous syllogisms abstracted from the realities they purport to govern.[88]

When we query whether the fourteenth amendment permits the state to adopt a particular affirmative action plan, the question can never be posed in an historical or cultural vacuum. We should, therefore, end the pretense that it ever can be decided in one. The process of searching out the meaning of the amendment for this or that affirmative action plan is conditioned by certain preunderstandings. These preunderstandings are a result of our having been thrown into a context of tradition and culture that shapes the lens through which we look to the past for meaning.[89] Thus, even as we search for meaning, we are influenced by the rhetoric of court cases, commentary, and cultural complexities that are themselves mere proxies for the meaning we seek.

But if our look to the past is always conditioned by our changing contexts, are we left adrift upon the uncharted waters of post-modern relativism, in which meaning is contingent on the historical times in which the interpreter lives? Are we left only with subjectivism, in which meaning is contingent on the experiences of interpreters living in the same times or the experiences of the same interpreter living in different times? I think not. But my conclusion is more a presupposition of faith than a proposition of fact. I contend that the past is important because it is a valuable source of narrative, a source of talking about what matters

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87. *See, e.g.*, J. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW 139-91 (1985) (contending that what appear to be factual narratives are also fictional and necessarily express values).

88. As Hoy observes,

> Hermeneutical philosophy does not tell interpreters what to do, but it does imply that an understanding that tries to understand itself (including both its doctrinal and methodological commitments) is better than one that does not. For the issue of judicial review, this point suggests that in the making or appraising of judicial decisions, the theory of judicial review behind those decisions also ought to be made clear.

Hoy, *Interpreting the Law*, *supra* note 35, at 157.

89. One scholar has described the influence of Heidegger on Gadamer's hermeneutics in the following way:

> Gadamer denies that hermeneutics is a "method" and returns to an essential insight about understanding made by early hermeneutics, one retrieved by Martin Heidegger—the historicity of our being-in-the world. We are thrown into a world whose context molds us and limits our imagination and, hence, our options. Our very being is a process of interpreting our past, which is projected onto us and to which we respond. As Gadamer later put it, Heidegger's central lesson is "not in what way being can be understood but in what way understanding *is* being."

Eskridge, *supra* note 47, at 617 (quoting H.-G. Gadamer, *On the Problem of Self-Understanding*, in PHILOSOPHICAL HERMENEUTICS (D. Linge ed. 1976)).

to us in the present.[90] Our encounter with the historical text provides an opportunity to explore the sources and implications of our own preunderstandings and commitments. It is only in such a dialogic encounter with the text and its interpretive traditious that we gain the opportunity to critique and transcend those preunderstandings.[91]

Because the fourteenth amendment accommodates different preunderstandings and narratives, the challenge to judges is to tell us how and when one narrative should be given primacy over others.[92] I argue below that a central narrative of the fourteenth amendment's history and tradition is the protection of those of African descent from the racism and subjugation that has defined and shaped the American ethos.[93] Considering that this narrative competes against other fourteenth amendment narratives for supremacy, the challenge is to articulate those conditions under which the presumption of African-American protection may be rebutted and other narratives may be given primacy. As our society evolves, the central question we must ask is what constitutes sufficient protection of this class of citizens. The deconstructionists are correct in assuming that neither text nor history can provide a definitive answer to this question. The answer is contingent on the ever-chang-

90. For general works on narrative, see ON NARRATIVE (W. Mitchell ed. 1980) (a collection of essays discussing the relationship between narrative and the development of social and psychological structures); P. RICOEUR, TIME AND NARRATIVE (1984); H. WHITE, TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM (1978); H. WHITE, METAHISTORY (1973).

91. Gadamer points out that "[i]n fact the horizon of the present is continually in the process of being formed because we are continually having to test all our prejudices. An important part of this testing occurs in encountering the past and in understanding the tradition from which we come." Interpretation, then, is the fusion of "the old and new" into "something of living value." H.-G. GADAMER, *supra* note 39, at 306.

92. *See* Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 411-12 (1989) (contending that judges are storytellers and, as storytellers, have certain ethical obligations to edify their audience). Ross writes that:

> If I tell a story that I cannot imagine has any purpose, or meaning, or use, and if it has no meaning for you, however true the assertions, perhaps I have violated the central ethical responsibility of the storyteller . . . I believe that Scalia [in *Richmond v. Croson*] ought to have not only invited, but also told narratives. He ought to have revealed more of his perspective and placed himself in the text of his stories. I believe that this is the ethical responsibility of the judge as storyteller.

Id.

93. Charles Lawrence has also discussed this ethos of racism and subjugation:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (footnotes omitted).

ing forms of oppression specific to the historical context in which the question is posed.

Experiential narrative simply commits us to a way of talking about the problem that puts the matter in "real" terms—language that enhances our capacity to feel another's pain and to share another's vision. The noninterpretivist judge must use materials extraneous to the text itself to assess when society has sufficiently mitigated the disparities in power and wealth that limit the life opportunities of African Americans in any given area. Such a determination would warrant greater deference to other narratives beside the standard interpretation of the constitutional text on the assumption that satisfaction of the central purpose of the amendment, the protection of the African-American class, is determined by the relevant sociological data.

