JOHN LOCKE, ROBERT BORK, NATURAL RIGHTS AND THE INTERPRETATION OF THE CONSTITUTION

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INTRODUCTION

This article is about the meaning and interpretation of the United States Constitution. Questions of meaning and interpretation arise inevitably with a constitution such as ours, in which the nature of the organization of the government and the relationship between the government and its citizens are set forth in general, compressed, and sometimes vague language. These questions become especially difficult to answer when a person claims a right to act freely and a government claims the power to prohibit or restrict that action.

Many scholars have considered it important, when considering such issues, to focus upon the original intent of the framers of the Constitution, and these scholars inveigh against what they view as an illegitimate and dangerous modern tendency to extend and expand the meaning of the Constitution beyond the framers' original understanding. These "originalist" scholars believe themselves to be rationalistic, tough-minded, responsible and faithful to the basic principles and purposes underlying our nation and its creation, they believe that they alone correctly understand that the function of the judiciary is to interpret and apply the law.

In this article, I consider whether the framers of the Constitution would have taken an "originalist" view in interpreting and applying the Constitution. I will look at the philosophical influences that formed the basis for the climate of opinion in which the framers lived and thought. There is widespread consensus that the writings of the English philosopher John Locke embodied that climate more thoroughly than the writings of any other author.[1] I will rely heavily on the contention that the framers

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[1] Many scholars and historians have noted and discussed the influence of Locke on the views and understanding of the era. *See, e.g.*, ALF MAPP, JR., THOMAS JEFFERSON, A STRANGE CASE OF MISTAKEN IDENTITY (1987). Other works that deal with the thinking of the era and the philosophical influences upon the framers, and the in-

were, in important respects, creating a constitutional structure which reflected and applied Locke's philosophical views, and I will investigate the implications of his writings on the relationship between the rights retained by citizens in a civil society, and the rights of a majoritarian government to limit and restrict those rights.[2]

I will then look at modern "originalism," especially the views of Judge Robert Bork, one of the most influential, and certainly the most conspicuous, of the originalist scholars. His views have been thoroughly set forth, among other places, in his recent book *The Tempting of America*.[3] I will assess Bork's views in the light of

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terpretation of natural rights theory include, among many others, AMERICA IN THEORY (Leslie Berlowitz, et. al eds. 1988); LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988) [hereinafter ORIGINAL INTENT]; GARRY WILLS, INVENTING AMERICA (1979); EDWARD DUMBOLD, THOMAS JEFFERSON AND THE LAW (1978); LEONARD LEVY, JEFFERSON AND CIVIL LIBERTIES (1963); SIDNEY HOOK, THE PARADOXES OF FREEDOM (1962).

[2] Much of the discussion in the secondary sources of Locke's influence pertains to Thomas Jefferson and the Declaration of Independence and the obvious and unmistakable Lockean doctrine and phraseology it contains. But the Declaration of Independence justified the separation of the colonies from Britain, and the formation of a new republic, on the basis of ideas which were current and which were generally accepted. No revolution could be justified effectively by plucking an obscure theory from the writings of a philosopher and then abandoning the theory as soon as the dust settles. On the contrary, the reason that the ideas of the Declaration of Independence were able to sway the thoughts and emotions of the people was precisely that these were ideas which were vividly, fervently and naturally accepted both by the American colonists., and the "civilized" world ("the opinions of mankind") to whom the document was ultimately addressed.

These points are made effectively by the historian Carl Becker. He refers to John Adams's complaint that the ideas of the Declaration were "hackneyed." Becker responds that "[t]his is substantially true; but as a criticism . . . it is wholly irrelevant, since the strength of the Declaration was precisely that it said what everyone was thinking. Nothing could have been more futile than an attempt to justify a revolution on principles which no one had ever heard of before." CARL BECKER, THE DECLARATION OF INDEPENDENCE 25 (1942). And elsewhere, Becker says that "[m]ost Americans had absorbed Locke's works as a kind of political gospel; and the Declaration, in its form, in its phraseology, follows closely certain sentences in Locke's second treatise on government." *Id.* at 27.

[3] BORK, ROBERT H., THE TEMPTING OF AMERICA (1990) [hereinafter TEMPTING]. I will also cite Bork's article, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 3 (1971), *reprinted in* JACK N. RAKOVE, INTERPRETING THE CONSTITUTION, THE DEBATE OVER ORIGINAL INTENT (1990) [hereinafter NEUTRAL PRINCIPLES].

For interesting reviews of *Tempting*, *see* Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 Yale L. J. 1419 (1990); Gerard V. Bradley, *Slaying the Dragon of Politics with the Sword of Law*, 1990 U. of Ill. L. Rev. 234 (1990); Stephen Carter, *Bork Redux, or How the Tempting of America Led People to Rise and Battle for Justice*, 69 Tex. L. Rev. 759 (1990); Anthony E. Cook, *The Tempting and Fall of Original Understanding*, 1990 Duke L. J. 1163 (1990); Ronald Dworkin, *Bork's Jurisprudence*, 57 U. Chi. L. Rev. 657 (1990); Michael J. Gerhardt, *Interpreting Bork*, 75 Cornell L. Rev. 1358 (1990); George Kannar, *Citizenship and Scholarship* , 90 Colum L. Rev. 2017 (1990); Robert F.

my discussion of the framers' views and intellectual attitudes. I will focus on the question of what the framers would have considered to be the correct assumptions about the process of determining what substantive rights were embodied in their Constitution, and what principles of interpretation should guide the resolution of such conflicts.[4] I will then analyze the patterns of constitutional argumentation of two recent cases, *Bowers v. Hardwick*,[5] and *Cruzan v. Commissioner*,[6] and I will use these cases as a springboard towards some tentative suggestions as to principles of constitutional argumentation which courts ought to accept.

My central thesis is that the framers would not and could not have been originalists in Bork's sense, and that the theory of con-

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Nagel, *Meeting the Enemy*, 57 U. Chi. L. Rev. 1057 (1990); Gene R. Nichol, Jr., *Bork's Dilemma*, 76 Va. L. Rev. 337 (1990); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. Rev. 1373 (1990).

Northwestern Law Review published no less than six reviews in a single volume. *See* Mortimer Adler, *Robert Bork: The Lessons to Be Learned*, 84 Nw. U. L. Rev. 1121 (1990); George Anastaplo, *Bork on Bork*, 84 Nw. U. L. Rev. 1142 (1990); Raoul Berger, *Robert Bork's Contribution to Original Intention*, 84 Nw. U. L. Rev. 1167 (1990); Richard S. Kay, *The Bork Nomination and the Defense of the Constitution*, 84 Nw. U. L. Rev. 1190 (1990); Stephen Macedo, *Originalism and the Inescapability of Politics*, 84 Nw. U. L. Rev. 1203 (1990); Suzanna Sherry, *Original Sin*, 84 Nw. U. L. Rev. 1215 (1990).

[4] Many scholars have speculated as to the specific substantive rights which the framers intended to be embodied within their Constitution but the question as to the framers' intentions with respect to their own intentions has received less attention. For two interesting articles addressing this problem, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, The Debate Over Original Intent 117 (Jack N. Rakove ed. 1990); H. Jefferson Powell, *The Original Understanding of Original Intent*, Interpreting the Constitution, The Debate Over Original Intent 53 (Jack N. Rakove ed. 1990).

Professor Powell argues that there was a tension during the era of the framers between a general suspicion towards any form of interpretation, on the one hand, and the established methods of statutory interpretation, as found in the English Common Law, on the other hand. Powell attributes the anti-interpretivist thinking to an "unlikely alliance" between Enlightenment rationalism and British Protestantism. Powell, *supra*, at 54. Powell's ultimate conclusion is that "the claim or assumption that modern intentionalism was the original presupposition of American constitutional discourse . . . is historically mistaken." *Id.* at 88. Professor Lofgren reexamines and comments upon the historical evidence adduced by Professor Powell and argues that we must distinguish between the intent of the framers and the intent of the ratifiers. He concludes that "it is not too much to say that at least some of the founders saw the ratifiers' historical or subjective intent as a check on the constructions which cut loose from the original understandings of the sovereign people." Lofgren, *supra*, at 143. The articles by Professors Powell and Lofgren are discussed in Daniel Farber and Suzanna Sherry, A History of the American Constitution 378-79 (1990).

[5] 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

[6] 110 S. Ct. 2841 (1990).

stitutional interpretation advanced by present-day originalists would have seemed absurd, if not unintelligible, to the framers. One can be an originalist only by thinking very differently from the framers. Only the assumptions and the "climate of opinion" of our present era make originalism at all plausible to us; and the climate of opinion in eighteenth century America, on political, social, and moral issues was very different from our own. Whatever the merits or demerits of the originalists' arguments as to how we should interpret the Constitution, those arguments do not reflect the framers' beliefs and intentions.

It was obvious to the framers that if their Constitution was to provide the legal and philosophical basis for the growth and development of the nation, it had to be applied to specific cases. It was equally obvious that as society evolved, issues and circumstances would arise which were not explicitly resolved by the text of the Constitution, and that some principles of interpretation would necessarily have to be chosen and implemented.

The "originalists"[7] are most concerned to argue against the view that the Constitution may, and indeed must, be interpreted to give effect to certain substantive values underlying its provisions, and that the great strength of the Constitution lies in "the adaptability of its great principles to cope with current problems and current needs."[8] I shall call these anti-originalist thinkers "organicists,"[9] to stress their conviction that the Constitution embodies principles sufficiently flexible to be adaptable to evolving social realities without doing violence to its meaning or spirit.[10]

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7 Bork lists scholars whom he considers to be "originalists" as including Raoul Berger, Michael McConnell, Lino Graglia and Joseph Grano. TEMPTING, *supra* note 3, at 223-24.

8 William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, INTERPRETING THE CONSTITUTION, THE DEBATE OVER ORIGINAL INTENT 23, 27 (1990)(Jack N. Rakove ed. 1990) (speech delivered to the Text and Teaching Symposium at Georgetown University on October 12, 1985).

9 As an illustration of what I am calling "organicist" thinking, see Norman Dorsen, *Rights in Theory, Rights in Practice*, AMERICA IN THEORY (Leslie Berlowitz et. al eds. 1988).

10 Under the heading "Theorists of Liberal Constitutional Revisionism," Bork gives prominent position to Alexander M. Bickel, John Hart Ely, and Laurence Tribe. Theorists he discusses more briefly under this heading include, among others, Frank Michelman, Richard Parker, Paul Brest, Thomas Grey, David A. J. Richards, Ronald Dworkin, Michael Perry, and Sanford Levinson. Bork tendentiously (and inaccurately) characterizes all of these thinkers as ones who "would depart, in varying degrees, from the actual Constitution." TEMPTING, *supra* note 3, at 207.

Originalists accuse organicists of supporting "judicial activism" and "judicial legislation," and they accuse them of endorsing the power of judges to create, rather than interpret the law. Originalists deride organicists for purportedly encouraging judges to substitute their opinions on social policy and morality for the opinions of the democratically elected representatives, contending that the judges, by so doing, exceed their constitutionally mandated powers. Originalists, therefore, believe that their views alone are faithful to the democratic ideals on which this nation was founded, and that organicists are unfaithful to these principles and purposes.

This controversy between originalists and organicists suggests the following two questions: First, in the intellectual and philosophical climate of their day, would the framers have imagined that the substantive rights of an American citizen were to be determined by focusing on the framers' purported "intentions," freeze-framed and fossilized at some moment in time; or, second, would they have assumed that the process of determining these rights would necessarily be a flexible, dynamic process, which would always require the thoughtful attention of people of good will, responding to human experience and social conditions as they evolve?

In addressing these questions, this article will consider the respects in which the framers thought differently from us. The answer, in short, is that the framers seriously accepted the view that human beings possess natural rights which exist as a component of the natural law. The natural law consists of a set of binding prescriptions and proscriptions which exist independently of the will or action of any human being, but which are discoverable by human beings. This idea is extraordinarily difficult for the modern mind to comprehend and take seriously, even though modern writers often formulate the point. Some modern writers, especially some originalists, treat the framers' acceptance of the existence of natural law and natural rights as if it were an amusing, slightly embarrassing quirk, as if the framers had earnestly professed a belief in the existence of leprechauns. These writers treat the framers' belief in natural law and natural rights as something to be acknowledged, tolerated with a smile, and then largely ignored for more "serious" topics which the modern author feels more comfortable discussing. This attitude misunderstands the framers to the greatest possible degree.[11]

[11] For an interesting discussion of the framers' fundamental commitment to the

Implicit in the originalists' attitude towards the eighteenth century's acceptance of natural law and natural right is the notion that this belief is a mere abstract theory which can be analytically separated and detached from a discussion of the concrete principles which the framers intended to embody in the Constitution.[12] Nothing could be further from the truth. A belief in the ideas of natural law and natural rights is inextricably bound up with a fundamentally different view of the ultimate nature of the universe—a fundamentally different set of metaphysical views and presuppositions. And merely understanding these views is not enough; what is necessary is the almost impossible task, to the modern reader, of assimilating, or "sensing from within," what it felt like to think about such concepts as "natural law," and "natural right," under the sway of an utterly different intellectual environment. A review of this way of thinking will help us to understand the framers' intentions, and will also make clear the meaning of certain specific constitutional concepts and provisions, such as the notion of "due process," and the Ninth and Tenth Amendments.

The metaphysical views and presuppositions to which I refer find their purest expression in the works of Aristotle and the medieval Thomist philosophers. As will be shown, these views survive in an explicit and undiluted form in Locke, and were passed on through him to the intellectual climate of opinion that lay at the heart of the ideas the framers embodied in the Constitution. Though these views are no longer in the ascendancy, they retain some modern adherents. The modern tendency, which passes for intellectual sophistication, is to scoff at the notion that there are such things as metaphysical views and presuppositions, and to regard inquiries into such views as sterile and futile. But there are two consequences of this modern arrogance: first, we tend to accept our own metaphysical presuppositions unknowingly and uncritically, and, second, we blissfully misconstrue and misrepresent the meaning and the understanding which earlier thinkers attached to their own statements. Both these hazards are evident in the writings of the originalists. It is a reasonable working assumption that if an examination of the writings of Locke provides us with an understanding of constitutional language that has

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doctrine of natural rights, see Jeff Rosen, *Was the Flag Burning Unconstitutional?*, 100 YALE L. J. 1073, 1075, 1078 (1990).

12 This strategy was illustrated by Supreme Court Justice Clarence Thomas' responses to questions about natural law posed at his confirmation hearings.

proved controversial or difficult to interpret, then we should take very seriously the implications of these writings with respect to the interpretation of that language.[13]

I. THE METAPHYSICS OF NATURAL RIGHTS AND NATURAL LAW

A. Presuppositions

The metaphysical views and presuppositions underlying natural rights and natural law theory may be summarized as first, a teleological conception of the universe; second, a tendency to run together a descriptive and an evaluative sense of the term "nature;" and third, a tendency to run together a descriptive and a prescriptive sense of the term "law." The teleological conception of the universe is the idea that the universe and all particular things in it are organized in terms of some overall purpose. Many thinkers holding this view argue that the idea of an end or purpose implies some higher rational being which imposes, or conceives of, the purpose, and thus they infer the existence of a Deity. Other thinkers reject, or at least do not stress, this inference, and are willing to speak of a "natural" or "rational" order of things in a sense not necessarily implying the existence of a supernatural being who imposes the order or design.[14]

The second presupposition is the tendency to identify with each other the descriptive and evaluative senses of the terms "nature" and "natural." Writing from a twentieth century perspective, one is tempted to call this a tendency to "confuse" the two senses, and to refer to arguments which are based upon this "confusion" as "fallacies."[15] But, for profoundly deep-seated

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[13] Even Bork appears to acknowledge this, or something quite close to it. In the context of discussing the tendency of some moderns to engage in what he regards as wild theorizing about the meaning of the Constitution, he writes: "It turns out, though previously it had never been suspected, that in order to understand the American Constitution ratified in 1787, one must study not John Locke or even James Madison, but a modern German Marxist." TEMPTING, *supra* note 3, at 134. The syntax of this sentence suggests that Bork acknowledges that the study of Locke *is* necessary, or at least relevant to an understanding of the meaning of the Constitution. So this article appears to be an enterprise invited by Bork himself.

[14] *See, e.g.*, SAMUEL PUFENDORF, DE JURAE NATURAE ET GENTIUM (seventeenth century German philosopher), *partially reprinted in* GEORGE C. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 161 (1973).

[15] This tendency survives to the present day. As an illustration of this sort of confusion, consider the argument that because homosexual activity is in some descriptive sense "unnatural," in that it is sexual activity not directed towards procreation, it follows that homosexual activity is an "unnatural act," in the sense of a morally objectionable act. This modern version of the equivocation between a descriptive and a normative sense of the term "natural," now that we do distinguish

reasons, most thinkers before the nineteenth century did not see the terms "natural" and "natural law" as expressing two separate, distinguishable concepts, one descriptive, the other normative. Neither the Aristotelian nor the Platonist tradition distinguished sharply between an ultimate metaphysical truth and an ultimate value. Rather, both traditions saw one integrated, indivisible concept: Ultimate facts about the universe and the ultimate values it contains are one and the same thing.

The third metaphysical assumption to which I refer—again, the modern reader is tempted to refer to this assumption as a "fallacy"—is a tendency to conflate the descriptive and prescriptive senses of the term "law." Scientific "laws," for example the "law" of gravity, describe how objects behave under certain conditions. If an object is thrown off a cliff, it "follows" the law of gravity without choice, and falls.[16] On the other hand, statutory "laws" prescribe behavior. For example, it is the law that you must, in general, come to a full stop when you are driving and encounter a stop sign. Here the question whether to follow the law is a matter of choice and volition. To our minds and our common sense, the difference between these two senses is obvious and unmistakable. Yet throughout much of human history, continuing through the eighteenth century, these senses were not sharply differentiated. A thing simply was required to "follow" the laws essential to its nature whether it was an inanimate object or a human being.

B. Classical Naturalism

With these metaphysical presuppositions having been made explicit, we may set forth a summary of a traditional, Aristotelian, argument for the existence of natural law and natural right. This argument was restated by Locke, and passed into the general understanding of the framers. It is an understatement to say that many volumes, if not libraries, could be written (and have been

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the two senses, *is* merely a logical blunder. Even if there is some narrow descriptive sense in which homosexual activity is "unnatural," no conclusion whatsoever follows about the moral rightness or wrongness of homosexual activity. The conclusion is invalidly reached through the fallacy of equivocation—that is, the fallacy of using the term "natural" in one sense (descriptively) in the premise, and in another sense (normatively) in the conclusion.

