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# THE IMPENETRABLE CONSTITUTION AND STATUS QUO MORALITY

Charles A. Kelbley\*

## INTRODUCTION

Professor George has presented an unconventional and provocative position on natural law and judicial review that raises a number of important questions about his natural law philosophy.<sup>1</sup> His response to Professor Fleming's commentary<sup>2</sup> raises still more troubling questions about the nature and extent of his commitment to the American legal tradition that is founded on a belief in natural law and the protection of natural rights.<sup>3</sup> In particular, his view of the role of judicial review in that tradition seems largely to negate two centuries of well-established practice under our Constitution. In this article I discuss some of the problems I find with George's positions as set forth in this colloquium.

My discussion has three parts. The first concerns George's criticism of Justice William O. Douglas's majority opinion in *Griswold v. Connecticut*.<sup>4</sup> Unlike George, who repeatedly criticizes Justice Douglas's use of the phrase "penumbras formed by emanations" in explaining the source of the right of privacy,<sup>5</sup> I find much to be said for that very language. I also think there is much more in Justice Douglas's opinion, and in the separate concurring opinions in *Griswold*, that can and does support the constitutional basis of the right of privacy. The second part of my discussion will focus on George's reliance on, and his agreement with, Justice Hugo Black's

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1. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 Fordham L. Rev. 2269 (2001).

2. James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 Fordham L. Rev. 2285 (2001).

3. Robert P. George, *The Natural Law Due Process Philosophy*, 69 Fordham L. Rev. 2301 (2001).

4. 381 U.S. 479 (1965).

5. See, e.g., George, *supra* note 3, at 2303-04.

dissenting opinion in *Griswold*.<sup>6</sup> Justice Black castigates the Douglas majority opinion for its holding that the right of privacy is implied by several of the amendments to the Constitution.<sup>7</sup> Black also criticizes the separate opinions of Justices White, Harlan, and Goldberg for engaging in what Black thought was a “natural law due process” methodology to justify the recognition of the right of privacy.<sup>8</sup> In light of Justice Black’s positivism, skepticism, and opposition to natural law and natural rights *tout court*, he is hardly an authority to rely upon to support George’s thesis that under our Constitution the legislatures, not the courts, have the primary authority to give effect to natural law and to protect natural rights.<sup>9</sup>

In the third part I focus on George’s related embrace of Robert Bork’s legal positivism,<sup>10</sup> which he evidently thinks is also consistent with legislative enactments of natural law. I argue that Bork is a radical skeptic and therefore an equally strange candidate for alliance with the promotion of natural law and natural rights. Following the lead of Justice Black and Bork, George appears to embrace a narrow legal positivism and literalism. That embrace does not lead to a clear, intelligible Constitution, as they claim, but to an impenetrable, opaque Constitution that stems from the virtual rejection of any meaningful and substantive sense of judicial interpretation of the moral content of the Constitution. In effect, George leaves the elaboration of natural law requirements primarily to legislative majorities, which of course tend to reflect popular opinion and status quo morality. How George can manage to distill natural law out of these fallible, and often prejudiced and discriminatory sources, is left wholly undeveloped. His move is also quite contrary to the historical mission of such key constitutional provisions as the Fourteenth Amendment’s Equal Protection and Due Process Clauses, which were enacted in great part to embody abstract moral principles to guard against abuses engendered by status quo morality.<sup>11</sup>

### I. IN DEFENSE OF *GRISWOLD*

George’s strategy in criticizing Justice Douglas’s majority opinion in *Griswold* is to characterize it as ludicrous because he thinks Douglas

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6. *Griswold*, 381 U.S. at 507 (Black, J., dissenting).

7. *Id.* at 509-10 (Black, J., dissenting).

8. *Id.* at 510-27 (Black, J., dissenting).

9. George, *supra* note 1, at 2282.

10. George, *supra* note 3, at 2302.

11. For a discussion and criticism of certain Supreme Court decisions which relied upon the related idea of “status quo neutrality,” see Cass R. Sunstein, *The Partial Constitution* 41 (1993) (stating that with the idea of status quo neutrality the Court took “existing practice as the baseline for deciding issues of neutrality and partisanship . . . by assuming that existing practice was prepolitical and natural—that is, that it was not itself a function of law, or subject to challenge from the standpoint of justice”).

was engaging in “free wheeling judicial review”<sup>12</sup> and drawing upon the “metaphysics of ‘penumbras formed by emanations.’”<sup>13</sup> In fact, Justice Douglas’s use of penumbra was an allusion “to an old and, to Douglas, familiar constitutional law concept of the implied powers of the federal government,”<sup>14</sup> powers that are based on the Necessary and Proper Clause.<sup>15</sup> Indeed, it is notable that the penumbra doctrine “permits one implied power to be engrafted on another implied power.”<sup>16</sup> As Professor Dorothy Glancy observes, “[t]he idea of implied limitations on government powers was not Douglas’s invention. Thomas Cooley’s *A Treatise on Constitutional Limitations* argues extensively for them and even discusses an implied right of privacy.”<sup>17</sup> Although he was not as inclined as Justice Douglas to engage in or support penumbral thinking without qualifications, Justice Holmes did use “penumbra” in a number of cases.<sup>18</sup> Indeed, in *Schlesinger v. Wisconsin*,<sup>19</sup> he stated that “the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured.”<sup>20</sup> That was, of course, precisely the point Douglas was making within the particular circumstances of the *Griswold* case.<sup>21</sup>