Under this approach, general societal discrimination would largely be presumed, given the tragic history of racism and oppression in the American experience. Evidence of statistical disparities would be used by the courts to justify or reject certain remedial measures and to determine when their task was completed. The touchstone for determining the scope of the remedy in these cases would be the disparity between the number of African Americans represented in the area that is the object of concern and the black population in an appropriate target area. These remedies need not, however, be limited to the percentage of "qualified" individuals within the pool of potential members. Such a narrow focus would only reproduce the inequitable allocation of opportunities inaugurated by the racism and oppression under challenge. Creative approaches to waivers and remedies for disparities that cannot be rectified because of real shortages can be developed. If a public or private entity is unable to find bodies to honor the decree, for instance, it might be required to pay damages to a specially organized foundation established for African-American education, training, and recruitment.

Interpretivism's contribution has been to remind us of the importance of this past and its interpretive traditions. Noninterpretivism puts a new gloss on interpretivism's message, providing us with the insight that because we can never escape the influence of those traditions, we might as well face them in the most constructive manner possible. I have suggested that the interpretive methodology of experiential narrative admirably uses both of these insights. My discussion of methodology, however, is inseparable from ideology. Here, I wish to make that ideological component more explicit. That is, just as interpretivism is premised on the assumption that the past plays—and should play—an important role in our search for meaning, I, too, believe that a conversation with the times and traditions of the past is both necessary and valuable.

No war has taken a greater toll on American lives and well being than the Civil War. Ours was a nation divided against itself, not simply over the race question in some abstract sense, but over the question of black subordination. This particular form of subordination divided families, fractured loyalties, intensified sectional rivalries, and brought the country to the brink of disaster. That history should have taught us something about the role of black subordination in our culture, how it divides and configures, and how it rationalizes the subordination of white workers, women, and other minorities who are psychologically compensated for their material subordination by the ideology of white supremacy. As I see it, the aspirational meaning of the constitutional fervor of this era was to eradicate the causes of divisiveness—not race in some abstract sense, but the pervasiveness of black subordination, rationalized by material misallocations of wealth and power, as well as ideological structures of oppression.

Because periods of constitutional amendment exemplify moments of heightened democratic awareness and humanitarian concern, the Supreme Court should not take such moments lightly,[94] even when those moments are distorted in many ways by the undemocratic qualities that have often played a role in American life. These are often moments in which people open themselves to the experiences and sufferings of others, empathize with those whose stories are not their own, and thereby glimpse the possibilities of alternative social arrangements that are less disempowering and oppressive.[95] We might think of the Reconstruction Amendments in this aspirational light.

One important aspiration of these amendments was to confront and challenge those social arrangements predicated on black inferiority and white supremacy that robbed all—white as well as black, men as well as women—of their dignity and human potential. We can fully appreciate this aspirational meaning only by understanding how the American enslavement of, and racism against, African Americans has molded a national identity, trapped many in the air-tight cages of social and spiritual poverty, and clouded the interpretive horizons against which we seek to understand the present in light of the past. Aspirational meaning says

94. *See* Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1020-23, 1046-49 (1984) (describing constitutional politics as the "highest kind of politics," which should prevail during rare periods of heightened political consciousness).

95. Richard Rorty describes empathy or solidarity as something

> to be achieved not by inquiry but by imagination, the imaginative ability to see strange people as fellow sufferers. Solidarity is not discovered by reflection but created. It is created by increasing our sensitivity to the particular details of the pain and humiliation of other, unfamiliar sorts of people.

R. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY at xvi (1989).

something not only about what we were as a nation, but also about what we hope to become.

Interpretivism must remain cognizant of a past and present in which widely-held racist beliefs of black inferiority and white supremacy have been woven into a social fabric of great complexity and intricacy;[96] it must seek to keep one central original insight alive: A nation divided against itself cannot stand and cannot be free until those of African descent are free from the bondage of racism, poverty, and despair—attributes that make blacks America's prized scapegoat for the tragedies visited on all Americans.[97] In other words, interpretivism must acknowledge that no meaning of the fourteenth amendment can detach itself from the realization that throughout America's tragic history of racism, the subjugation of African Americans has justified the subordination of women, workers, and other ethnic groups and permeated the narratives that create (and recreate) our national identity.[98]

This is an originalism, an interpretivism, that springs from the harsh and brutal realities of our Nation's history, rather than from some mystical notion of the Framers' subjective intent or from a reliance on vague references to the "public understanding of the times." When the search for meaning is situated within this interpretive commitment, the willingness to declare some legislative acts unconstitutional and to uphold race-specific remedial classifications may not pose the countermajoritarian difficulty first envisioned.[99] When courts rule some legislative decisions un-

96. *See* G.M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND 44 (1971) (outlining the arguments of proponents of slavery in the 1830s that it was necessary to preserve the South and that blacks were unprepared for freedom); *see also* G.M. FREDRICKSON, THE ARROGANCE OF RACE (1988); W. JORDAN, WHITE OVER BLACK (1968) (tracing the history of attitudes toward blacks from 1550-1812); C.A. Miller, *Constitutional Law and the Rhetoric of Race*, in 5 PERSPECTIVES IN AMERICAN HISTORY 147-200 (D. Fleming & B. Bailyn eds. 1971) (arguing that the language and logic of the Court and the Constitution were used to preserve white dominance).