[16] This is notwithstanding the experience of a character in a Looney Tunes cartoon who walked safely off a cliff without following the law of gravity, with the explanation that he had never studied law.

written) explicating, objecting to, and tracing the implications of this argument, but it goes, in substance, as follows:

(1) In general, the fundamental nature of a thing is equated with the end or purpose of the thing; the question "What is it?" is identical to the question "What is it for?" In Aristotelian terms, the final cause of a thing (its natural end or purpose) is identical to its formal cause (its "whatness" or "actuality").[17]

(2) Some ends and purposes of a thing are natural, in the sense that when the thing is left to generate and develop in its own, unhindered way, it will follow one path rather than another.[18] Therefore, the highest fulfillment, or the highest "virtue," of which a thing is capable is the complete fulfillment of its natural end or purpose.

(3) Therefore, to understand the nature of human beings, it is necessary to know their highest end and purpose. When one observes human beings, one sees that they are animals who are differentiated from other animals in that their essential, natural function is to be rational. They belong to the genus "animal," and the species "rational."

(4) Rationality is conceived of not as a static set of capacities and experiences, but as an active way of life. To be rational (which is also to be virtuous) is not merely to have certain characteristics, or to be in some state, but rather to act and behave in a certain way.

(5) Given this account of the nature of human beings, the identification of rationality with behavior, and identification of the nature of a thing with its purpose, it follows that the essential nature of a human being is to live according to a set of rational principles.

(6) When one views the world, one observes regularities in its functioning. We observe that everything in the world behaves in certain ways and according to certain laws which determine how each thing is "obliged" to behave as a consequence of its essential nature.

(7) Just as there are natural laws that describe how things are "obliged" to behave, so, by parallel reasoning,

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17 This is not counterintuitive. If you are in a friend's house whose taste runs to modern, abstract objects, you may be unsure whether a particular object is a work of art, or a piece of furniture, and if the latter, what type of furniture it is. To find out what the object is, you must know whether it is for looking at, sitting on, or placing a drink on.

18 Aristotle, too, had difficulty putting this in a non question-begging way. The classic example is the acorn, which "naturally" becomes an oak tree, and only "accidentally," or "adventitiously" becomes squirrel food.

> there are natural laws which determine how a human being is obliged to behave in the manifestation of its essential nature, namely to live according to certain rational principles; and these principles constitute the natural law.

Some modern readers may regard this derivation as a kind of sophistical hocus-pocus. It is not my intent to either affirm or deny the soundness of the argument. It is clear that the argument makes heavy use of the three presuppositions I discussed above. To the modern reader, it also contains an equivocation on the term "obliged" between the statements numbered (6) and (7). But to the framers, this was a familiar and natural way of thinking.

Three implications of this manner of thinking are crucial. First, natural law exists independently of anyone's will or fiat or preference. Second, there is no incongruity in the notion of a law's imposing an obligation without a human sanction imposed for a breach. The notion of an obligation is built into the concept of a law, as shown by the above derivation. It is metaphysically incoherent to speak of a law of nature not imposing an obligation; the obligation imposed by the law simply is an indivisible part of the essential nature of the human beings to whom the law applies. Third, the natural law has substantive content. That is, the specific content of the obligations imposed by the natural law are fixed by the rational nature of human beings; the content is not subject to the opinion or predilection of any person.

II. JOHN LOCKE

A. Introduction

These views of natural law survived clearly in the writings of John Locke. I will look at two separate aspects of Locke's philosophy: his "consent" theory of the basis for political authority, and his "light of nature" theory of natural rights. Locke's political theory is well known and is widely discussed; his doctrine of natural rights is often mentioned superficially, but it is less frequently explained clearly in the context of the history of metaphysical and moral philosophy which form the necessary background to an understanding of the doctrine. Further, it is this doctrine of natural rights, understood through the illumination of its historical antecedents, which most clearly leads to a proper interpretation of certain constitutional provisions and which suggests that the framers could not have imagined that contemporary originalism was a satisfactory principle of constitutional interpretation.

Locke's political theory of governmental authority based upon consent is set forth most clearly and thoroughly in his Second Treatise of Government (Treatise). This is the work of Locke most familiar to modern readers. It does not contain a full-scale derivation of the theory of natural rights; rather Locke postulates the existence of natural rights as a starting point. For the explicit derivation and discussion of the theory of natural rights, one must look to his Essays on the Law of Nature (Essays).

B. Locke's Theory of Natural Law and Natural Rights

Locke's starting point in the Treatise is a theory of intrinsic value based upon the fundamental concepts of a "natural right," and the "law of nature." It is a basic moral and metaphysical truth, for Locke, that all human beings possess natural rights. These rights are given not by any human law giver, but rather they form a part of the rational order of the universe. Locke, following a long philosophical tradition, terms this rational order the "law of nature." To expand these conclusions into a full-fledged theory, Locke must explain first what specific rights are included within the inventory of those naturally possessed by human beings; second, he must give some account of the nature of these rights—what they are and what their status is among the inventory of things which exist in the universe; and, third, Locke must explain the way in which we come to know of the existence of natural rights—the basis for our knowledge and certainty that such rights exist.

1. The Specific Inventory of Natural Rights

Locke addresses the first of these issues, the specific inventory of natural rights, in the Treatise, and the second and third, more philosophical issues, in the Essays. Locke most frequently summarizes the specific natural rights as comprising "life, liberty and property." There is a danger, however, that this formulation will mislead the modern reader.[19] Locke repeatedly stresses the importance of "property" as a natural right, and it is clear that this is the right which he regards as most basic. An oft-encountered criticism of Locke's treatment of the natural right of prop-

[19] A proper understanding of Locke's theory of property will provide insights as to the framers' actual intentions about how the Constitution was intended to regulate economic institutions. As we shall see, this understanding may cast doubt upon the conclusions of some originalists as to the framers' intentions with respect to the purported constitutional guaranteeing of economic rights. *See infra* notes 19-30 and accompanying text.

erty is that he was presenting a crass, politically-motivated justification, in the guise of natural philosophy, for the class interests of the landed gentry. But this criticism is wide of the mark because it misunderstands Locke's use of the term "property." In one usage of the term, Locke did understand "property" to mean "the ownership of wealth," but in its most basic sense, he used the term property to mean essentially "the general set of material conditions necessary for human well-being."[20] Thus, in the earliest formulation of the content of the law of nature in the Treatise, Locke asserts that the "state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his *life, health, liberty, or possessions*. . . ."[21] And shortly thereafter, Locke states that a human being must "preserve the rest of mankind," and must not "take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another."[22] Later in the Treatise, when Locke uses the phrase "life, liberty and property," it is a reasonable conclusion that he uses that phrase as a convenient, shortened form of the broader formulations he first introduced.

At least twice in the Treatise, Locke defines the term "property" as a person's "life, liberty and estates."[23] These quotations, too, show that Locke uses the term "property" to refer not to the crass ownership of physical objects, but to the general conditions necessary for the attainment of human well being and satisfaction. Scholars have speculated as to why Thomas Jefferson substituted the expression "life, liberty and the pursuit of happiness" in the Declaration of Independence for the Lockean phrase "life, liberty and property." The answer is that Jefferson understood the implications of Locke's phrase "life, liberty and property," and substituted another phrase which would more

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20 As Professor Levy put it, Locke used the word "property" not "to denote merely a right to things; he meant a right to rights." ORIGINAL INTENT, *supra* note 1, at 276 n.1. Again, Levy states: "Locke used the word 'property' to mean all that belongs to a person, especially the rights he wished to preserve." *Id.*

21 JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 6 (Bobbs-Merrill ed., The Library of Liberal Arts 1952 (1690))(emphasis added)[hereinafter SECOND TREATISE].

22 *Id.*

23 *See id.* §§ 87, 123 (where Locke speaks of men uniting "for the mutual preservation of their lives, liberties and estates, which I call by the general name Property").

accurately express the intended meaning, and would be less likely to mislead readers.

Nothing could be more mistaken than to suppose that Locke's doctrine of the natural right of property provides a theoretical basis for the acquisition of great wealth, and for a general protection of commercial and economic activity directed towards such acquisition. On the contrary, the natural right to property is strictly limited, in Locke's writings, to the direct products of one's own personal labor, and one's right to acquire is limited to one's personal needs. This is clear first from Locke's articulation, two centuries before Karl Marx, of a labor theory of value, and second, from his theory of "spoilage," or "waste."

It may surprise some people that Locke articulated what the modern reader is likely to identify as a "marxist" labor theory of value, even to the extent of using the marxist metaphor of "mixing" one's labor with a thing:

> [E]very man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature has placed it in, it has by this labor something annexed to it that excludes the common right of other men. For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.[24]

Locke anticipates the objection that this theory endorses a natural right to acquire "as much [property] as he will,"[25] and squarely rejects it. As to how much property we are naturally entitled to, Locke writes: "As much as any one can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in; whatever is beyond this is more than his share and belongs to others."[26] From this general theory of property, Locke goes on to articulate a natural right to property in land as a special case, not as the paradigm of the general theory. Locke explains: "Property in [land], too, is acquired as [in other goods.] As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labor does, as it were, enclose it

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24 *Id.* § 27.
25 *Id.* § 31.
26 *Id.*

from the common."[27] Locke acknowledges that in his "modern" society, things are not quite as simple as his agrarian, labor-intensive model of the creation of value would indicate. He reiterates that in the model society, in which there was an effectively infinite oversupply of natural goods and land for the number of people who demanded them:

> The measure of property nature has well set by the extent of men's labor and the conveniences of life. No man's labor could subdue or appropriate all, nor could his enjoyment consume more than a small part, so that it was impossible for any man, this way, to entrench upon the right of another. . . . This measure did confine every man's possession to a very moderate proportion, and such as he might appropriate to himself without injury to anybody. . . .[28]

Locke then discusses the creation of money, which he defines as "some lasting thing that men might keep without spoiling, and that by mutual consent men would take in exchange for the truly useful but perishable supports of life,"[29] and he acknowledges that the use of money has made possible, by tacit agreement, "disproportionate and unequal possession of the earth."[30] But the *natural* right to property is limited by the labor theory and the concept of spoilage. By positive law, people may agree to an unequal distribution, but the right of each person to his share as defined by the labor theory remains a natural right. Conversely, there is no natural right to anything more than that which is defined by the labor-spoilage theory. This analysis also makes clear why Locke sometimes seems to refer to land as the paradigm of ownership of property. His theory of the natural right of property was derived using for a model a simple society in which land and its cultivation was a necessary basis for the creation of all the other forms of wealth required for human subsistence.

An analysis of Locke's views about property ought to be of interest to those who believe, quite wrongly, that the framers intended a general, unrestricted natural right to acquire property. Anyone who wishes to find such a protection in the Constitution must locate a theoretical basis for it in something other than the climate of opinion of the time as articulated by Locke.

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27 *Id.* § 32.
28 *Id.* § 36.
29 *Id.* § 47.
30 *Id.*

2. The Nature and Status of Natural Rights and Natural Law

With respect to the second question, as to the nature of human rights—their "ontological status," as a philosopher might say—Locke gives an account which is remarkably close to the paradigm Aristotelian argument set forth above. Natural rights are part of the objective nature of things. The "laws of nature" which define and determine natural human rights are as much a part of the universe as the scientific laws which determine the behavior of material objects. The existence and nature of natural rights may be apprehended and understood by human beings, but their existence and nature in no way depends upon the opinion or perception of any human being. Thus, Locke states in the Essays that the existence of the law of nature may be derived from "the very constitution of this world, wherein all things observe a fixed law of their operations and a manner of existence appropriate to their nature."[31] He observes that "it seems just therefore to inquire whether man alone has come into the world altogether exempt from any law applicable to himself. . . ."[32] Locke answers that "it does not seem that man alone is independent of laws while everything else is bound. On the contrary, a manner of acting is prescribed to him that is suitable to his nature. . . ."[33]

Locke quotes Aristotle's statement that "the special function of man is the active exercise of the mind's faculties in accordance with rational principle,"[34] and Locke determines that Aristotle "rightly concludes that the proper function of man is acting in conformity with reason, so much so that man must of necessity perform what reason prescribes."[35] Locke sums up by stating that the law of nature is "the decree of the divine will discernible by the light of nature and indicating what is and what is not in conformity with rational nature, and for this very reason commanding or prohibiting."[36]

Notwithstanding his references to the "divine will," Locke does not argue that we know the natural law through divine reve-

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[31] JOHN LOCKE, ESSAYS ON THE LAW OF NATURE, *reprinted in* GEORGE C. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW, 217, 220 (1973)[hereinafter ESSAYS].

[32] *Id.* at 217-18.

[33] *Id.* at 220.

[34] *Id.* at 219.

[35] *Id.*

[36] *Id.* at 218.

lation, or through any direct activity of a divine being. Rather, he believes: "[W]e do not investigate here what a man can experience who is divinely inspired, or what a man can behold who is illuminated by a light from heaven, but what a man who is endowed with understanding, reason, and sense-perception, can by the help of nature and his own sagacity search out and examine."[37] It is essential to our thinking about the Constitution to understand that these views, which we tend to associate with an earlier period, were held and articulated so explicitly by the thinker who is widely regarded as the single greatest philosophical influence on the framers of the Constitution.[38]

3. The Basis for Our Knowledge of Natural Rights and Natural Law

How do we come to know the truths about natural rights and the natural law? What is the basis for our certainty that some statements about natural rights and natural law are true? These "how do we know" questions—epistemological questions, the philosopher would call them—are especially acute for Locke. Earlier thinkers could resort to solutions such as a "special faculty," or a "moral intuition," distinct from sense experience, which infallibly delivered conclusions as to moral and metaphysical truths. These thinkers could argue that such truths were apprehended directly by reason, or that they were known innately, or inscribed directly upon the human mind with no dependence upon sense experience.

But these solutions were not available to Locke because he was an empiricist. That is, he believed that all knowledge must

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[37] *Id.* at 222.

[38] Becker asserts that while not every eighteenth century American would have accepted this philosophy, Jefferson "phrased it, without qualification, as the 'common sense of the subject'," and that "the underlying preconceptions from which [this natural rights philosophy] is derived, were commonly taken for granted." BECKER, *supra* note 2, at 26. Becker continues:

> That there is a 'natural order' of things in the world, cleverly and expertly designed by God for the guidance of mankind; that the 'laws' of this natural order may be discovered by human reason; that these laws so discovered furnish a reliable and immutable standard for testing the ideas, the conduct, and the institutions of men—these were the accepted premises, the preconceptions, of most eighteenth century thinking, not only in America but also in England and France. They were, as Jefferson says, the 'sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of public right.' "

Id.

ultimately have its source in sense experience, or at least that sense experience must play some part in all claims to factual knowledge. It is difficult to be committed to empiricism, and simultaneously to maintain a theory of natural law and natural rights, because the one thing that seems obvious is that the content of natural law, however we may claim to know it, is not perceived straightforwardly through the external senses. We cannot just look at a situation and perceive natural rights and laws, as we can perceive size, shape, color, and so forth.[39] But it would have been inconsistent with his empiricism for Locke to claim that these truths were directly apprehended by reason, or by a moral faculty, or by intuition, without sense experience forming any part of the ground for our certainty.

Locke's solution to this dilemma is an uneasy compromise, which we may summarize by saying that he believed that truths about natural law and natural rights were known through reason acting upon sense experience. Such truths are not known innately. They are not "dictates of reason," in the sense of being known independently of sense experience.[40]

Nor can the law of nature be known through "tradition," as Locke takes great pains to argue. A mere habitual way of thinking and believing, shared by members of a society and passed on to successive generations, cannot amount to reliable knowledge of the law of nature. There are so many conflicting traditions and ways of thinking among human beings that tradition could not possibly serve as a reliable indicator of the truths about natural law. In Locke's words, there is "so much variety among conflicting traditions it would be impossible to determine what the law of nature is, and it would be difficult to decide completely what is true and what is false, what is law and what is opinion, what is commanded by nature and what by utility, what advice reason gives and what instructions are given by society."[41] Human traditions are relative to time, place, and historical and cultural accident, while this cannot be true, in Locke's view, with respect to the existence and characteristics of natural law.

Locke also offers another argument of a form which later

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39 Locke would be quick to point out that under certain objective conditions or when an observer is in certain subjective circumstances, the observer may also be mistaken or deluded about size, shape, color, and so forth.

40 The law of nature is not "the dictate of reason, since reason does not so much establish and pronounce this of nature as search for it and discover it . . . ." ESSAYS, *supra* note 31, at 218.

41 *Id.* at 223-24.

philosophers have termed "infinite regress."[42] A tradition is, by definition, learned from someone else. If one searches back to the "author of the tradition," one must either go back infinitely far, or one must come to someone who originated the tradition. If we must go back infinitely far, then we will never arrive at the source of our knowledge of the tradition. On the other hand, if we do come to the author of the tradition, then the ultimate source of reliability for the tradition is not tradition itself, but rather the act of knowing by the author of the tradition. This argument shows that tradition cannot, in either instance, be the ultimate basis for our knowledge of the truths of natural law and natural right.

Locke's view is that a human being may know the law of nature not innately, but directly, through the exercise of his own faculties, without the intervention of any other person. As Locke sometimes puts it, the law of nature may be known by the "light of nature."[43] This medieval expression is distracting and misleading to the modern reader, but Locke reassures us that all he means by it is that "there is some sort of truth to the knowledge of which a man can attain by himself and without the help of another, if he makes proper use of the faculties he is endowed with by nature."[44] And the faculties to which Locke refers turn out to be no more mysterious than reason and sense experience.[45] To understand the dictates of nature, a person must engage in careful, painstaking, attentive and sympathetic use of his rational faculties, activated by and acting upon sense experience.

It is important to reiterate how sharply and categorically Locke rejected the "traditionalist" theory. Tradition cannot yield knowledge because of the differences and inconsistencies among various traditions, and the absence of independent criteria to decide which tradition correctly incorporates the law of nature. But an obvious objection to Locke's own theory as to how we discover the existence and content of the law of nature is that it does not provide any ultimate criterion of reliability either. If

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[42] The paradigm of the argument is illustrated by the story of the two philosophers who are discussing how the earth is supported. One argues that it is held by a giant, who is himself supported by standing on the back of a huge elephant. "But how is the elephant supported?" asks the other. "It stands on the back of an even larger turtle." "But how is the turtle supported?" "It stands on an even larger turtle, and you can stop asking, because from here it's turtles all the way down."

[43] ESSAYS, *supra* note 31, at 221.

[44] *Id.* at 222.

[45] This is not to deny that there are many puzzling and mysterious questions to be asked about these faculties.

two people use their rational and sensory faculties as Locke directs, and yet arrive at conflicting conclusions as to the nature and content of natural law and natural rights, it appears that Locke does not give us an independently reliable test to determine which of them is right.