97. *See* G. MYRDAL, AN AMERICAN DILEMMA 523-34 (1944); D. BELL, RACE, RACISM AND AMERICAN LAW § 1.9, at 30 (2d ed. 1980) (contending that black rights are cyclically and ritualistically extended and sacrificed upon the altars of white political expediency when the self-interest of elite whites so dictate). Bell argues that "[i]n the resolution of racial issues in America, black interests are often sacrificed so that identifiably different groups of whites may settle a dispute and establish or reestablish their relationship." *Id.*

98. *See* G. MYRDAL, *supra* note 97, at 524-25 (prejudice toward African Americans, in effect, creates an exception to the notion that justice must be uniform, this in turn provides a precedent for denying justice to other groups); J.B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 430-501, 858-925 (1973) (discussing the legal use of the language of race and the narrative imagination). For a general account of the role of race relations in the creation of our national identity, see D. BELL, *supra* note 97, at 2-24; K. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956); M. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860, at 44-70 (1981).

99. *See* Ackerman, *supra* note 94. According to Bruce Ackerman,

> When the Court invokes the Constitution, it appeals to legal enactments that were approved by a whole series of majorities— namely the majorities of those representative bod-

constitutional, they merely defer to the higher form of politics embodied in the Constitution over the more temporal form of politics embodied in legislation. And when courts permit race-based affirmative action classifications, they merely encourage government to embrace a central aspirational meaning of the Constitution.

The standard of color-blindness embraced by Bork as the central meaning of the fourteenth amendment is an abstraction divorced from the historical context that led to its creation; Bork's move is thus an explicitly ideological one. My conception of public meaning is an abstraction as well, but, as I have tried to demonstrate, it is one explained in terms of the aspirational insights drawn from the historical contexts of slavery, oppression, and struggles for liberation.[100] Furthermore, I do not claim that this is the *only* meaning of the amendment. I claim only that it is a *central* one to which proper deference should be paid in our interpretation of the amendment's purpose and scope.

My argument is that we should own up to, rather than run away from, one clear and central meaning of the fourteenth amendment—that the amendment's primary purpose was to protect the class of newly-freed slaves. Justice Samuel Miller discussed the meaning and purpose of the Reconstruction Amendments[101] in the *Slaughter-House Cases*:

> [O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppres-

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ies that proposed and ratified the original Constitution and its subsequent amendments. Rather than a countermajoritarian difficulty, the familiar platitude identifies an intertemporal difficulty.

Id. at 1013.

100. *See* Ross, *supra* note 92, at 408 (examining the relationship between ideology and narrative). Ross argues that Scalia and Marshall adopt different forms of storytelling in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), Scalia embracing a narrative of abstractions and syllogistic reasoning and Marshall embracing a narrative of lived experience.

> Thus Scalia and Marshall tell different narratives. Scalia invites the reader to make his abstractions and metaphors concrete and vivid. Marshall tells stories in explicit detail, stories with details not likely to be provided by his audience. The forms of narrative connect to ideology, but the connection is in the complex way expressed by the distinction between narrative invited [Scalia] and narrative told [Marshall]. When Scalia offers the abstract principle of symmetry, the white reader will have little difficulty providing narratives and imaginings that permit him to reject affirmative action. The rejection only appears to occur at a formal level on the field of the cool syllogism; it goes on in the hot and vivid world of the imagining reader.

Ross, *supra* note 92, at 408.

101. Bork contends that judges committed to the judicial philosophy of original understanding should pay "particular respect . . . to precedents set by courts within a few decades of a provision's ratification since the judges of that time presumably had a superior knowledge of the original meaning of the Constitution" (p. 157).

> sions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.[102]

Given what I have characterized as the central meaning of the fourteenth amendment, there should be a rebuttable presumption in favor of legislation and judicial decrees designed to remedy the disparities of wealth, power, and status between white Americans and African Americans. This presumption should hold even when such actions temporarily subordinate other fourteenth amendment narratives, for instance by adversely affecting members of the dominant group through race-specific legislation, constraining the police powers of the state or requiring persistent federal intervention in ways that the fourteenth amendment's concern for federalism might resist.

Under the approach outlined above, benign classifications and quotas intended to promote black equality, to redress a pervasive societal discrimination against and oppression of African Americans, and to move America closer toward the aspiration of a truly color-blind society may be fully consistent with dimensions of the interpretivist's and noninterpretivist's search for meaning. My hope is that students and scholars of constitutional theory and jurisprudence will resist the temptation presented by Bork's rendition of a paradise lost and direct their attention toward developing this integrative jurisprudence in far more detail than is possible given the limited purposes of my Essay.

102. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1872).