Locke acknowledges that this objection "readily presents itself" and he formulates the objection himself: "[I]f the law of nature becomes known by the light of nature, how does it happen that where all are enlightened there are so many blind, since this inward law is implanted by nature in all men? How does it arise that very many mortals are without knowledge of this law and nearly all think of it differently, a fact that does not seem possible if all men are led to knowledge of it by the light of nature?"[46] Locke answers that this objection would have force against the "innate inscription" theory, but it has none against his own theory, inasmuch as "granted that our mental faculties can lead us to the knowledge of this law, nevertheless it does not follow from this that all men necessarily make proper use of these faculties."[47] Locke describes the proper use of these faculties as follows: "Careful reflection, thought, and attention by the mind is needed, in order that by argument and reasoning one may find a way from perceptible and obvious things into their hidden nature. . . ."[48] The law of nature comprises truths which are "hidden like the treasures of the earth, and in order to find them," people "have to equip themselves; and it is with great labour that those resources which lie hidden in darkness are to be brought to the light of day. They do not present themselves to idle and listless people, nor indeed to all those who search for them, since we notice some also who are toiling in vain."[49] And why do so many toil in vain? Locke answers:

> [M]ost people are little concerned about their duty; they are guided not so much by reason as either by the example of others, or by traditional customs and the fashion of the country, or finally by the authority of those whom they consider good and wise. . . . It does not therefore follow that the law of nature cannot be known by the light of nature because there are only few who, neither corrupted by vice nor carelessly indifferent, make a proper use of that light.[50]

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46 *Id.* at 225.
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*, at 226.

But the same questions remain. What if two people follow all Locke's rules and still arrive at conflicting results? That is, they both engage in careful reflection and thought, equip themselves, are not idle or listless, and so forth, and yet still disagree. How do we know which one is right? Presumably one of them is "corrupted by vice" or "carelessly indifferent," but how do we know which is which? One modern reaction, shared by Bork and the originalists, and by others who are not originalists, is that no response is possible. Questions as to ultimate laws, rights, and values, simply have no answer, at least in any sense implying any demonstrable objective validity. To this way of thinking, conclusions with respect to such matters amount to nothing more than expressions of individual preference, predilection or prejudice. I will defer further consideration of this disagreement between Locke and the modern "originalists" until we have looked at the political philosophy that Locke developed based upon the starting point of the theory of natural rights.

C. Locke's Political Theory

Because the rights and freedom of human beings are ultimate values, and because the creation of a system of laws necessarily involves curtailment of these rights and restrictions on human freedom, Locke must explain the basis for legitimate political and legal authority. He finds the only possible basis for such authority in the consent of people, and the delegation of their natural rights, in what amounts to a trusteeship arrangement, to the government. Specifically, Locke states: "Men being . . . by nature free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent."[51] Thus, according to Locke, "that which begins and actually constitutes any political society, is nothing but the consent of any number of freemen capable of a majority, to unite and incorporate in to such a society. And this is that, and that only, which did or could give beginning to any lawful government in the world."[52] Because generally no one gives explicit consent to the authority of government, Locke relies heavily on the doctrine that a person tacitly consents to such authority by "accepting the benefits of ownership of possessions," and by enjoying "any part of the dominions of [a]

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[51] SECOND TREATISE, *supra* note 21, at § 95.

[52] *Id.* § 99.

government."[53]

Human beings possess natural rights whether they live in a civil society or in the "state of nature,"[54] and, furthermore, they possess all the rational and sensory faculties necessary to discern the binding quality of the natural law in either situation. Because human beings are naturally rational (though they possess other, less noble traits as well), the "state of nature" for Locke is not the lawless "war of all against all" which it was for Hobbes.[55] But the state of nature nevertheless has drawbacks and disadvantages that impel people to consent to delegate their natural rights and power to a government to form a civil society. Specifically, Locke discusses three such drawbacks. First, there lacks "an established, settled, known law, received and allowed by common consent to be the standard of right and wrong. . . ."[56] Even though the law of nature is binding and "intelligible to all rational creatures,"[57] because people are sometimes "biassed by their interest, as well as ignorant for want of studying [the natural law],"[58] they sometimes are not willing to allow that this law "bind[s] them in the application of it to their particular cases."[59] Second, "[i]n the state of nature, there wants a known and indifferent judge, with authority to determine all differences according to the established law. . . .";[60] and, third, "there often [lacks] the power to back and support the sentence when right, and give it due execution."[61]

The central issue in interpreting Locke's political theory is

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53 *Id.* § 119. Locke's doctrine of tacit consent has been heavily criticized, but it is unnecessary to the purposes of this Article to discuss these criticisms.

54 The "state of nature" was a concept used by various theorists (e.g., Hobbes and Rousseau), as well as Locke, to describe a (presumably hypothetical, or logically constructed) situation in which human beings live prior to the formation of a civil society. The point of the hypothesis is to make generalizations and observation about human nature, and the nature of the universe. These observations constrain and dictate the kind of civil society, and the kinds of justifications for political authority which the theorist goes on to defend.

55 Thomas Hobbes, writing a half a century before Locke, portrayed a grim state of nature in which human beings are motivated by fear of and irrational competitiveness with each other. The civil society which comes out of Hobbes' state of nature is one in which the people agree to cede all of their natural rights and powers to an all powerful sovereign which is not a party to the agreement at all, and which thereafter is the sole source of rights.

56 SECOND TREATISE, *supra* note 21, at § 124.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* § 125.

61 *Id.* § 126.

the question of the extent to which people, in the pursuit of creating a civil society, renounce and delegate their natural rights and powers to the government. Is the delegation categorical and general, or are there limits and boundaries to the delegation, and if so, what is the nature and source of these limits? On the one hand, Locke writes that "every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact . . . would signify nothing."[62] And when a person enters civil society, the "power . . . 'of doing whatsoever he thought fit for the preservation of himself' and the rest of mankind, he gives up to be regulated by laws made by society."[63]

But because the value which is being protected by the creation of a civil society is the freedom of human beings to exercise their natural rights, a person consents to the delegation of these rights to a government only because civil society allows him to enjoy more fully and comfortably the freedoms to which he is naturally entitled. Locke explains clearly that the consent is granted only for certain specific purposes which limit and circumscribe the permissible bounds of legal and governmental authority. A person delegates his natural rights "to preserve himself, his liberty and property—for no rational creature can be supposed to change his condition with an intention to be worse";[64] and legitimate public power therefore "can never be supposed to extend farther than the common good, but is obliged to secure everyone's property. . . ."[65] And Locke reiterates that the force of law may legitimately be "directed to no other end but the peace, safety, and public good of the people."[66]

Even in the above-quoted passages where Locke sets forth the requirement that natural powers and rights be delegated to form a civil society, Locke immediately adds limiting and qualifying clauses which establish that the delegation is not categorical and unconditional. Thus, where Locke asserts that a person entering civil society undertakes to "submit to the determination of the majority," otherwise the compact would "signify nothing," he goes on to add that the compact would "signify nothing, and be no compact, if he be left free, and *under no other ties than he was*

62 *Id.* § 97.
63 *Id.* § 129.
64 *Id.* § 131.
65 *Id.*
66 *Id.*

in before in the state of nature."[67] Of course, if a person in civil society were under no other ties than before, the compact would signify nothing, but this is far from a statement of unconditional delegation of right and power. And where Locke asserts that where a person undertakes to be "regulated by laws made by society," he adds, "so far . . . as the preservation of himself and society shall require."[68]

In a passage to similar effect, Locke states that a person in civil society "is to part . . . with as much of his natural liberty . . . as the good, prosperity, and safety of the society shall require. . . ."[69] This assertion obviously raises the further question of how much of one's natural liberties does society require a person to part with when fulfilling these ends. The most important conclusion is that the delegation of power and rights by the citizens of a civil society is not general and categorical; one need not pay with all one's natural rights and powers to gain an admission ticket to a civil society. Rather, any governmental assertion of power must be justified by reference to the governmental purposes of achieving the peace and security of the citizens. No doubt the extent of the delegation required to achieve these ends will be considerable. But the presumption is not in favor of governmental authority, but rather, against it.[70] Because natural rights are presumed to have been retained by the people unless a basis for their delegation to the government can be specifically demonstrated, this theory places substantial and general limitations on the power of government. Because the legislative power is exercised, in Locke's political theory, by a democratically elected majority, this limitation is, *ipso facto*, upon the power of the democratically elected majority.

Locke is not at all mysterious or equivocal about the fact that human natural rights and the natural law provide a check upon the powers of a democratically elected legislature. He states flatly that "the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must . . . be conformable to the law of na-

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67 *Id.* § 97 (emphasis added).

68 *Id.* § 129.

69 *Id.*

70 Governmental power is defined as the jurisdiction of a court of limited jurisdiction. Such a court has no general power, but rather only the jurisdiction which is expressly granted to it from the source with the authority to confer jurisdictional power. The presumption is against jurisdiction.

ture. . . ."[71] It is no exaggeration to say that the major task of applied jurisprudence, under this doctrine, is to continually assess and reassess legal restrictions to determine when they exceed the permissible boundaries of tacit consent, and infringe upon substantive natural human rights, which are always, necessarily, retained by the people, and can never be understood to have been bargained away. There are difficulties in working out in a practical context the institutions and mechanisms whereby this assessment and reassessment will be accomplished. I must reiterate that the traditions, conclusions and intentions of the past can never be a valid source for present knowledge of these matters, although these traditional sources can no doubt provide guidelines, suggestions, and rules of thumb. But to claim "tradition" as a binding source for present conclusions as to natural rights and obligations, is, as we have seen, the doctrine which Locke takes greatest pains to refute.

D. The Right of Revolution

An examination of Locke's discussion of revolution reinforces the above conclusions as to the limitations upon the power of government, and the retention of natural rights in a civil society. The people have the right, according to Locke, to revolt and overthrow the government whenever the legislature, or the executive "act contrary to their trust."[72] A legislature acts contrary to its trust "when they endeavour to invade the property of the subject, and to make themselves, or any part of the community, masters, or arbitrary disposers of the lives, liberties, or fortunes of the people.[73]

This passage has profound and far-reaching implications. It establishes a standard of "non-arbitrariness" for all legislative action, and establishes that for a legislature to restrict liberty "arbitrarily," in and of itself amounts to an unauthorized violation of its trust. In other words, this passage establishes a standard by virtue of which legislative encroachments on human liberty and property must be assessed and the standard points to reasonableness and rationality. This standard indicates clearly that the presumption is in favor of human liberty, and it is governmental encroachment which bears the burden of demonstrating rationality.

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71 SECOND TREATISE, *supra* note 21, at § 135.
72 *Id.* § 221.
73 *Id.*

II. BORK AND THE ORIGINALISTS

A. *Introduction: The Concept of Interpretation*

We will now look at the views of the originalists, especially Judge Robert Bork, with respect to constitutional interpretation, in the light of the above discussion of the views and intellectual attitudes of the framers of the Constitution. It is useful first to consider briefly the concept of "interpretation." We are examining the situation where the text of the Constitution does not specifically and unambiguously state whether a claimed individual right or a claimed governmental right to regulate should prevail. Because the Constitution does not explicitly answer the question, we require some process for deciding how these competing claims of right should be resolved and some principles on the basis of which such resolution should be accomplished.

All that we mean here, and all that is generally meant by "constitutional interpretation," is "the principles and process of constitutional adjudication," and it would be well to keep this in mind. Some originalists speak as if there is something shady and unauthorized even about the act of interpreting the Constitution. Merely by interpreting, some originalists believe we threaten to commit the sin of abandoning the text of the document and the intentions of the framers. Such originalists will permit interpretation, but only grudgingly, and only when done in moderation, with great restraint and caution.[74] But it contributes to clear thinking to regard interpretation not as a specific kind of activity, capable of being practiced in different degrees, but merely as the unavoidable process of constitutional adjudication, where competing constitutional considerations arguably point towards different results. If we look at the matter this way, we will not ask useless and unintelligible questions such as: "How far is it permissible to go in interpreting the Constitution?" Rather, we will ask useful and relevant questions such as: "What procedures, principles, policies and values should be adopted in order to resolve competing claims of Constitutional right?"

B. *Originalism Generally*

Originalism is the view that, in interpreting the Constitution, we should be guided by, or, in a more doctrinaire version, bound

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[74] *See, e.g.*, Joseph Graglia, *How the Constitution Disappeared, reprinted in* INTERPRETING THE CONSTITUTION, THE DEBATE OVER ORIGINAL INTENT 35, 41 (Jack N. Rakove ed. 1990).

by, the intentions of the framers of the Constitution. Professor Rakove states: "Taken at face value, the idea of a 'jurisprudence of original intention' simply holds that a judge interpreting the Constitution or a statute should adhere as closely as he can to the expressed ideas and purposes of its framers."[75]

It is unclear what this means, or could possibly mean, and our first task will be to try to discern what the originalists, especially Bork, mean by it.[76] In particular, it is unclear what it means, in practice, to "adhere" to intentions and purposes, and it is unclear how a judge is supposed to perform the necessary task of adherence. Second, it is unclear what is meant by "intentions and purposes."[77] For one thing, we must know on what level of generality we are to understand the expression "intentions and purposes," and we must know whether we are supposed to consider the probability that the framers had a multiplicity of purposes and motivations in much of what they did. Third, we need an account of the procedures we are supposed to use to determine the framers' actual intentions and purposes, and what sort of evidence we are allowed to bring to bear on this question.[78]

In theory, at least, originalism is, or ought to be, result-neutral. It appears to be formulated as a doctrine about how to perform the task of constitutional adjudication, not as a loaded statement as to what the result should be. There is nothing about originalism in principle which suggests that the claim of a governmental right to prohibit or regulate a human action ought, in general, to prevail over the claimed individual right. Presumably, one may fail to fulfill the framers' original intentions by finding a right to regulate where the framers would have found an individual right, just as much as by finding an individual right where the framers would have found a right to regulate. And Bork, for one, insists that the doctrine is result-neutral in this way.

But the plain motivation of most theorists who call them-

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75 Jack N. Rakove, *Mr. Meese, Meet Mr. Madison*, INTERPRETING THE CONSTITUTION, THE DEBATE OVER ORIGINAL INTENT 179 (Jack N. Rakove ed. 1990).

76 I do not mean that there is anything unartful or misleading in Professor Rakove's summary of the doctrine, but rather that it is unclear what the doctrine itself could mean.

77 For an analysis of these concepts, see Dworkin, *supra* note 3, at 661.

78 For a discussion of this issue, see Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990).

selves original intentionalists is to deny that there is an adequate constitutional basis for most claims of individual right and to defend the general right of governmental regulation against such claims.[79] One is led to suspect that "originalism" is not merely a doctrine about the right way to interpret the Constitution, but rather that the doctrine also embodies a substantive claim that, in general, the framers intended claims of governmental regulation to prevail over claims of individual right.

It is not logically impossible that the originalists consistently apply their doctrine in a strictly result-neutral manner, and that it just happens that recent courts, especially throughout the 1950's, 1960's and 1970's have consistently misapplied the procedures and principles of interpretation in such a manner that they consistently err on the side of discovering individual rights that the framers did not intend. But even this claim injects an inevitably substantive dimension to the analysis of originalism, because the originalists are making the claim that the courts have been led by their flawed interpretive methods to violate the framers' intentions in one particular substantive way.[80]

Originalism has thus come to be identified as a doctrine about what the framers' substantive intentions actually were, and not just a neutral doctrine about interpretation. Further, it is not credible that the analytical method of the originalist scholars has been to search diligently for the misapplication of interpretative procedures, and upon finding such, to discover fortuitously that it just happens that the substantive result consistently is the erroneous acknowledgement of an individual right. It is clear that the originalists' belief that the framers did not, in general, intend to create individual rights is more fundamental than, and precedes the conviction that, an interpretive procedure is being improperly applied, and just happens to be yielding a consistent pattern of error.

In short, in discussing originalism, it is reasonable to consider the substantive issue of the framers' intentions with respect to individual rights. Let us suppose that it could be shown that, contrary to the view of the originalists, the framers actually did intend a general commitment to human rights. If this were so,

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[79] Professor Graglia, for example, is unabashedly explicit about this. He writes: "[A]though the Constitution does create some individual rights, they are actually rather few, fairly well-defined, and rarely violated." Graglia, *supra* note 74, at 39.

[80] For a thoughtful discussion of the relationship between political views and theories of constitutional interpretation, see Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990).

we would have to conclude that the principles of interpretation defended by the originalists yielded errors as to the actual intentions of the framers, because the originalists repeatedly apply their principles of interpretation, and arrive at the wrong result (by hypothesis) as to the intentions of the framers. Therefore, to whatever extent the originalists claim that the application of their interpretive procedures and principles lead to correct conclusions as to the intentions of the framers, it is a sufficient refutation of the those principles and procedures to show that they have driven the originalists to the wrong conclusions about the framers' intentions.

C. General Objections to Originalism

Many objections and obstacles to the very idea of basing constitutional interpretation on the original intentions of the framers have been proposed and widely discussed, and though they will not be my major focus, I will survey briefly a few of these objections and obstacles. How do we determine what the intentions of the framers were with respect to a particular issue? On what basis do we assume that the framers had any intention whatsoever with respect to a particular issue? Even if we assume that the framers did have intentions with respect to an issue, on what basis do we assume that there was a single, univocal intention held collectively by the framers? Why should it be the intentions of the *framers* which are relevant to constitutional interpretation, rather than the intentions of the *ratifiers*, who took the necessary steps to bring the Constitution into force and effect?

The originalists' usual first response to such questions is that by merely asking them, the critic misrepresents the position being criticized. As one illustration, Justice William Brennan, offered the following objection: "In its most doctrinaire incarnation, [originalism] demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them."[81] Brennan goes on to opine that this view merely "feigns deference" to the framers' intentions and that "it is arrogant to pretend that . . . we can gauge accurately the intent of the Framers on application of principle to specific, contemporary

[81] *See* Brennan, *supra* note 8. *See also* TEMPTING, *supra* note 3, at 162 (quoting Justice Brennan).

questions."[82]

Bork protests vehemently that Brennan is attacking a straw man, and that no one actually holds the position he attacks.[83] Bork acknowledges: "The requirement that the judge know what the specific intention of the lawgiver was regarding the case at hand would destroy all law . . . If they had to have such knowledge, they could never decide. If such specific knowledge were available, judges would never disagree with one another. . . ."[84] Bork concludes: "Justice Brennan demolished a position that no one holds, one that is not only indefensible but undefended."[85]

Aside from the fact that Brennan acknowledges that he is describing the "most doctrinaire" manifestation of the originalist view—a point which Bork, although he quotes the words, does not mention—it is not so clear that no one holds this position, at least in substance. Depressingly often, one hears repeated in triumphant tones what is surely the worst and most unsophisticated constitutional argument ever conceived, to the effect that "the Constitution does not contain the word 'X,' (or does not mention 'X' or refer to 'X'), therefore the Constitution has nothing to say with respect to 'X' (for 'X,' substitute 'abortion,' 'privacy,' 'bussing,' 'affirmative action,' 'child labor,' 'minimum wage,' or whatever you please). Thus, Professor Rakove, though not an originalist himself, sets forth as one of the standard objections offered by conservative critics to Supreme Court decisions of the past three decades, that "the Court has acted improperly by establishing new rights that the written Constitution does not even mention. . . ."[86] To this preposterous argument that the Constitution applies to a matter only if it mentions that matter, it is a completely sufficient response (as Bork acknowledges) that there are many words the Constitution does not contain, for example the word "truck," but no one doubts that the Commerce clause may be interpreted to regulate interstate truck travel.[87]

Bork himself is not above invoking the absurd "Constitution doesn't mention 'X' " argument. For example, in the course of a vituperative polemic against the views of Professor Laurence Tribe, Bork "clinches" his analysis of Tribe's discussion of a woman's constitutional right to an abortion with the words "[t]he

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82 Brennan, *supra*, note 8.
83 TEMPTING, *supra* note 3, at 162.
84 *Id.*
85 *Id.*
86 Rakove, *supra* note 75, at 180.
87 TEMPTING, *supra* note 3, at 202.

Constitution now seems to contain another unmentioned right, reproductive autonomy."[88]

It is clear that the framers did not think about many of the Constitutional issues which come before courts today for adjudication, and that the framers, therefore, had no specific intention whatsoever with respect these issues. The most obvious literal meaning of the term "originalism," once one acknowledges this, is that in deciding a matter of constitutional adjudication, the result must be the one which the framers would have reached, or most probably would have reached had they been deciding the issue.

This interpretation of originalism is also obviously vulnerable to attack. How are we to decide what result the framers would have reached? Lawyers and court watchers today have difficulty enough predicting how courts are going to resolve issues that are current, widely discussed, and which stir passions now. Why should we suppose that there is "a" result which the framers would have achieved? Both historical evidence and our common knowledge of human beings and human affairs tell us that the framers did not speak, and could not have spoken, with one voice. They were as divided in their opinions and attitudes as are people of our time, although this division and diversity was limited for them, as for us, by the largely unconscious presuppositions and the climate of opinion which prevailed during the period. And when we speak of the result which the framers would have achieved, do we mean the result they would have achieved had they been born in our own time with our education and socialization? Or do we mean the result they would have achieved if they had somehow been able to gaze from their own historical and cultural perspective into our time?

Again, Bork acknowledges the force of these attacks and insists that this is not the position that originalists maintain. Originalism, Bork argues:

> [D]oes not mean that judges will invariably decide cases the way the men of the ratifying conventions would if they could be resurrected to sit as courts. Indeed, the various ratifying conventions would surely have split within themselves and with one another in the application of the principles they adopted to particular fact situations.[89]

In the face of Bork's persistent strategy of insisting that critics

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88 *Id.*

89 *Id.* at 163.

of originalism misrepresent the doctrine and attack a straw man, it will simplify matters to move on to a discussion of Bork's own account of originalism.

D. Bork's Account of Originalism

Bork begins his account of originalism with a quotation from Professor John Hart Ely: "What distinguishes interpretivism from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution."[90] Bork endorses this with the words: "In short, all that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action."[91]

It is not so clear that Ely's term "interpretivism" means the same thing as Bork's term "originalism," and that the difference in terminology reflects only "current academic fashion,"[92] although Bork is free to stipulate that he uses them in the same way. The facial difference is that while Ely refers to an inference whose starting point is "fairly discoverable" in the text of the Constitution, Bork's method would allow the interpreter of the Constitution to consider the "text, structure and history." Depending upon the sense in which Ely used the expression "fairly discoverable," it appears that Ely's formulation refers solely to the actual text of the Constitution, whereas Bork's method of interpretation attaches greater weight to external investigation. But Ely did refer to a psychological process—an "inference"—and described the text as the "starting point" for that process.[93] Ely intended, therefore, that ingredients other than the text are necessarily involved in that process, and Bork summarizes these ingredients as "structure and history."[94]

Given Bork's identification of his view with Ely's, and his explicit reference to "structure and history," it is difficult to quarrel with the doctrine that legitimate constitutional interpretation re-

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90 *Id.* at 162.
91 *Id.* at 162-63.
92 *Id.* at 162.
93 *Id.*
94 *Id.*

quires a starting point fairly discoverable in the Constitution. Bork's statement of his position, combined with the fair implications of his endorsement of Ely, yields a doctrine which actually sounds quite moderate and reasonable. A premise in a constitutional argument is a "principle or stated value" the framers wished to protect. It is not necessary that this principle or stated value be explicitly mentioned in the Constitution, but rather that it be "fairly discoverable." It is fairly discovered by a process of inference, which is accomplished by attending to the "text, structure and history of the Constitution."

But Bork's actual doctrine is not consistent with this statement of his doctrine. His writing, and the writings of other originalists, is characterized by an attitude of profound ambivalence to the relevance of both the text of the Constitution, and the principles and values which the framers intended to protect. As we shall see, when it suits his purposes, Bork insists, in the guise of a theory of interpretation, upon a literal reading of the Constitutional text, ignoring extrinsic information which makes clear the meaning of the text.[95] But when it suits his purposes, Bork focuses entirely upon extrinsic information, to the point of largely ignoring the clear meaning of the words.[96]

E. Bork's Underlying Moral Theory, as Expressed by His "Dilemma" Argument

The basic difficulty with originalism is that the doctrine relies at its heart upon a theory about the nature of moral reasoning and moral analysis which the framers would certainly have rejected. Bork repeatedly asserts this moral theory in the form of a dilemma: If a judge fails to look to the intentions of the framers when performing constitutional adjudication, then it follows logically that the judge is merely imposing his or her own moral predilections and preferences. That is, the judge either relies upon the intentions of the framers or, if he fails to do so, it follows necessarily that he must be merely imposing his own preferences and values. Thus Bork writes:

> Every clash between a minority claiming freedom, and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution

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95 *See, e.g., infra* notes 112-19 and accompanying text (discussing the Ninth Amendment).

96 *See, e.g., infra* notes 120-31 and accompanying text (discussing the Fourteenth Amendment).

> has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure.[97]

Bork goes on to say:

> There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. . . . There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own. . . . Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute.[98]

This is truly astonishing. Bork offers these conclusions, which are so central to his theory of constitutional interpretation, without defense, and without any apparent recognition of the extraordinary complexity of the issues. The reason why Bork is so persuaded of the force of his "dilemma" argument is that he presupposes, without argument or defense, a radically subjectivist moral theory, which assumes that there is no basis other than the preference of the adjudicator, for deciding essentially moral questions as to the worthiness of competing interests or gratifications.[99]

Despite Bork's avowed intention to eschew moral theorizing, his words constitute a moral theory, or at least a conclusory and undefended assertion of a moral conclusion. Bork asserts, without argument, that there is no principled way of deciding whether one form of gratification is more worthy than another.[100] If there were such a principled way, then a judge could apply it when making a decision, and we would no longer say that the decision was necessarily "unprincipled," and that it merely reflected the judge's personal predilections. Then Bork would no longer be able to rely upon the forced dilemma that a judge either follows the intentions of the framers, or else necessarily asserts his own opinion.

It is especially outrageous for Bork to assert his particular moral theory dogmatically, as if it were sufficiently supported by the

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97 *Neutral Principles*, *supra* note 3, at 197, 203-04.

98 *Id.* at 204.

99 This article will examine Bork's Radical Subjectivism in more detail. *See infra* notes 104-11 and accompanying text.

100 Bork's use of the language of "pleasure" and "gratification" in this context is misleading and insensitive to the nuances of meaning involved. He obviously uses the pleasure/gratification language to refer to the satisfaction of any interest whatsoever—a plain misuse of that language. But I will accept the terminology he introduces.

force of his own assertion. Bork does not merely assume without defense a positive moral theory. Rather, Bork's theory asserts the invalidity of all other moral theories that attempt to provide a principled basis for distinguishing one form of gratification as more worthy than another. One would have thought that a theory of this scope would have required several volumes in its defense.

The framers would not have accepted this forced dilemma. The idea that the only two alternatives available to a judge who interprets the Constitution are either to follow the original intentions of the framers or to impose the judge's own preferences and values, would have been unintelligible to them. Bork's argument by dilemma presupposes that there are two, and only two, possible patterns of justification for the moral conclusion that a person does or does not have a right to perform a particular action free of governmental prohibition. According to the dilemma, either this moral conclusion is justified by its conformity to the views of someone else (in this case, the framers) or, alternatively, the conclusion represents nothing more than the opinion or prejudice of the person uttering the conclusion. But, not only would the framers have rejected the idea that these two alternatives are the only possible justifications for a moral conclusion, they would have rejected both of Bork's alternatives as a possible basis for a moral conclusion. On the contrary, the framers would have believed that when one reaches a moral conclusion about a human right, one is doing something quite different from either recording the opinions of someone else or setting forth one's own opinion, predilection, or prejudice. In complete opposition to Bork, the framers believed that the doctrine of natural rights supplied the necessary objectivist basis for the moral conclusion as to the existence of a human right. We may disagree with the framers and reject their thinking, as the originalists do, but the fact remains that the originalists are in the paradoxical position of defending a "framers' intent" theory of interpretation on the basis of arguments the framers would have categorically rejected.

F. Corollaries of Bork's "Dilemma" Argument

1. The Argument from "Democracy"

Bork relies upon other undefended and unacceptable assumptions which are related to, or corollaries of his dilemma argument, based, as it is, upon the assumption that there is no principled way of making a moral distinction among different human gratifications. Except in a few narrowly drawn situations

(i.e., those explicitly covered by the first eight amendments to the Constitution), Bork argues that it would be "undemocratic" to allow anyone other than a duly elected majority to decide whether a citizen does or does not have a particular right to be free from governmental regulation.[101]

But the framers would have denied that this conclusion followed from the notion of democratic rule. Whatever the framers thought about democratic rule, they believed that truth about the universe did not vary with or depend upon a democratically chosen consensus.[102] Principles about human rights based upon natural law, in the framers' view, are no more subject to democratic vote than scientific principles relating to universal gravitation or the conservation of matter and energy. To the framers there would have been nothing undemocratic about recognizing that matters of fundamental human right are outside the bounds of majoritarian consensus and control.

2. The Argument from the Capacity of Judges

Bork also argues repeatedly that judges have no more capacity to reach conclusions about values and policy choices than anyone else. Evidently this is not intended as an observation as to the actual capacity of judges, but rather, as a way of making the general claim that no one has any more capacity to reach conclusions about values and policy choices than anyone else, and that judges are no different in this regard from anyone. This too is a startling claim, although Bork vacillates between two different meanings for it, which he does not clearly keep separate. In one sense, the claim that judges have no more capacity to make value

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101 *See, e.g., Neutral Principles, supra* note 3, at 201, 205, and *passim*. In *Tempting*, Bork quotes his address, *Tradition and Morality in Constitutional Law*, to the effect that "[i]n a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator. . . . The sole task of the [judge] is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances." TEMPTING, *supra* note 3, at 11 (quoting Robert H. Bork, *Tradition and Morality in Constitutional Law*, Address Before the American Enterprise Institute, The Francis Boyer Lectures on Public Policy, Dec. 1984)). Bork sets up the following false alternative: "If this nation were starting from scratch, we might argue about whether, as a general matter, judicial rule is to be preferred to democratic rule." *Id.* at 201. *See also* Lino Graglia, *How the Constitution Disappeared, reprinted in* INTERPRETING THE CONSTITUTION, THE DEBATE OVER ORIGINAL INTENT 37 (Jack N. Rakove ed. 1990)("Constitutional limitations on popular government are undoubtedly undemocratic, even if they were themselves democratically adopted by a supermajority"). This is precisely what the framers would *not* have thought.

102 *Cf.* Gerhardt, *supra* note 3, at 1371 (discussion of the framers' view of democratic rule).

choices is a claim about what judges are, or ought to be, *entitled* to do under our governmental structure and institutions. In this sense, the claim is not about the ability of judges to make value choices. It is not a denial that some value choices are better than others, or a denial that some judges may be able to make better choices than some other people. Rather, its a claim that it is inconsistent with our democratic institutions to permit a judge ever, under any circumstance, to make such a choice. I shall refer to this as the "weak" version of the theory.

In this version, Bork's theory about the capacity of judges may at least be intelligible, albeit implausible. When Bork defends the weak theory, he argues that the Constitution embodies no commitment to any general set of values (apart from some limited, particular provisions) which serve to guide judges with respect to underlying moral goals and principles which the Constitution strives to foster. Bork further argues that the democratic institutions established by the Constitution require that all value choices be submitted to majority vote and that under no circumstance may a judge make such choices. This weak version of the theory is almost surely unacceptable, and it surely was not intended by the framers. As we have seen, it misconceives the framers' understanding of a democratic society. Further, it is utterly implausible that the framers intended no general commitment to a general set of values. But at least the theory is on some level coherent.

But Bork also defends a more radical version of the theory as to the capacity of judges. In this second version (which I will refer to as his "strong" theory), he contends that judges have no more capacity to make value choices than anyone else for the reason that no value choice is any better or any more justified than any other. As we have seen, Bork accepts both the strong and the weak theories, and we will now investigate them further.

G. Bork's Strong Theory as to the Capacity of Judges

1. Bork's Radically Subjectivist Moral Theory

Bork's "strong" theory—that judges have no more capacity to decide issues involving choices among competing gratifications because all gratifications are intrinsically equally worthy of satisfaction—is a consequence of his assumption of a radically subjectivist, or radically relativist moral theory. Radical moral subjectivism (or relativism) is the view that moral utterances (e.g. "This state of affairs is more valuable or more desirable morally

than that") is, in reality, nothing more than an expression of the preference of the speaker. It is the view that there is no objective or intersubjective sense in which moral utterances are valid. It is the view that there is no objective moral basis for preferring one person's moral claim to another person's. Values are indistinguishable from preferences. Like most radical moral relativists and skeptics, Bork both denies that he is one, and takes positions inconsistent with his stated moral theory. This is not surprising because his theory so conflicts with our basic instincts and common sense that it is almost impossible to maintain consistently.

Bork denies, in a casual paragraph, the charge that he is a moral relativist or skeptic: "Nothing could be further from the truth. Like most people, I believe I have moral understanding and live and vote accordingly."[103] But this is no response whatsoever to the characterization of his view as radically subjectivist or relativist. Of course, one presumes that Bork has "moral views" in the sense that he prefers some values and policies over others. But having such preferences is consistent with the belief that statements of moral value are nothing more than expressions of the preferences of the person making the statement; that is, having preferences is obviously consistent with a radically subjectivist view of moral utterances, because to the radical subjectivist, a moral view *is* a preference.

His response to the charge that he is a radical subjectivist or relativist reveals what Bork understands by the notion of a "moral position," or a "moral view." Bork simply identifies, without argument, a moral view with a subjective preference: "Every clash between a minority claiming freedom from regulation and a majority asserting its freedom to regulate requires a choice between the *gratifications (or moral positions)* of the two groups."[104] In other words, a moral position is simply a preference whose fulfillment will cause gratification or pleasure. The "argument" for this remarkable opinion is the set of parenthesis marks which place the word "gratification" in apposition to the phrase "moral position."

It is this undefended conclusion about the meaning of the term "moral position" which lies behind Bork's bizarre analysis of Alexander Bickel's hypothetical about the fiend who raises puppies for the sole purpose of torturing them to death. By hy-

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103 TEMPTING, *supra* note 3, at 259.

104 *Id.* at 257 (emphasis added).

pothesis, the torture takes place on an island where no one has to witness it. But most of us will be profoundly troubled by the knowledge that this is taking place. Presumably, most of us agree that it would be constitutionally permissible and morally obligatory to enact legislation prohibiting this practice (assuming, of course, that the island is within the sovereignty of this nation).

At this point, Bork accomplishes an amazing sleight of hand. He first generalizes the observation that we will be troubled by the knowledge of the canine torture by saying: "Knowledge that immorality is taking place can cause moral pain."[105] and, therefore, that "[m]oral outrage is a sufficient ground for prohibitory legislation."[106] Bork then takes this principle as a broad, sweeping justification for prohibitory legislation. Take, for example, consensual homosexual relations in private between consenting adults. Are people troubled by the knowledge that this conduct takes place? Well then, by definition, this conduct causes moral outrage, and this moral outrage is just as deserving of legislative protection as any other moral outrage—after all, there is no principled basis for choosing among gratifications. Society, according to Bork's logic, is therefore justified in prohibiting consensual homosexual activity. To have a principle that will let us protect the puppies, that principle must be broad enough to allow us to prohibit homosexual relations, because there is no basis for distinguishing the one "moral outrage" from the other.

Apparently it did not occur to Bork that one basis for distinguishing the two examples is that it might be that torturing puppies is immoral, while engaging in consensual homosexual relations is not. Of course, Bork's moral theory, because it identifies a moral position with a subjective gratification, makes it impossible for him to entertain, or even to articulate, this possibility. Further, because Bork identifies a "moral" view with a subjective preference, there is no meaningful distinction, for Bork, between "moral" outrage and any other form of outrage. "Moral" outrage, insofar as Bork can use the term in any meaningful sense, is merely outrage that is intensely felt and deeply troubling to the person. Bork has no basis upon which to discriminate between moral outrage, and any other form of outrage on the basis of the objective content of the situation generating the outrage. He not only does not deny this, but he takes great

105 *Id.* at 258.
106 *Id.* at 124.

pains to insist upon it. That is the point of the story of the puppies and the homosexual conduct.

"Feeling outrage" is an activity guided by psychological, not logical principles. There is no logical limitation upon the human capacity to feel outrage. It is not only possible, but appears to be the case, that some people feel at least as troubled and dismayed by the knowledge that homosexual activity is taking place in private, as they do by the knowledge that animals are being tortured. Therefore, to Bork's "strong" theory, the reaction to homosexual activity is as much moral outrage as the reaction to the unfortunate canines, and there is no basis for favoring a statute prohibiting one activity to a statute prohibiting the other. There is, in short, no distinction for Bork between moral outrage and prejudice.

The reason why Bork's strong theory may fairly be characterized as "incoherent" is that it depends upon this fundamental equivocation and confusion over the concepts of a "moral position" and "moral outrage." It sounds pious and commendable to affirm that a moral person must accept that "morality" may be legislated, and it appeals to our most basic emotions to invoke the suffering of unseen puppies to support this. When we realize that Bork slips in the implication of his theory that the "legislation of morality" simply means the legislation of the prejudices of the majority, however, the theory loses some of its luster. Bork asserts that there is "vast confusion" on this point,[107] but the only "confusion" involved in rejecting Bork's strong theory is the "confusion" involved in entertaining the possibility that there might be some basis upon which to make moral distinctions.

2. Bork's Skepticism of Moral Theory Based Upon His Argument from Lack of Universal Assent

The most fundamental and profound confusion inherent in Bork's strong theory is his ridiculous notion that his theory (and his theory alone) avoids and escapes the complexities and pitfalls of moral reasoning, and that his theory alone provides a neutral procedure for constitutional adjudication without having to make any commitment to any unverifiable moral theory. No great philosopher, Bork argues, has succeeded in articulating a moral theory which has commanded universal, or even general, assent. "Revisionist" theorists (by which Bork means essentially law

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107 *Id.* at 123.

professors who disagree fundamentally with him in print) are merely "semiskilled moral philosophers."[108] Therefore, it is unlikely that these "semiskilled" philosophers will "succeed where for centuries, philosophers of genius have failed."[109] Bork's conclusion is that it is futile, pointless, and perhaps intellectually dishonest even to attempt to make moral distinctions, or to reason about the grounds or justifications for moral judgments. Bork, therefore, resolves "to give up reading this literature."[110]

This argument from lack of universal assent presupposes, without defense, that "success" in moral philosophy is measured only by reaching a result which is universally acceptable; and that absent the possibility of a universally accepted result, the discipline of moral philosophy is futile and arid. Like so many of Bork's undefended assumptions, this one should surely be rejected. Moral philosophy may perform many useful tasks even without an expectation of achieving a universally accepted result. Moral philosophy may assist in clarifying our thinking about the meaning of normative terms in moral and non-moral contexts. It may force us to reflect on the similarities and dissimilarities between moral judgments and ordinary factual judgments. It may attune us to various "emotive," "non-cognitive" linguistic functions of moral language. It may force us to think about the principles underlying the moral evaluations which we in fact make, or which are generally made by a society. It may force us to recognize respects in which our instinctive, automatic moral judgments are inconsistent with each other, or presuppose conflicting principles which cannot both logically be true. It may force us to recognize logical implications of a theory which we claim to accept—implications which we find troubling and which force us to reexamine our commitment to the theory. It may simply attune us to thinking more consciously and systematically about the grounds and reasons for our moral judgments; it may help us to think critically; to make distinctions; to perceive analogies and disanalogies; to recognize the difference in our own thinking between reasoned judgment and automatic prejudice.

Without a doubt, Bork's challenge—that moral philosophy should either put up (i.e., achieve universally acceptable results) or shut up—raises profound and troubling issues about the nature of moral reasoning, and the meaning and justification of

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108 *Id.* at 254.

109 *Id.*

110 *Id.* at 255.

moral judgments, which deserve to be taken seriously. But one is tempted to suggest that Bork's defense of his moral views could have been assisted by even semiskilled moral philosophizing. Whatever the merits of Bork's skeptical challenge to the enterprise of moral philosophy, if Bork imagines that his moral theory circumvents the messy business of moral theorizing by avoiding commitments to any in principle unverifiable moral theory, he is mistaken. Bork is addressing the moral question: How ought we resolve conflicting claims of right in a situation where no constitutional provision explicitly addresses the situation? One possible response—Bork's response—is that there are no valid principles upon which such situations can be rationally analyzed and adjudicated, and, therefore, the only possible solution is that the prejudices of the majority must control. As even a superficial review of the philosophical background of the framers' era reveals, this answer bears not the slightest relation to the answer intended and established by the framers of the Constitution. Bork's answer, furthermore, is a moral theory—that is, a theory about the meaning and justification of moral claims. Not surprisingly, like all moral theories, Bork's is not universally accepted. His moral theory has the same general characteristics, and raises all the same problems and issues, as any other moral theory.

H. Bork's "Weak" Theory about the Capacity of Judges

1. The Meaning of the "Weak" Theory

Bork's weak theory holds, in substance, that the framers intended no general commitment to human rights and that judges, therefore, are not authorized by the Constitution to base a decision on a person's possession of an unenumerated right. This claim that the framers intended no general commitment to human rights is crucial to Bork and the originalists. If the framers did intend a principle underlying the specific provisions of the Constitution to be a general affirmation of human rights and human freedom, then anyone interpreting or applying the Constitution would be justified, indeed obliged, to consider that principle when interpreting and applying the specific provisions. Correspondingly, anyone ignoring that principle or purpose would be acting unfaithfully to the framers' intentions.

We must remember that all Bork requires for a process of constitutional interpretation to be legitimate is that the interpretation proceed from a "principle or stated value that the ratifiers

wanted to protect against hostile legislation."[111] Further, it is not necessary that this principle be explicitly asserted; rather, it is sufficient that this underlying principle be "fairly discoverable" in the Constitution through a study of its "text, structure and history." Bork's thesis, then, is that there is no general commitment to human rights fairly discoverable in the Constitution through a study of its text structure and history. We now turn to an assessment of this element of the "weak" theory.

2. The Impossibility That the Weak Theory Could Be True

One's first reaction to the view that the framers did not intend a general commitment to human rights is amazement that any knowledgeable writer could seriously assert it. The simplest and most effective refutation is that it could not have been the view of people who were seriously committed to the philosophy of natural rights. Bork's view, in substance, is the that while the framers may have enjoyed theorizing about abstract philosophical notions of natural right and natural law, when it came to the serious enterprise of creating a nation and drafting a constitution, they decided that such principles were of interest as theories only, and had no application in a practical context. Thus, according to Bork's view, when we interpret the Constitution, we may ignore the evidence that the framers expressed belief in natural rights, on the grounds that the framers specifically intended not to embody that theoretical belief in the actual Constitution.

But Bork's view is a strict logical impossibility and the framers surely would have recognized it as such. To someone who believes in natural rights theory "on a theoretical level," it does not matter whether one explicitly asserts the existence of natural rights in a constitution or not; human beings possess such rights independently of whether anyone asserts or recognizes them or whether anyone presumes to confer them. And to one who believes in the Lockean version of natural rights theory, a nation which purports to exist without recognizing human natural rights has no legitimate powers; the social order in such a nation is despotic, not a legal order at all. Hence, to one who accepts the framers' natural law philosophy, it is logically impossible to assert the existence of a legitimate society, under the rule of law, which does not recognize the fundamental existence of natural human rights.

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[111] *Id.* at 162-63.

Bork's view, therefore, entails that either (1) the framers did not really believe the natural law philosophy they asserted (despite the massive evidence to the contrary), or (2) the framers did not intend to establish a legitimate society under the rule of law, or (3) the mental powers of the framers were so limited that they were unable to discern that it is logically impossible to accept natural rights philosophy in theory, but to purport to abandon that theory in practice. It would be interesting to know which of these entailments Bork would defend. In my view, they are all indefensible.

Although it was not necessary for the framers to explicitly assert a general commitment to natural rights for it to be "fairly discoverable" in the light of an examination of the "text, structure and history" of the Constitution, one would feel more comfortable if that commitment were explicitly stated in the Constitution. Fortunately, it was stated, at least three times, in terms that could hardly have been more explicit.

3. Specific Refutations of the Weak Theory

a. The Ninth Amendment

The first, and most unequivocal statement of a general commitment to human rights is found in the Ninth Amendment, which provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[112] The meaning of this amendment is not subject to reasonable dispute. The key word is "retained." Human beings have rights which precede (temporally and logically) those explicitly conferred by this Constitution; they are the natural rights possessed by all human beings independently of human fiat. Specific constitutional provisions do not, and could not, affect these rights.

Unfortunately, the plain meaning of this amendment is an embarrassment to the originalists and their political agenda. They are compelled, therefore, to assert that the amendment does not mean what it says and they must go to considerable lengths to contrive some other meaning. Bork at least recognizes the force of the verb "retained" and realizes that he must find some rights which people possessed before the enactment of the

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[112] U.S. CONST. amend. IX. For a recent comprehensive discussion of the Ninth Amendment, see Sol Wachtler, *Judging the Ninth Amendment*, 59 FORD. L. REV. 1491 (1991).

Constitution and some source from which these pre-existing rights emerged. Bork locates that source about the only place he could, namely in the individual states. His view is that the Ninth Amendment was intended to reassure us that the federal Constitution was not intended to abrogate rights which had previously been granted to citizens of the several states by state charters.[113]

In defending this implausible suggestion, Bork states: "There is almost no history that would indicate what the [N]inth [A]mendment was intended to accomplish."[114] This is ludicrously untrue. The history that indicates clearly what the Ninth Amendment means is all the history that describes the framers' commitment to an essentially Lockean doctrine of natural rights.

Bork continues his defense by stating: "[N]othing about [the Ninth Amendment] suggests that it is a warrant for judges to create constitutional rights not mentioned in the Constitution."[115] This statement is a masterpiece of irrelevance and obfuscation. There is no issue, as the framers thought about the matter, of anyone—judges or anyone else—creating anything. Natural rights exist independently of any form of government; neither judges nor any other human being can "create" them. Almost certainly, the framers did intend, through the division of powers, that judges were to be charged with the responsibility of adjudicating competing claims of right between governments and individuals. But although the question of who is charged with this responsibility is an important structural issue, it is not the central issue. The point is that the Constitution requires a mechanism for adjudicating claims of a governmental right to legislate against a claim of individual right to be free from governmental regulation. The creation of this balance is the central tension inherent in the form of government established by the framers, and the adjudicatory function is the most essential function in realizing the form of society intended by the framers. The pseudo-issue formulated in terms of whether judges have authority to create rights is simply obfuscation.

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113 TEMPTING, *supra* note 3, at 184. Two recent articles have argued that the Ninth Amendment is to be interpreted in the light of the rights enumerated in State Constitutions. *See* Calvin Massey, *The Anti Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WISC. L. REV. 1229 (1990); Rosen, *supra* note 11. Professor Rosen points out that most State constitutions include general commitments to human rights and argues that the Ninth Amendment refers, among other things, to these provisions.

114 TEMPTING, *supra* note 3, at 183.

115 *Id.*

Bork's phrase, "constitutional rights not mentioned in the Constitution," is similarly meaningless when analyzed in the context of the framers' beliefs. The Ninth Amendment, itself, shows that the Constitution embodies a theory of human existence in which human beings possess natural rights. One who understands the Lockean epistemological underpinning of this view will understand that it is, in principle, impossible to give an exhaustive specification of these rights at any one moment in time. The specification of these rights necessarily involves the contribution of the sense experience of the person who is performing the task of attaining awareness of the content of these rights.

The fact that the Ninth Amendment embodies a general commitment to natural rights is made clear when we consider the Ninth and Tenth Amendments together.[116] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[117] The crucial words are "or to the people." Consider the logic of the Bill of Rights. The first eight amendments grant specific protections and rights to citizens. The Ninth states that these eight amendments do not exhaust human rights; people retain the rights they had previously. But a question remains as to residual powers which are neither granted expressly to the federal government nor prohibited to the states. The Tenth Amendment could have simply said that *all* such powers were delegated to the states. If the Ninth Amendment meant what Bork asserts, then that is all the Tenth Amendment would have needed to provide, and all that it would have provided. In other words, if "rights retained by the people" merely meant "rights previously granted by a state," then it would have been sufficient for the Tenth Amendment to provide that any power not granted to the national government nor withheld from a state resides in the state. This would be all that would be needed to assure that a state would have the power to grant a right to a citizen which the federal Constitution did not expressly grant.

But the Tenth Amendment would not have been sufficient in that form, precisely because "right retained by the people" does not merely mean "right previously granted by a state." The Tenth Amendment makes explicit beyond reasonable doubt that

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116 For another discussion of the interaction of the Ninth and Tenth Amendments, see Ackerman, *supra* note 3, at 1431.

117 U.S. CONST. amend. X.

the framers did not intend that a state possessed all power neither expressly granted to the federal government nor expressly prohibited to the states. Those residual powers beyond the reach of the states (and the federal government) are the powers to invade the natural rights necessarily retained by the people. This is the only interpretation which makes sense of the actual text of the Tenth Amendment, which reserves powers to the states "or to the people." Powers are generally delegated to the states except those powers which cannot be assumed by any government because they would trespass upon natural human rights.

In defending his conception of the Ninth Amendment, Bork argues: "Surely if a mandate to judges had been intended [by the Ninth Amendment], matters could have been put more clearly."[118] And Bork offers several suggestions as to how the amendment might have been drafted, such as: "The courts shall determine what rights in addition to those enumerated here, are retained by the people."[119] But again, Bork completely overestimates the importance the framers placed on the issue of who performs the adjudicatory function. It may be that the framers felt less strongly than Bork about the need to specify a precise mechanism for performing this function. On the other hand, it surely seemed obvious to the framers that this function was assigned to the judiciary. When you create judges, their function is to judge. The reason why Bork is driven to a totally disproportionate obsession with the powers of judges is his erroneous notion that the framers would have regarded judges as being involved in the "creation" of rights. While it may seem to Bork that a judge "creates rights" when he engages in constitutional adjudication, the framers thought otherwise. If the originalists understood this, they would be less inclined to reject the obvious meaning of the Ninth Amendment on the purported ground that the framers could not have intended a grant of power to judges which the originalists, on the basis of their own assumptions, consider excessive, but which the framers would have considered the ordinary function of adjudication.

To mirror Bork's argument, if all the framers had meant by the Ninth Amendment was that states were free to grant rights not granted by the federal Constitution, then it would have been very easy for them to say so. There is another structural argu-

118 TEMPTING, *supra* note 3, at 183.
119 *Id.*

ment which makes clear that this is not what that amendment means. The Ninth and Tenth Amendments are obviously intended to be read together and to address the issue: "What about rights and powers not explicitly mentioned in the federal Constitution?" The Tenth Amendment explicitly addresses the division of power between the federal government and the states. It is clear, therefore, that the intent of these two amendments was to clarify the allocation of rights and powers among the national and state governments and the people. Because the Tenth Amendment explicitly allocates *power* to the states, it is a reasonable inference that had the framers intended to allocate *rights* to the states in the Ninth Amendment, they would have done so explicitly.

The meaning of the Ninth Amendment is plain, and to the framers the point was obvious: Its essential purpose was to make clear that some powers are beyond the reach of either state or federal government. The only reason why the originalists are so determined to deny its plain meaning is their misconceived and anti-historical notion of the purported authority it gives judges to "create" rights.

b. *The Due Process Clauses of the Fifth and Fourteenth Amendments*

The second major statement in the Constitution of the general commitment to human natural rights is the Due Process Clause of the Fifth Amendment which provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."[120] This amendment functioned as a restraint on the federal government only. But in 1868, the Fourteenth Amendment was adopted. Its purpose was to extend due process protection to acts of State governments. Because the Fourteenth Amendment directly adopted the language of the Fifth, I will follow the convenient and common practice of discussing the Due Process Clauses of the Fifth and Fourteenth Amendments jointly, as if they were one clause.

The fundamental analysis of due process protection is familiar. Focusing on the "liberty" aspect of the clause, there is unanimous agreement that the Due Process Clause provides certain (unspecified) procedural rights to someone who is threatened by a loss of liberty by governmental action. But there is profound

[120] U.S. CONST. amend. XIV, § 1.

and fundamental disagreement as to whether the clause also provides certain substantive protections; that is, whether there are certain legal restrictions which the government is prohibited from imposing on citizens because of the substantive content of the restriction. Bork, and other originalists, and some who are not originalists,[121] argue vehemently that the Due Process Clause may not legitimately be interpreted to afford substantive protection against governmental action. Thus, Bork writes that due process "is simply a requirement that the substance of any law be applied to a person through fair procedures by any tribunal hearing a case. The clause says nothing whatever about what the substance of the law must be."[122] He also states: "The [D]ue [P]rocess [C]lause . . . is simply a requirement that government not do certain things to people without fair procedures, not a statement of what things may be done."[123]

A review of the vast literature on this topic is beyond the scope of this article, but I believe that the Due Process Clause of the Fourteenth and Fifth Amendments does impose substantive restrictions upon the permissible legislative enactments of the state and federal governments, and that this may be demonstrated with reasonable certainty by means of a rather simple argument. Those who deny that the clause embodies substantive restrictions, and insist that the clauses impose "procedural" restrictions only, point to the word "process," and argue that this word means essentially "procedure" and that the clause is limited accordingly. Thus Bork quotes Professor Ely to the effect that "there is simply no avoiding the fact that the word that follows 'due' is 'process.' [W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.' "[124]

The response to this is that the words which follow the word "process" are "of law," and that the constitutional phrase is not just "due process," but rather "due process *of law*." If one reads the entire phrase, with the emphasis on the word "law," one will be driven to a different, accurate understanding of the clause. The framers' understanding of the concept of "law" differed fundamentally from our own. In our time, it has become automatic to understand the term "law" in an essentially positivistic sense.

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121 Professor Ely is an example.

122 TEMPTING, *supra* note 3, at 31.

123 *Id.* at 180.

124 *Id.* at 32.

That is, we think of a law as an enactment by a determinate person or group of people with the authority and power to issue commands and enforce them by sanctions.[125] Thus, it is natural for us to assume that any command which is uttered, or any legislative directive which is enacted in a procedurally authorized way, constitutes a law. We automatically regard the question whether the law is wise or foolish, humane or cruel, as a separate, unrelated question—one which may be worth asking, but which is a different issue from the question whether the command or enactment is or is not a law.

Bork gives an odd twist to the positivistic conception of law. He writes: "When we speak of 'law,' we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires."[126] That statement also assumes, of course, that a law is by definition something which is subject to change by human fiat, and which we have a right to change, so long as we do so through prescribed procedures.

But it is quite recently that this became the ordinary understanding, or the common sense of the matter, and this was not the understanding or sense of the framers. To understand what the framers meant by the phrase "due process of law," it is necessary, as I have stated, to focus on the word "law." What the phrase is intended to state is that the processes and institutions that are "due" an American citizen—that is, the processes to which an American citizen is entitled—are lawful processes, not tyrannical or despotic processes. As the framers understood the matter, a governmental rule or command that trespasses upon the rights to which a human being is naturally entitled in a rationally (or "lawfully") ordered society is not a process *of law*. Instead, the rule is a tyrannical or despotic process, or a usurpation. In other words, to the eighteenth century mind, the concept of law itself necessarily included a normative component that it does not have for us today, and the substantive aspect of the guarantee of due process of law is built not into the concept of the "process," which is "due" to a citizen, but rather into the concept of "law." The phrase "due process *of law*" is properly understood not as a reference to procedures, in a narrow sense, but rather as meaning "lawful, rational institutions."

Bork's treatment of the Due Process Clause is disingenuous

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125 *Cf.* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1854).
126 TEMPTING, *supra* note 3, at 143

in the extreme. Bork plainly believes that the Fourteenth Amendment was enacted to assure the liberties—substantive liberties—of freed slaves. For example, Bork writes: "Federal enforcement of rights against the states came to seem important only after the Civil War, when it became essential to guarantee the liberties of the freed slaves against hostile Southern state governments."[127] And Bork agrees that the Fourteenth Amendment was enacted for this purpose, stating: "The Fourteenth Amendment was adopted shortly after the Civil War, and all commentators are agreed that its primary purpose was the protection of the recently freed slaves."[128] But Bork's stated and vehemently defended view is that the Due Process Clause of the Fourteenth Amendment offers procedural protections only, not substantive protections.

Why should we assume that those who enacted the Fourteenth Amendment intended to achieve the substantive result of protecting the liberties of freed slaves by enacting a provision which, in Bork's view, on its face fails to achieve this result? One must also recall that Bork also argues that when speaking of the framers' original intent, one refers not to the subjective content of their minds, but rather to the objective intent as they expressed it in writing. Bork answers, in essence, that one must assume in this case that this substantive result was achieved because this was the legislative purpose behind the adoption of the Amendment. Again, one presses the question as to why those enactors of the Fourteenth Amendment would have sought to achieve that purpose by enacting language which (in Bork's view) fails to achieve that result. At this point we have come full circle, and Bork still has not responded.

Apparently Bork accepts that the Due Process Clause does not mean what (in his view) it says, in at least one respect, because it embodies a substantive guarantee of the liberties of freed slaves. At this juncture, one notices that the Fourteenth Amendment provides: "[No state shall] deprive *any person* of life, liberty, or property, without due process of law."[129] It does not say that no state shall deprive any *freed slave* of life, liberty or property. So is Bork driven after all to recognize substantive protections guaranteed by the Due Process Clause? Bork answers, in essence, "No.". The Amendment fails to mean what it says in this further

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127 *Id.* at 93.

128 *Id.* at 180.

129 U.S. CONST. amend XIV, § 1 (emphasis added).

respect: The reference to "any person" does not embody general substantive protections; those protections extend only to freed slaves. It is only the procedural protections of the clause which extend to all persons. In other words, some of the protections afforded by the Amendment extend as far as the Amendment says they do—the procedural protections—and some of the protections do not extend as far as the Amendment says they do—the substantive protections.

It would be simpler and more plausible to assume that the Fourteenth Amendment means what it says. Bork's doctrine that it is the objective meaning of the words used by the enactors of the Amendment which control, not the subjective content of their minds, should lead him to the same conclusion.

It may have occurred to the reader that I am suggesting that there is an analogy between the process of determining the nature and extent of natural rights for Locke, and the process of determining the content and limits of substantive due process rights under the Fifth and Fourteenth Amendments. In fact, I am suggesting not an analogy, but rather, an identity. The process of fleshing out the nature and content of natural rights in a civil society is precisely the task of determining the content and limits of substantive due process rights under the Constitution. In deciding whether the Constitution guarantees a particular substantive right, as the framers would have conceived of the matter, the judge must perform two essentially Lockean tasks. First, the judge must come to understand whether the right claimed by the individual is one which an individual possesses naturally.[130] Second, the judge must determine whether the claimed right is one which the individual has consented to cede to the government, or rather one which the individual can never be understood to have bargained away. This, as we have seen, requires an analysis of the purposes and ends of civil government, and the purposes and effects of the challenged legislative enactment, because the powers of government are not general and categorical, but rather, limited by the natural purposes and ends of governments.[131]

c. *The Preamble to the Constitution*

In the Preamble to the Constitution the framers set forth in their own words the purposes and ends for which they established and ordained the Constitution. They wrote that they did

130 *See supra* notes 38-45 and accompanying text.
131 *See supra* notes 56-65 and accompanying text.

so "in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity. . . ."[132] It would seem to be beyond serious argument that if one is seeking to understand the intentions and purposes of the drafters of a document, then the drafters' statement of their intentions and purposes in that document is relevant. But the position of Bork and the originalists is that it would be unfaithful to the intentions and purposes of the framers to consider their statement of their intentions and purposes in the Preamble.

If this sounds like a caricature of his view—as Bork would no doubt claim—it is not. Bork argues vehemently that the reference to "establishing justice" should be given no weight in constitutional adjudication on the grounds that it is "entirely hortatory, and not judicially enforceable."[133] Of course, the provision is hortatory. It is an exhortation to anyone who interprets and applies the Constitution that one of the central, fundamental principles and policies which underlie the document—so fundamental that it deserves to be set forth in an all-encompassing preamble—is the establishment of justice. Of course, it is true that this provision does not specify precise guarantees or rights—rather, it is intended to apply generally and pervasively. The Establishing Justice Clause is intended to temper and mould the application of specific constitutional provisions to particular circumstances as required. This is the plain and direct meaning of the Preamble; it does not even deserve to be called an "interpretation" of it.

That Bork understands that this is the plain and direct meaning of the Preamble is clear from the fact that he does not even attempt to interpret it away, as he did the Ninth Amendment. Rather, he has no other recourse than to insist that it should be ignored. Bork offers only the by-now-familiar refrain that "if [the Establishing Justice Clause] states a criterion for judicial review, every judge is free to decide which laws are just and which not. Subjectivism is given free rein."[134] But, of course, this is not true. Establishing justice is one among several purposes and principles which a judge must balance and harmonize. And a judge who strives to achieve a just result, even if this were the

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132 U.S. CONST. pmbl.

133 TEMPTING, *supra* note 3, at 35.

134 *Id.*

only purpose and principle which he applied, would not, as the framers understood the matter, merely be enacting his or her own subjective opinion or preference.[135]

Bork is inexplicably troubled by the fact that the Preamble exhorts judges to keep in mind several, rather than just one, underlying principle and purpose when interpreting the Constitution: "Worse than that, there are any number of 'spirits' within the Preamble itself: other stated purposes are. . .[Bork quotes the other stated purposes]. That is a cornucopia of 'spirits' for a judge to draw upon in making up his own Constitution."[136] Again, interpreting a Constitution in the light of several interacting general policies and purposes has nothing to do with "making up" a Constitution. Beyond this, one is simply bewildered as to why Bork thinks it is bad or "worse than that" for a judge to be exhorted to consider and balance interacting policy goals and purposes. It is obvious, even if the framers had not explicitly so stated, that this is precisely what constitutional interpretation necessarily involves.

I. Conclusions as to Bork's Strong and Weak Theories of the Capacities of Judges

Bork and the originalists misunderstand the framers in at least two crucial respects. First, they imagine that the framers would have understood that when a judge determines whether a person's right to life, liberty or property extends to the right claimed in a particular case, that judge is merely imposing his or her personal preferences and predilections. As demonstrated above, it is impossible to conceive of a more fundamental misunderstanding of the Lockean epistemology of natural rights. Second, the originalists imagine that in an essentially Lockean political system, the members of the society give up and delegate

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135 The ambiguous and troublesome concept of a "criterion" may contribute to Bork's confusion here. In one sense a "criterion" is a sufficient condition, or sufficient indication, as when one says that litmus paper's turning blue, after contact with a liquid, is a criterion of the liquid's alkalinity. But in another sense, "criterion" is used in the sense of "one of the factors or indicators of," as when one says that "One criterion of a good education is knowing Latin." In this usage, knowing Latin would be neither necessary nor sufficient for having a good education. If Latin were all one knew, this would not be sufficient for a good education, and if one knew enough other things, one could have a good education without knowing Latin. In this sense, it is proper to say that attention to the requirements of justice is one criterion, (and one criterion intended by the framers) of a sound piece of constitutional adjudication.

136 TEMPTING, *supra* note 3, at 36-37

their natural rights and powers categorically and without reservation. This is the most fundamental misunderstanding possible of Locke's theory of political authority.

The originalists' view is that the rights retained by the members of this society are narrowly limited to those explicitly granted by the government. In other words, the originalists understand this society to exist on an essentially Hobbesian rather than on a Lockean model. According to the originalists' view, once a civil society is created, the citizens cede all their power to the government, and the government becomes the sole and ultimate source of rights; any rights retained by the people exist solely by the explicit sufferance of the government. To say that the originalists view the society on this essentially Hobbesian model is not to say that their version of a civil society must be cruel and tyrannical. Rather, it means that under their view, the government is the sole source and grantor of rights; that whatever powers and rights the person had in a "natural" state are ceded to this government; and the rights which the person possesses are those which are granted by the government. That this is Bork's view of the matter is also demonstrated—not that there is any doubt about it—by his dogged insistence that the phrase "retained by the people" in the Ninth Amendment must refer to the conferring of rights by some governmental source.

That the framers did not intend to enact a Hobbesian system, but rather a Lockean one, is made clear, as we have seen, from an analysis of the "text, structure and history" of the Constitution, with special reference to philosophical background and intellectual climate which prevailed when they worked. "The common sense" of the era was Lockean; the intellectual giants among the framers and founders explicitly acknowledged the Lockean basis of their views; and the language of passages in the Constitution, and other essential documents of the era, reflect Lockean doctrine.

III. Constitutional Argumentation

A. Introduction

The views defended by Bork and the originalists are not only fundamentally confused and muddled, but they are confused in a dangerous and even pernicious way. These views attempt to do away with the delicate balance, which the framers labored to achieve, between the right of a government to act in the interests of the peace and security of the citizens and the general right of

individuals to be free of governmental control and coercion. In place of the subtle vision of the framers, the originalists substitute their own preference for a society in which the powers of government are essentially unchecked, except in a few narrow respects which were explicitly and exhaustively set forth at the time of the drafting and enactment of the Constitution.

For their part, the originalists accuse those who disagree with them of ignoring the actual Constitution so they may substitute their political and social preferences. Each side of this dispute accuses the other of choosing substantive social and political results first, and adopting what purports to be a theory about proper principles of interpretation only because the theory makes it easier to achieve the desired results. Mutual accusations of intellectual dishonesty are at the heart of this disagreement. This may explain why, as Bork notes, these topics have generated remarkable levels of heated, even ill-tempered, dispute on both sides. It would be interesting to consider whether it is possible to say anything about principles of good and bad constitutional argumentation independently of the substantive results which certain forms of argument tend to generate.[137]

Unfortunately, this may prove difficult. Apart from the fact that Bork's "originalist" views are completely at odds with the intentions of the framers, is there anything demonstrably wrong with them? Ultimately, to reject Bork's thesis is to reject the kind of society which it entails, and this is a judgment of social philosophy, rather than of constitutional law.

I will discuss two cases which I believe contain some of the worst constitutional argumentation to be found in the twentieth century: argumentation which plainly does not fall "within the range of the acceptable." In this way, we may attempt to discover useful principles about what *is* acceptable. I refer to the majority opinion in *Bowers v. Hardwick*[138] and the opinions by Justices Rehnquist and Scalia in *Cruzan v. Commissioner*.[139] Obviously, the challenge is to discuss the patterns of argumentation in these opinions independently of the conclusions which they reach. I will acknowledge at the outset that I find both the result and the

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137 Bork observes: "The functions assigned to the [Supreme] Court impose a need for constitutional theory . . ." and he asks rhetorically "How is the Court to reason about the resolution of the disputes brought it? If we have no firm answer to that question, it will not be possible to know, or even rationally to discuss, whether judicial decisions are within the range of the acceptable." *Id.* at 140.

138 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

139 110 S. Ct. 2841 (1990).

argumentation in *Bowers* to be appalling. On the other hand, I can honestly say that in *Cruzan*, although I think I would have reached a contrary result, I am more disturbed by the argumentation than the result. One of the reasons that I conclude that I would have reached different results is precisely because I find the principles of argumentation of the two opinions not only unpersuasive, but profoundly objectionable as constitutional reasoning. The blatant bias and intellectual dishonesty of these two opinions persuaded me of the contrary view. Both of these cases have been widely discussed. I will summarize them only to the extent necessary to illustrate the topics under discussion.

B. Two Illustrative Cases

1. Cruzan v. Commissioner

a. *Background*

In 1983, Nancy Beth Cruzan, a healthy, twenty-five year old woman, was involved in an automobile accident which rendered her unconscious and deprived her of oxygen for at least twelve minutes.[140] This resulted in a profound coma—a persistent vegetative state. When it became clear that she had no chance of recovery, her parents sought a court order to remove the nutrition and hydration tubes.[141] Applicable Missouri state law required proof by clear and convincing evidence that the incompetent patient would have wanted the life-sustaining treatment terminated before a surrogate decision maker could obtain an order terminating the treatment.[142]

Cruzan's parents presented substantial evidence at trial that Nancy Cruzan would have wanted the life-sustaining nutrition and hydration tubes removed.[143] The trial court made the explicit findings of fact that Nancy Cruzan had stated that she would not want to live as a "vegetable,"[144] and that at age twenty-five, Nancy had stated "in somewhat serious conversation with a house mate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally."[145] The trial court concluded that these statements suggest that "given her present condition she would not wish to

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140 *Cruzan*, 110 S. Ct. at 2845.
141 *Id.*
142 *Id.* at 2852.
143 *Id.* at 2855.
144 *Id.*
145 *Id.* at 2846.

continue on with her nutrition and hydration."[146]

Notwithstanding this evidence, the Supreme Court of the State of Missouri reversed the lower court's decision granting the petition of the parents for leave to remove the feeding and hydration tubes.[147] The Missouri Supreme Court held that the lower court had committed the legal error of failing to apply the "clear and convincing evidence" standard required by Missouri law.[148] Inasmuch as the lower court had failed to apply the applicable legal standard to the evidence presented, especially where there was reason to think, on the basis of the lower court's findings, that the lower court would have held that the evidence *was* sufficient to meet the "clear and convincing evidence" standard, the Missouri Supreme Court should have remanded to the lower court to make this determination on the basis of the live testimony, subjected to cross examination. Instead, the Missouri Supreme Court gratuitously reversed the lower court's findings, on the basis of a paper record.

The issue before the United States Supreme Court was whether it was consistent with the United States Constitution for the State of Missouri to require that an incompetent patient's wish to reject life-sustaining medical treatment be shown by clear and convincing evidence.[149] The effect of this evidentiary standard is to stack the deck against the party seeking to terminate the treatment by imposing a higher evidentiary burden on the party seeking to establish that the incompetent person would have wanted the treatment terminated.

b. *Justice Rehnquist's Principal Opinion*

A five to four majority of the Court affirmed, holding that Cruzan's acknowledged constitutional right to decline treatment did not overcome the State of Missouri's countervailing interests in enacting its heightened evidentiary requirement.[150] As Justice

146 *Id.*

147 *Id.* at 2855.

148 *Id.* at 2846.

149 This formulation is a compilation of several statements by the Court of the issue as it conceived it. *See, e.g., id.* at 2846, 2851, and *passim*. An alternative formulation of the issue might have been as follows: May a State constitutionally usurp, by enacting a heightened and burden-shifting evidentiary standard, a person's right under the United States Constitution to refuse medical treatment, in the face of her expressed wishes to decline such treatment, and the unanimous consent of her family and loved ones, her physicians, and her court-appointed guardian ad litem that such treatment should be discontinued?

150 *Id.* at 2856.

Rehnquist's principal opinion, and Justice Scalia's concurring opinion viewed it, this was a simple case. The principal opinion acknowledged that Nancy Cruzan had a liberty interest under the Fourteenth Amendment to refuse medical treatment.[151] But the Court held that this interest was overcome by the general state interest "in the protection and preservation of human life"[152] and the Court observed: "there can be no gainsaying this interest."[153] How do we know that the state has an interest in life sufficiently broad to encompass this situation? The heart of the opinion is this simple-minded response: "[T]he States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide."[154]

When considering issues involving human rights, Locke cautioned us against reasoning that was "carelessly indifferent," "idle and listless" or "corrupted by vice." It is difficult to imagine constitutional reasoning which is more careless; more indifferent and insensitive to emotional and moral considerations; and more corrupted, if not by vice, then by personal bias and predilection, than this opinion. The case presents profoundly difficult, novel and troubling issues concerning the legal, moral and metaphysical status of a person who is neither dead, nor fully alive—a person who bears some of the indications of both states.[155] The Court's pattern of reasoning is the very paradigm of intellectual carelessness and moral indifference: Is Cruzan alive? Yes. Will the intentional act that the petitioners seek to perform proximately cause her death? Yes. Well, this is by definition homicide, and therefore it is obvious that the state's interest in preventing homicide must prevail.

But this will not do; it is argumentation which, given the issue and the circumstances, is not within the realm of the acceptable; and this conclusion is demonstrable, I believe, without reference to the result. The essence of the legal and moral ques-

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151 *Id.* at 2851 n. 7.

152 *Id.* at 2852-53.

153 *Id.* at 2852.

154 *Id.*

155 Nancy Cruzan was clearly alive, in some sense. Certainly under none of the legally recognized criteria—cardio-pulmonary, or electro-encephalographic—was she dead. Her heart and lungs were functioning, and she gave evidence of some brain activity. On the other hand, there is a deeper, metaphorical sense, in which one might say that her condition was not really, or essentially, life.

tion presented is whether *this* act of intentionally bringing about the death of another person is sufficiently like the typical instance of causing the death of another person to be controlled by the general rule against homicide. That is, the question presented is whether the legal and moral principles which would apply to most living human beings apply *a fortiori* to Nancy Cruzan, or whether her situation calls for a more sensitive and discerning legal and moral analysis.[156] If nothing else, this question is unavoidably difficult and profound. Where the essence of the case is whether this act of bringing about the death of a person is sufficiently like an ordinary act of homicide to be controlled by the general rule against homicide, then to ground a decision on a mere repetition of the general rule against homicide is to ignore the real issue.

To confront the case, rather than to beg the question by citing a general rule, the Court would have to recognize that the term "life" refers to a wide range of dissimilar states of existence ranging, at one extreme, from the healthy, intelligent, vital ten-year old girl Nancy Cruzan once was, to the persistent vegetative state which she eventually entered. The progress of technology, which conferred the dubious benefit of allowing her to enter that state, should force us to recognize that distinctions must be made as to the legal and moral consequences that flow from the various states of human existence comprehended under the heading "life." But the Court contents itself with the offhand remark that "a [s]tate may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life. . . ."[157] One might have thought that the Court was comparing a life with, and without, a persistent toothache.

From the fact that a state possesses a legitimate and strong

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156 There is an obvious refutation of the Court's *a fortiori* argument. The Court acknowledges that Nancy Cruzan has a constitutionally based right to reject medical treatment, that is, a right to consent to action by others which would result in her death. But there is no legal right to consent to homicide. This shows immediately that Cruzan's situation, like the situation of any medical patient, is different from the general case where a person performs or omits an action which results in the death of another. It shows that general truths about societal interests in life do not apply *a fortiori* to Cruzan. Presumably this is why Justice Scalia, as we shall see, pretends as if the voluminous law establishing a right to reject medical treatment does not exist. He wants to argue that for Cruzan to reject life-sustaining medical treatment is just like any other instance of consenting to suicide. He can make that bizarre argument only by ignoring all the law relating to consent to medical treatment which flatly refutes his view.

157 *Id.* at 2853.

interest in many of the variations of human existence that we call "life," it does not follow that the state has a similar interest in all such variations. To the extent that the Court's reasoning is based on this fallacious argument, the Court errs, and it errs in a particularly careless, blatant, and elementary way.[158]

The Court's argument for what it asserts to be a general state interest in preserving life, displays a mode of argumentation which is to start from a definition or a general rule and apply it mechanically to a particular situation without serious consideration of the reasons why it may or may not apply to that situation. What are the grounds or bases for a state interest in the preservation of life? One cannot know whether the general rule comprehends the novel and unique situation of Nancy Cruzan until one has seriously considered and analyzed this question. Surely the answer must include such considerations as the following: 1) Most living human beings have the capacity for some form of pleasure, happiness and enjoyment, and to the extent that society's interests are made up of the individual interests of its members, the experiences of each member are a component of the whole; 2) Each individual generally has the capacity to engage in activities which benefit and contribute to the well-being of other members, and to society as a whole, and society has a legitimate interest in securing such benefits; and, 3) It is crucial to the well-being of society that its members think of human life seriously and reverently, understanding that the taking of a human life may be done only with the greatest justification, and upon serious deliberation and reflection.

Perhaps the Court could have argued cogently that one of these state policies could be furthered by a rigid application of a general rule against homicide to Nancy Cruzan's situation. But whether this is so or not, the Court's offhand argument from a general state interest in life to its application in this case does not adequately confront the issue.

In what respect, if any, does the Court attempt to address

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158 *Cf. Cruzan*, 110 S. Ct. at 2886 (Stevens, J., dissenting). Justice Stevens asserts:

> Missouri insists, without regard to Nancy Cruzan's own interests, upon equating her life with the biological persistence of her bodily functions . . . [T]he Court errs insofar as it characterizes this case as involving 'judgments about the 'quality' of life that a particular individual may enjoy . . . [F]or patients like Nancy Cruzan . . . there is a serious question as to whether the mere persistence of their bodies is "*life*" as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.

Id.

the actual case before it? The Court asserts that "[w]e think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute."[159] One imagines that at last the Court will seriously confront the psychological and emotional realities of this situation from the point of view of the human beings who have a genuine stake in the outcome—the parents and loved ones of Nancy Cruzan. But, mysteriously, what the Court finds instead is a heightened power on the part of the State of Missouri to ignore the past expressed wishes of Nancy Cruzan, and the present wishes of her parents and loved ones. The Court, for example, asserts:

> [I]n the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements.[160]

The Court acknowledged that this heightened evidentiary standard placed on the party seeking to terminate treatment an increased likelihood of bearing the burden of an "incorrect" decision.[161] The Court even acknowledged that "Missouri's requirement of proof in this case may have frustrated the effectuation of [what the Court called] the not-fully-expressed desires of Nancy Cruzan."[162]

This asymmetric allocation of burden was justifiable, the Court concluded, because of the consequences, as the Court viewed them, of an erroneous decision in each direction. An erroneous decision to terminate treatment is "not susceptible of correction,"[163] the Court reminds us; but the Court insensitively dismisses the consequence of an erroneous decision not to terminate as merely the "maintenance of the status quo."[164] The Court lists the supposed virtues of maintaining the status quo as "the possibility of subsequent developments such as advancements in medical science, the

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159 *Id.* at 2854.

160 *Id.* at 2852-53.

161 *Id.* at 2854.

162 *Id.* The Court responded cryptically that "the Constitution does not require general rules to work faultlessly; no general rule can. *Id.* But the issue here has nothing to do with whether a rule works "faultlessly." *Id.* The question is whether the Missouri statute, as interpreted, gives sufficient weight to Nancy Cruzan's Constitutional right to reject medical treatment.

163 *Id.* at 2854.

164 *Id.*

discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment . . ."[165] and the Court also states that the occurrence of any of these possibilities "create[s] the potential that a wrong decision will eventually be corrected or its impact mitigated."[166]

The Court did not even find it necessary to raise the issue of the emotional and moral burdens which the status quo imposes on the human beings involved. Surely the Court has an obligation at least to articulate and consider the following sorts of considerations: For most people a seemingly endless, unresolved limbo is the most painful, stressful and intolerable situation imaginable. As long as the status quo is maintained, Nancy Cruzan's parents will be in this limbo, unable to free themselves from the past, unable to begin the emotional healing process which will enable them to resume their own lives. It is a reasonable supposition that few of us would desire to be maintained in a persistent, vegetative state, but that most of us have a strong interest in being remembered as healthy and vital, rather than as a pathetic caricature of a human being. Every week, month and year that the status quo continues, the memory of Nancy Cruzan as she really was fades and weakens, to be replaced by and associated with feelings of pity, tragedy and horror. Thus, not only do her parents have an interest in being spared this state of limbo, but Nancy Cruzan herself has an interest in the kinds of images, recollections and associations which her life imprints on those who loved her and cared for her.[167]

If anything qualifies as "careless" or "indifferent" reasoning, then surely it is the Court's argument that it would "correct or mitigate" the impact on her loved ones of an erroneous decision to continue treating Nancy, if she were to die unexpectedly after weeks or months more of lying inert as a grotesque caricature of a human being. It is simply intellectually careless or dishonest for the Court to present this argument without a serious consideration of the meaning and significance of the status quo.

It cannot reasonably be denied that the Court's reasoning is "corrupted" by a preconceived bias in favor of the State of Missouri as a decision maker in this case. The Court's arguments cannot be rationalized even on the basis of a misguided constitutional theory

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165 *Id.*

166 *Id.*

167 *Cf. id.* at 2868 (Brennan, J., dissenting) ("A quiet, proud death, bodily integrity intact, is a matter of extreme consequence.").

which holds that power resides generally with the states, and human rights are limited to those which have been narrowly and specifically conferred by human fiat. Consider the Court's statement that the State of Missouri may "safeguard the personal element of the choice"[168] by stacking the deck against the patient and her loved ones. The outcome of Missouri's front loading of the result is that the state, not the patient or the parents, will make the decision. Even if this outcome is defensible on some grounds, it is plain intellectual dishonesty or carelessness to refer to this as "safeguarding the personal element of choice," because there is nothing "personal" about the State's making the decision.

The Court's references to Cruzan's parents are at best condescending, at worst contemptuous. The Court does describe them as "loving and caring parents."[169] But they are unsuitable decision makers because they:

> [M]ay have a feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent.[170]

These observations, I submit, could be made only by someone whose reasoning was clouded by carelessness or indifference, or who had decided the issue without reasoning seriously about it at all, that is, whose reasoning was corrupted by bias. Of course there is no "automatic assurance" that the view of close family members will be the same as the patient's would have been. But the "automatic assurance" standard is plainly unreasonable, and the Court could have asserted it only to guarantee that family members will never make the decision, because the standard is inherently incapable of being satisfied. But apparently the same standard does not apply to the party who will actually make the decision, the State of Missouri, because there is no "automatic assurance" that its decision will match what the patient would have decided, and the standard is equally unreasonable in either case. The "automatic assurance" standard, therefore, provides no basis for preferring one

168 *Id.* at 2852-53.
169 *Id.* at 2855.
170 *Id.* at 2855-56.

decision maker over another, and it can only be careless, indifferent, or corrupt to argue that it does.

It is also true that a decision by family members would not be "entirely disinterested," and it is probably true that the State would be a more qualified decision maker on the basis of the "disinterestedness" standard. But the Court does not adequately defend "disinterestedness" as an appropriate standard. Apparently the Court considers it a dangerous possibility that loved ones will consider feelings and human values in making the decision, and the Court implies that Nancy Cruzan needs the calm and rational hand of the State of Missouri to champion her interests against her parents, whose reason and judgment are likely to be clouded by ambivalent feelings.

The Court's opinion displayed bias and carelessness as well in its treatment of the evidence presented at trial as to Nancy Cruzan's wish that she not be kept alive in a persistent vegetative state. The Court upheld the conclusion of the Missouri Supreme Court that the evidence was not sufficient to meet the applicable "clear and convincing evidence" standard, on the grounds that "[Nancy Cruzan's] observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition."[171] In other words, Nancy Cruzan's failure to use the specific terms "nutrition," "hydration" and "withdrawal of medical treatment," and presumably her substitution of the word "vegetable" for the term "persistent vegetative state," convinced the Court to refuse to give effect to her expressed wishes pursuant to her acknowledged constitutional right. If the Missouri statute requiring clear and convincing evidence is interpreted as the Court interpreted it, to require not only evidence that the patient expressed her wishes, but also that she correctly used specific medical terminology, then the statute makes a mockery of the patient's constitutional right to refuse medical treatment. Again the conclusion is inescapable that the Court picked an interpretation of the statute which would assure that the State of Missouri would prevail as decision maker. At the very least, this gratuitous interpretation of a Missouri statute is a task which the federal courts, even the Supreme Court, has no business performing.

We should remember that the only court which heard the evidence held that the petition to terminate the life support systems should be granted.[172] The Supreme Court still had the opportunity to correct the Missouri Supreme Court's gratuitous injection of its

171 *Id.* at 2855.
172 *Id.* at 2846.

view of the facts by ordering the case remanded to the trial court in order to determine whether the evidence presented of Nancy Cruzan's wishes met the clear and convincing evidence standard.

c. *Justice Scalia's Concurrence*

Whereas the principal opinion focuses on the state's interest in preserving life, Justice Scalia's concurring opinion focuses on the other side of the same coin—the state's interest in preventing suicide. Scalia first announces that "American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life. . . ."[173] He then rejects the well-established constitutional right to reject medical treatment by asserting that "no substantive due process claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference. . . . [T]hat cannot possibly be established here."[174]

The remainder of Scalia's opinion is devoted to arguing for the proposition, as astonishing as it may seem, that there is nothing different or distinctive about this case to suggest that it would be anything other than an ordinary case of suicide for Nancy Cruzan to choose the removal of her life support systems. Scalia quotes Justice Brennan's statement in his dissenting opinion that the state "has no legitimate general interest in someone's life completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment."[175] Scalia responds that:

> One who accepts [this] must also accept. . .that the State has no such legitimate interest that could outweigh 'the person's choice to put an end to her life. . . . [I]nsofar as balancing the relative interests of the State and the individual is concerned there is nothing distinctive about accepting death through the refusal of 'medical treatment,' as opposed to accepting it through the refusal of food, or through the failure to shut off the engine and get out of the car after parking in one's garage after work." Suppose that Nancy Cruzan were in precisely the condition she is in today, except that she could be fed and digest food and water without artificial assistance. How is the

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173 *Id.* at 2859 (Scalia, J., concurring). Justice Scalia's concurrence is discussed in Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1093-94 (1990).

174 *Cruzan*, 110 S. Ct. at 2859.

175 *Id.* at 2862.

> State's "interest" in keeping her alive thereby increased, or her interest in deciding whether she wants to continue living reduced?[176]

This is preposterous, but the problem, as always, is whether this can be conclusively demonstrated. Two aspects of Scalia's thinking combine here to lead him to his conclusions. The first is his acceptance of an essentially "originalist" doctrine about the meaning and interpretation of the Constitution. On the question of Nancy Cruzan's right to reject medical treatment, Scalia states that "the Constitution has nothing to say about the subject. To raise up a constitutional right here we would have to create out of nothing (for it exists neither in text nor tradition). . . ."[177]

The second aspect of Scalia's thinking here is a dogged refusal to analyze and to make distinctions. The answer to the rhetorical question with which Scalia concludes the above quotation is to think, and to analyze and answer it. One line of reasoning which might be "within the range of the acceptable," might go as follows: Scalia asks us to posit a hypothetical situation which is in "all respects" like Nancy Cruzan's actual situation, "except that she could be fed and digest food and water without artificial assistance." But is this hypothesis even possible? Might it not be the case that the ability to take food and water without artificial assistance necessarily evidences a sufficiently higher level of brain activity that someone in *that* condition would necessarily be more likely, eventually, to make further recovery and to experience further improvements in brain functioning? And if that were the case, might there not be a legitimate basis for saying that the interest of the state in continuing *that* variation of existence is augmented. And even if this is not so, might there not be some basis for arguing that the state has a higher interest in the continuation of the life of someone enjoying the higher level of brain functioning.

Other lines of reasoning, whether or not they reach conclusions with which I agree, would also be within the realm of the acceptable. But what is not acceptable is to refuse to reason, to ignore issues and distinctions, to refuse to question one's pet theories and generalizations, even in the face of instances which challenge and threaten them.

Scalia looks at Nancy Cruzan in a persistent, vegetative state, compares her with a hypothetical Nancy Cruzan who sits in a closed garage with the motor running after coming home from work de-

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176 *Id.* at 2862.

177 *Id.* at 2863 (emphasis in original).

pressed, and sees no difference. The legal commentator, of course, has the duty to make clear that what Scalia means is that he sees no difference relevant to the constitutional interpretation of the situation, on the basis of constitutional doctrine which he accepts. To Nancy Cruzan's parents, however, Scalia's analysis (or non-analysis) is simply cruel and vicious in its effect. From their point of view, they are being told that by acquiescing in their daughter's wish that her life end under her present circumstances, they are acting no differently than they would be if they passively allowed her to set up a hose to gas herself in a garage while she was healthy. At a certain point, when one's pet constitutional theory yields conclusions which are sufficiently intellectually absurd, and morally repulsive, it is time to consider questioning the theory.

B. Bowers v. Hardwick

In *Bowers v. Hardwick*, a homosexual man who had been arrested and charged with violating a Georgia statute criminalizing "sodomy," brought an action challenging the constitutionality of that statute.[178] The Statute makes no distinction between homosexual and heterosexual "sodomy."[179] A heterosexual couple were originally joined as plaintiffs to the action, but their claims were dismissed on the grounds that they lacked standing to maintain the action because "they had neither sustained, nor were in any immediate danger of sustaining, any direct injury from the enforcement of the statute. . . ."[180] The Court, therefore, stated that it was considering the statute only insofar as it related to homosexual "sodomy" and took no position on the statute as it related to heterosexual activity.[181] The ruling on the standing issue makes it clear that the statute is interpreted in a discriminatory way, because one violator was arrested, and other violators or potential violators are deemed to have no danger of having the statute enforced against them.

The Eleventh Circuit Court of Appeals had held that the Georgia statute was unconstitutional because it violated a fundamental right of "private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment

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178 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

179 *Id.* at 188 n.1. The Georgia sodomy statute provides, in pertinent part: "[O]ne commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . ." GA. CODE ANN. § 16-6-2 (Harrison 1984).

180 *Bowers*, 478 U.S. at 180 n.2.

181 *Id.*

and the Due Process Clause. . . ."[182] The Supreme Court, in a five to four opinion, reversed the Court of Appeals, holding that the State of Georgia could constitutionally forbid Hardwick from engaging in his chosen sexual activities.[183]

The principal opinion by Justice White and two concurring opinions by Justices Burger and Powell all held that the issue presented was whether the Constitution conferred a right to engage in homosexual sodomy;[184] they concluded that it did not. Among the several things wrong with the Court's conception of the issue, it ignores the plain text of the Statute, which was not limited in its application to homosexual activity.[185]

The issue, rather, is whether Georgia enacted an unconstitutional statute; the issue is not defined by the fact that Georgia makes distinctions (probably unconstitutional distinctions) among the people it arrests and charges with violating the statute.[186] Suppose, for example, that Georgia enforced the statute only against poor people. Would the Court have argued that the Constitution contains no provisions about the rights of poor people to choose their own sexual activity, and therefore that this must be a constitutionally fit subject for governmental regulation? If one interprets a statute to apply only against a narrow class of violators, it should come as no surprise that the Constitution contains no precise language referring expressly to that narrow class. The issue as identified by the Court demonstrates again both the absurdity and the extraordinary seductiveness of the argument of the general form: "The Constitution doesn't mention 'X;' therefore, it contains no provision relating to 'X.' " The Supreme Court is permitting a state to insulate its statute from constitutional scrutiny by the simple device of interpreting it in an unconstitutionally discriminatory way.

In proceeding to the merits of the action, the Court acknowledged grudgingly that although "the . . . Due Process [Clause] . . . appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which [that Clause has] been interpreted to have substantive content. . . ."[187] The

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182 *Id.*

183 *Id.* at 189.

184 *Id.*

185 For an interesting discussion of the problem of selecting the appropriate level of generality to describe an issue, with specific reference to *Bowers*, see Tribe and Dorf, *supra* note 174, at 1065.

186 *Cf. Bowers*, 478 U.S. at 199 (Blackmun, J. dissenting).

187 *Id.* at 191.

Court also complains that "[a]mong such cases are those recognizing rights that have little or no textual support in the constitutional language."[188]

Two principal tests have been used historically to identify the boundaries of the substantive rights guaranteed by the Due Process Clause. The Court identifies these two tests as follows:

> In Palko v. Connecticut,[189] it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*[190]. . . where they are characterized as those liberties that are "deeply rooted in this Nation's history and

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188 *Id.* The Court rejects Hardwick's argument that a line of cases including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny create a right of privacy sufficiently general to include the activities prohibited by the State of Georgia, and the Court asserts that "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or the respondent." *Bowers*, 478 U.S. at 191.

If the Court is suggesting that the right of privacy articulated in *Griswold* was limited to situations involving "family, marriage or procreation," that interpretation flies in the face of the much more general language of *Griswold*. Justice Douglas's famous language of penumbras and emanations was unfortunate and badly chosen. The Justice stated: "[The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." 381 U.S. at 483. Ever since Justice Douglas wrote these words, it has been easier to make fun of the metaphor than to appreciate the substance and importance of the doctrine it set forth. But the same point can be made in less colorful language: A person can fully enjoy the rights guaranteed by the Bill of Rights only if clusters of related rights are also acknowledged. These clusters of rights, or "zones of privacy" have come to be referred to collectively as the "right to privacy." It is probably also an unfortunate choice of words to refer to these clusters of rights as "privacy," since it is easy to make linguistic arguments that some rights included under that rubric have little to do with the concept of "privacy," properly understood. But these arguments have no force against the underlying doctrine, but merely against the choice of terminology.

And it is careless or dishonest to suggest, as the Court does here, that the right articulated by Douglas was limited to situations involving "marriage, procreation or the family"; the discussion of those topics was merely the application of the general principles to the facts of the particular case. *Id.* at 485 ("The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

For an interesting discussion of the relationship between Bork's originalism and the *Griswold* case, see Reynolds, *supra* note 78 (concluding that an application of Bork's interpretive theory would not necessarily have changed the result in *Griswold*).

189 302 U.S. 319, 325-26 (1937).

190 431 U.S. 494, 503 (1977).

tradition."[191]

These two characterizations of substantive due process limits are often stated together, in apposition, as if they were essentially synonymous.[192] But, as our discussion of Locke's account of how we come to know the natural law makes clear, the two formulations are essentially different. To Locke, and the Lockean framers of the Constitution, tradition, even the basic tradition of our society, is not an ultimately reliable source of knowledge and understanding as to a natural right or, in other words, as to a substantive right guaranteed by the Due Process Clause.

Of course, in a system of precedent and common law, tradition cannot be ignored. That system is itself based on tradition and authority, and respect for, and fidelity to, controlling precedent. Where law created by human fiat is concerned, tradition and precedent may be an authentic source of such law. Even in the realm of human rights and substantive due process, there is no reason why tradition and commonly received wisdom may not function as a guideline, or a rule of thumb. But, as we have seen, according to the framers' understanding, tradition alone can never be an authentic source for understanding the boundaries of substantive due process and human rights.

On the other hand, *Palko v. Connecticut* presents a completely different doctrine and gets the matter exactly right. The language "liberties that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed,"[193] is profoundly sensitive and faithful to the Lockean intentions of the framers. Some "liberties" (i.e., human rights) are "implicit in the concept of ordered liberty," (that is, they must necessarily remain with the people in a civil society), because if they were sacrificed, legitimate political authority would be forfeited, and, by definition, a legitimate political society would no longer exist. It is "implicit in the concept" (or definition) of a legitimate political society that some human rights are necessarily retained by the people.

The Court argues that the challenge to the Georgia statute fails under both of these substantive due process tests, although the ar-

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191 *Id.* at 2844 (citation omitted).

192 *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952). Justice Frankfurter argues that the boundaries of due process rights are "not final and fixed," but "are derived from considerations that are fixed in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. *Id.* at 325.

193 302 U.S. 319 (1937).

gument displays the confusion I alluded to of treating the two tests as essentially equivalent. Prohibitions of homosexual conduct "have ancient roots . . . and [such conduct] was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights."[194] The Court concludes that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[195] While a conclusion about what is rooted in tradition may follow from a description of historical laws, no conclusion whatsoever follows from such premises as to whether a right is "implicit in the concept of ordered liberty." The two inquiries, as Locke taught us, could not be more distinct and dissimilar, and courts should be careful not to run the two inquiries together.

What the Court's argument really accomplishes is a *reductio ad absurdum* of the "history and tradition" test for the existence of a human right. The argument, in essence, is that people have always reviled and persecuted homosexuals; therefore, homosexuals have no right against continued legalized persecution. But the capacity of the human race to revile and persecute others is, if not unlimited, fairly open ended. To make the existence of a right logically dependent upon whatever happens to be the fashion in persecution and revulsion contradicts the concept of a right. To be more accurate, if one understands the notion of a "right" to be limited to that which was expressly and explicitly conferred by some human agency at some moment in time, then there is no contradiction. In fact, we would not even need the "history and tradition" test; all we need is an authoritative copy of the words of those who conferred the right.

This is essentially the view of the "originalists." As I have argued, however, it was not the view of the framers. Until the commitment of the framers to human rights has been completely displaced by the agenda of the "originalists," judges in cases such as this will have an obligation, under the principles of their profession, to reason and agonize, not merely to point smugly at a history and tradition of persecution. The Court's conflation of the two substantive due process tests is not just a theoretical error. It is dangerously misleading insofar as it invites us to imagine wrongly that the only kind of relevant argument is a discussion of history and tradition.

The Court's reasoning is "beyond the realm of the acceptable" not because of the result it reaches, but because, proceeding from a dogmatic prejudging of the result, the Court fails to identify the is-

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194 Bowers v. Hardwick, 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).
195 *Id.* at 194.

sue presented, and fails to address even the issue which it does identify according to the legally applicable standards. Apart from its wholly unsatisfactory history and tradition argument, the majority opinion in *Bowers* merely gives us the usual doctrinaire ranting about "redefining the category of rights deemed to be fundamental,"[196] and "expand[ing] the substantive reach of the [Due Process] Clauses."[197] In *Bowers*, what purports to be Constitutional adjudication is, in fact, based on a theory about the task at hand—a theory that prejudges the result without serious analysis or even a fair consideration of the claims and arguments of one of the disputants.[198]

D. Toward Neutral Principles of Constitutional Argumentation

1. Introduction

The purpose of this look at *Bowers* and *Cruzan* was not to review and analyze them thoroughly, but to use them as a springboard for deriving conclusions about the nature of constitutional reasoning that a rational person would have to accept, regardless of his or her political views, and regardless of the results to which the application of those principles leads in a particular case. I am referring, as always, to the clash between the claim of individual right, and the claimed governmental right to restrict and regulate. Whether this task can be accomplished depends upon how much burden is placed on the word "rational." At the threshold, I think that a constitutional adjudicator must approach the task with an open mind. The judge must acknowledge at the outset that the two disputants have at least an equal prima facie right, or *a priori* right, to prevail. That is, before the substance of the claim is known, the judge must, with a sufficiently open mind, listen to arguments and considerations on both sides of the case.

But to adopt this mind set, the judge must accept that individual claims of constitutional right have, in general, the right to be presented and considered seriously. This is exactly what the originalists will not acknowledge. Have we reached an unbridge-

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196 *Id.* at 195.

197 *Id.*

198 It can be argued persuasively that one of the major functions of an adjudicatory system is to give members of society the belief and feeling that it is possible for them to obtain a serious, reasoned consideration of their petitions and grievances, regardless of the eventual outcome. *See, e.g.*, George C. Christie, *Objectivity in the Law*, 78 YALE L. J. 1311, *reprinted in part in* ESSAYS, *supra* note 31, at 1005. To the extent that a theory of interpretation has the result that a court frequently abandons all pretense of a serious, sympathetic hearing of a litigant's arguments and claims of constitutional right, an important function of the court system is lost.

able impasse here at the threshold? If a judge persists in the belief that there is only a short list of individual rights that are even entitled to serious, thoughtful consideration, then I fear that we are indeed at an impasse. If this is the mind set of the judge, then the resulting style of adjudication is similar to *Bowers v. Hardwick*. The judge looks at the title of the claim, matches it against the titles on the short list, and if it is not found, dismisses the claim. In short, the claim is not adjudicated at all.

To adopt this assembly line disposition of constitutional claims, the judge must believe both that the principle of general respect for human rights was no part of the constitution intended by the framers, and also that regardless of the framers' intentions, there are no convincing arguments of social policy which justify allowing litigants to obtain serious consideration of their claims of individual right. On the basis of the considerations advanced in this article, and many others, the originalists' conclusion that the framers made no general commitment to individual rights cannot rationally be maintained. On the other hand, it is obvious that the philosophical underpinnings of the framers' political and constitutional opinions are not unanimously shared today. So it remains an open question as to whether the thinking of the framers has been so discredited that it should be rejected in the categorical, uncompromising terms that the "originalists" reject it, or whether the framers' thinking retains some validity and value even in the modern era.

I believe that the framers' wisdom does retain validity today, and that society ignores their thinking at our peril. Do the framers' legal and constitutional ideals fall aside if one rejects their views about natural rights, or is it possible to remain faithful to the basic social and constitutional order which they intended without accepting the philosophical structure which motivated them? I submit that it is possible to accept the framers' general commitment to human rights without accepting all their philosophy, and that there are good reasons for accepting the following guidelines as reasonable principles of constitutional adjudication, even if one rejects the framers' views about natural rights. I do not think that it can be conclusively demonstrated that these guidelines must be accepted. These guidelines, however, are essentially faithful to the framers' intentions and they are independently defensible on social policy grounds. What these principles of adjudication will lack for the modern reader is the strong sense of inevitability and necessity that they had for the

framers. For the framers, these principles were deeply embedded in a broader theory of what the world is and must be. For the modern reader, the principles lack this kind of metaphysical inevitability, so they must be justified by reference to social policy goals and considerations.

2. Principles of Constitutional Adjudication

First, the judge must understand and accept that the authority of a government to regulate human actions is limited by the purposes and ends of civil government intended by the framers, and that these purposes are best defined by the Lockean terminology of "peace and security," or something essentially similar. Furthermore, it is the limitation or restriction of human freedom that requires justification or explanation in terms of legitimate governmental peace or security interests.

Second, the judge must understand that the peace and security involved is that of the other members of society. It is the *members* of society who are the ultimate source of the delegated powers of government, and the *members* of society whose quasi-contractual or metaphorically contractual activity creates the civil society. On the basis of the principles enacted by the framers, there is no such thing as an "interest of society" or a "social interest" abstracted and distinct from the shared interests of the members of society; "interest of society" means, and can only mean, "generally shared interests of the members of society." Understanding this should subtly affect judicial reasoning. It may be a convenient abstraction, on occasion, to think of "society" as a great entity with desires and interests of its own, but the judge must always remember that analytically, this will not do. In rejecting a claim of individual right in favor of a governmental right to regulate, it is always necessary for the judge to identify a concrete interest possessed by the actual human members of the society whose satisfaction justifies and rationalizes the governmental regulation. Judicial opinions endorsing governmental restriction on the basis of such vague considerations as "social cohesiveness," or "the general integrity of society," are always suspect, because they suggest that the judge has substituted cliché and metaphor in favor of an actual reasoned analysis of the human interests at stake. An irrational (i.e., unexamined, unreasoned) demand for social conformity is never a sufficient basis for a restriction on free human action, unless some basis for the de-

mand for conformity, located in the concrete rights and interests of other members of society, can be shown.

Third, as is clear from what has been said so far, a judge may not merely decide a case on the basis of his or her preferences, predilections or prejudices. To do so would be the very essence of the abdication of the judicial function; the very essence of a violation of the judge's professional responsibility to society. Bork takes the position that unless one interprets (or misinterprets) the Constitution to contain a short, exhaustive laundry list of human rights, then any decision by a judge is necessarily a mere expression of such preference. But this is a straightforward empirical error. There is a difference between one's preference, predilection or prejudice and one's reasoned conclusion on the basis of applicable principles of analysis.

One could remake the English language, and redefine the term "preference," as Bork does, to compel logically the result that any decision a judge reaches is an expression of preference. But this Borkian conceptual reformation has nothing to recommend it; there is no good reason to define the category of reasoning and rational analysis out of existence by subsuming it under the heading of "preference." A great deal could be written about the concept of "rationality" and the process of reaching a conclusion on the basis of rational considerations, but on its face, this is a different activity from stating one's preference, predilection or prejudice. This can be aptly illustrated by referring to *Bowers*. It is perfectly possible for one to feel a personal distaste for homosexual activity, even a prejudice against it, and yet to reach the reasoned conclusion that there is no valid basis for a government to prohibit it, indeed that it would be a "despotic insanity" to do so.[199]

Fourth, despite Bork's remarkable claim (which he does not maintain consistently) to the contrary, not every preference or prejudice is equally entitled to deference. On the contrary, I think that a judge must accept that the mere fact that I would prefer that you did not exist, or that you would behave or conduct your life differently, is never in and of itself a sufficient reason to limit your freedom of action. The ability of human beings to succumb to hatreds, passions and prejudices regarding their fellow beings is logically unlimited. If society accepts that preference or prejudice is sufficient to limit the freedom of our fellow citizens, then society is adopting a constitutional theory which

199 *See* TEMPTING, *supra* note 3, at 234.

permits logically unlimited and unconfinable restrictions on human liberty. One of the few bulwarks against mindless explosions of social passions and prejudices is the inculcation in the members of society of the principles that everyone must be treated rationally and fairly, and that there are principles and values which underlie and limit the behavior of majorities towards non-conforming individuals and minorities.

Finally, courts must understand that notwithstanding the importance of precedent in our jurisprudence, tradition is never dispositive, especially where tradition denies a right or freedom. Restrictions on freedom must be rationally based, rather than rooted in preference and prejudice of a legislature or a judge, and must trace back to the peace and security interests of other members of society. A judge must always be alert to the possibility that a tradition does not fulfill these conditions, and that the tradition is, therefore, unauthorized and indefensible. A judge must be unfailingly attentive to this possibility precisely because these issues cannot be resolved by strict deductive arguments, and precisely because a judge, like every other human being, is vulnerable to passion, prejudice, insensitivity and irrationality.

That human beings inevitably suffer to some degree from these infirmities is no reason to deny that it is the essence of the judicial function to seek to minimize and surmount them. Further, it is no reason to deny that a collective, ongoing effort by judges to review and rethink issues in the light of the wisdom expressed in earlier opinions, is the best guarantee of fair and rational adjudication which is humanly possible. Again, to some extent, theory drives actuality. Does society want judges to be steeped in the academic pronouncements of the originalists that rationality is an illusion, and that when a judge agonizes over clashing interests and values, all he can ever do in the end is to express his own preference and desire? The danger is that some judges will actually come to believe this, and having come to believe it, will conclude that the agonizing, draining process of reasoning about competing interests and values is futile and unnecessary. But I submit that this is not the attitude with which we want judges to approach their task. On the contrary, if there are any members of society that should be thoroughly attuned to the difference between calm and careful consideration, on the one hand, and preference and prejudice, on the other hand, it is judges.

V. CONCLUSION

Bork himself cites a clear counterexample to his originalist thesis, which he attributes to a student questioner at a lecture he delivered. The student asked whether Bork thought that the Constitution prohibited a state from abolishing marriage.[200] It is not clear whether "abolishing marriage" was intended as a euphemism for "prohibiting sexual intercourse," but the counterexample is effective in either case. Bork's strange response to the counterexample was not so much to confess and avoid as to confess and ignore. Bork responded:

> I said no, the Constitution assumed that the American people were not about to engage in despotic insanities and did not bother to protect against every imaginable instance of them. [The student] replied that he could not accept a constitutional theory that did not prevent the criminalization of marriage. It would have been proper to respond that in any society that had reached such a degenerate state of totalitarianism. . . it would hardly matter what constitutional theory once held; the Constitution would long since have been swept aside and the Justices consigned to reeducation camps, if not worse. The actual Constitution does not forbid every ghastly hypothetical law, and once you begin to invent doctrine that does, you will create unconfinable judicial power.[201]

But this does not address the force of the counterexample. Many people would be surprised and dismayed to learn that in the opinion of a man who almost became a Justice of the United States Supreme Court, a state legislature may constitutionally enact a "despotic insanity." One would assume that our Constitution *did* protect citizens against despotic insanities, and one certainly would feel more secure in a society which did. Fortunately, the framers agreed, and made it clear that the very essence of their undertaking was to draft their Constitution in response to what they considered "despotic insanities."

The most interesting feature of Bork's response is his acknowledgment that there is such a thing as a law, duly enacted through proper procedures by a democratically constituted legislature, that may properly be classified as a "despotic insanity." This is notwithstanding the fact that a majority of the legislature evidently preferred the law in question. Apparently, not every preference is equally worthy of gratification after all, unless all Bork means by a

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200 *Id.*
201 *Id.*

"despotic insanity" is a law of which he personally disapproves. It is clear, though, that Bork does not use the phrase "despotic insanity" in this radically subjectivist sense; he uses it to mean—well—a despotic insanity. And it is totally incomprehensible how Bork, on the basis of the principles he endorses, could refer to a hypothetical situation where a duly constituted legislature enacted a law of which he disapproves as a "degenerate state of totalitarianism."

Bork contradicts himself here. Unless one acknowledges that there is some valid standard of moral evaluation, independent of the democratically elected majority's preferences, for assessing those preferences, then it is logically impossible to condemn those preferences in such normative terms as "insanity," "degenerate," and "totalitarian" (unless one is merely expressing disapproval). But Bork does condemn some hypothetical preferences. Further, if he condemns a hypothetical expression of legislative preference, then he is also logically committed to the possibility of condemning actual preferences (using the word "condemn" in a sense other than the mere expression of subjective disapproval). One should not be surprised that Bork contradicts himself in this way; as I observed earlier, the radically subjectivist moral theory which Bork ostensibly espouses is so counterintuitive, and so contrary to what we really believe, upon reflection, about moral matters, that his theory is almost impossible to maintain consistently.

Bork's response to the counterexample is first that as a matter of empirical fact, the American people would never enact a despotically insane law, and second, that if they ever did, this could only mean that society had reached such a stage of decay and collapse that nothing much would matter any more. Both of these propositions are surely false. It is fatuous to imagine that the American people could never act in a despotically insane fashion. On the contrary, a broad majority of the American people—and many other people—have on more than one occasion consciously and deliberately adopted social beliefs, and engaged in conduct which amounted to despotic insanity.[202] Certainly the institution of slavery, and texture of laws, policies and institutions which supported it is one illustration. Many would argue that a judicial decision such as *Bowers v. Hardwick*,[203] and the statutes on which it is based, is

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202 *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (Supreme Court upholding about as despotic a regulation that has ever been devised by our government—one that placed loyal United States citizens of Japanese ancestry into internment camps under the pretense of national security).

203 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986); *see supra* note 123 and accompanying text.

another.

Nor is there any reason to think that the enactment of a despotically insane law is conceivable only where all semblance and all remnants of constitutional order have vanished. By Bork's hypothesis, the despotically insane law was chosen by a majority of the democratically elected legislature. And by Bork's constitutional theory, judges have no authority, based upon a theory of human rights, to assail the despotically insane law. Based on Bork's own vision of the proper constitutional order, the majority need not fear that judges will effectively challenge their insane despotism. Only the victims of the insanely despotic law have the motivation to challenge it, and while they may generate some level of social instability and disorder, there is no reason to suppose that this could not be effectively suppressed by the majority, and the instruments of force they control. This may not be Bork's view, but I suspect that it is Michael Hardwick's view.

American society under slavery immediately refutes Bork's hasty supposition that an insanely despotic law could be enacted by the American people only in a situation where society had collapsed to the extent that "the Constitution would long since have been swept aside." Without doubt, the institution of slavery constituted moral decay and collapse, and without doubt the institution was flagrantly inconsistent with the Constitutional principles of human dignity, human worth and human rights. To that extent, and in that respect, the Constitution had always been swept aside. American society during the entire period of slavery, however, was plainly not in a situation of total decay and collapse, where "all semblance of constitutional organization was swept aside," and judges were "consigned to reeducation camps, if not worse."

Bork's response to the student shows an amazing indifference to or lack of recognition of the real logical force of the device of refutation by hypothetical counterexample. Bork's interlocutor presents an example, and asks: "Does your theory not have the absurd consequence that the law against marriage could be constitutionally enacted?" Bork's response is, in effect: "Yes, the theory does have that consequence, but don't worry about it, it could never happen." But to reject the force of the hypothetical example on the grounds that it is hypothetical fails to confront the argument. Bork's response both acknowledges that his theory does have the stated consequence, and fails to deny that the consequence is absurd. As the dialogue stands, therefore, the counterexample is unrefuted, and the student interlocutor has prevailed.

It is precisely the real possibility of despotic insanity, and the real need to guard against it, which make Bork's notion of a morally indifferent Constitution—a Constitution which fails to include a general commitment to human rights, or to set forth any general vision of a desirable society—so troubling, if not dangerous. Obviously, constitutional theory alone cannot fully protect against despotic usurpations of power. Today, the pen may or may not be mightier than the sword, now that "sword" has become a metaphor. But the confusions of the "originalists," and their mischievous and fanciful notion that their views represent the framers' intentions, are deplorable. The best protection against "despotic insanity" is for people to understand that the framers did intend to create a Constitution which embodies moral ideals, which accords ultimate value to the rights and freedoms of individuals by creating zones which are secure against governmental restriction and interference; and in which neither legislatures nor judges are free to enact their own preferences, predilections or prejudices in the performance of their constitutionally mandated duties, but rather where both the legislatures and judges are constrained and limited by the principles and values expressed in the Constitution.