Justice Holmes’s use of penumbra is also captured by the “spirit of the law”—as in the familiar distinction between the “letter and the spirit of the law”—which is very commonplace and not at all spooky, least of all to natural lawyers. Far from engaging in “free wheeling judicial review”<sup>22</sup> or “metaphysics,”<sup>23</sup> it would be more accurate to say that Douglas was simply relying in great part on common sense.<sup>24</sup> It is

12. George, *supra* note 3, at 2305.

13. George, *supra* note 1, at 2270 (quoting *Griswold*, 381 U.S. at 484); see also George, *supra* note 3, at 2310.

14. Dorothy J. Glancy, *Douglas’s Right of Privacy: A Response to His Critics*, in “He Shall Not Pass This Way Again”: The Legacy of Justice William O. Douglas 155, 162 (Stephen L. Wasby ed., 1990).

15. U.S. Const. art. I, § 8.

16. Black’s Law Dictionary 1022 (5th ed. 1979); see Glancy, *supra* note 14, at 162, 174 n.45.

17. Glancy, *supra* note 14, at 174 n.46 (citation omitted).

18. See *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring).

19. 270 U.S. 230, 241 (1926) (Holmes, J., dissenting).

20. *Id.* (Holmes, J., dissenting).

21. *Griswold v. Connecticut*, 381 U.S. 479, at 482-83 (1965) (“Without those peripheral [penumbral or implied] rights the specific rights [set forth in the Bill of Rights] would be less secure.”).

22. George, *supra* note 3, at 2305.

23. George, *supra* note 1, at 2270; George, *supra* note 3, at 2310.

24. Even H.L.A. Hart, the most prominent proponent of a sophisticated version of legal positivism in the twentieth century, had much to say about the uses of “penumbral thinking” in the law. He stated that:

We may call the problems which arise outside the hard core of standard instances or settled meaning “problems of the penumbra”; they are always

a common sense notion of the letter and spirit of the law—both with respect to particular provisions and the entire Constitution. As Justice Douglas said in his *Poe* dissent, “[t]his notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live.”<sup>25</sup>

Quite apart from sophisticated constitutional interpretation and the careful and reasoned analysis of precedents that characterized Justice Douglas’s opinion for the Court in *Griswold*, it seems almost a matter of common sense, against the background of our constitutional scheme of government, that if I have a right of free speech I also have the implied or peripheral or penumbral right to speak privately. If not, my alleged right of free speech is meaningless, threatened, or, at the very least, “less secure.” If I have a Fifth Amendment right not to incriminate myself, I may very well argue that I have an implied or peripheral or penumbral right to remain silent. If not, my right against self-incrimination is illusory or, at the very least, “less secure.” Analogously, if a married woman has a right to have sexual relations, she may sensibly conclude that she has an implied or peripheral or penumbral right to her private decision to have sexual relations without risking pregnancy at that particular by using some form of contraception. If not, her responsible exercise of sexual freedom is significantly attenuated by the state’s virtual oversight of “the sacred precincts of marital bedrooms.”<sup>26</sup> It is little wonder, then, that all nine justices in *Griswold* thought the Connecticut statute was a bad law. As George recognizes,<sup>27</sup> even the two dissenters, Justices Black and Stewart, found the Connecticut anti-use statute “offensive” or “uncommonly silly.”<sup>28</sup> Yet George defends it.

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with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution. If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises.

H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607-08 (1958).

25. *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting) (citations omitted).

26. *Griswold*, 381 U.S. at 485.

27. George, *supra* note 1, at 2274.

28. *Griswold*, 381 U.S. at 507 (Black, J., dissenting) (“I feel constrained to add that the [Connecticut anti-use] law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg who, reciting reasons why it is offensive to them, hold it unconstitutional.”); *id.* at 527 (Stewart, J., dissenting) (“I think this is an uncommonly silly law. . . . As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to

George is absolutely correct, however, in saying that many constitutional scholars have criticized Justice Douglas's use of the idea of "penumbras formed by emanations."<sup>29</sup> Even Professor Laurence Tribe, who otherwise defends *Griswold*, referred to its "twilight zone talk of 'penumbras . . . formed by emanations . . .'"<sup>30</sup> Yet, as I have suggested, underneath Douglas's language there is a good deal of common sense. The same is true of Justice Harlan's opinion in *Griswold*,<sup>31</sup> where he declined to join Justice Douglas's opinion for the Court because Douglas's approach was too wedded to the particular texts of the Constitution.<sup>32</sup> Instead, Harlan thought Douglas should have relied on the Fourteenth Amendment's Due Process Clause. His reasons were expressed in his famous dissent in *Poe v. Ullman*,<sup>33</sup> where the Court, over Justice Harlan's dissent, refused to reach the merits of the identical issues that were to be raised again four years later in *Griswold*.

"Due process," Harlan wrote,

has not been reduced to any formula; its content cannot be determined by reference to any code. . . . If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them.<sup>34</sup>

Justice Harlan's emphasis on "rational process" is echoed in what Joseph Koterski said in his response to George, that "natural law arguments depend on careful reasoning and bringing reasonable people to see the compelling nature of the arguments offered."<sup>35</sup> Harlan's long dissent in *Poe* was an admirable attempt to do just that. Here I might note in passing that it is striking that George should, in his criticism of *Griswold*, concentrate on Justice Douglas's majority opinion and ignore both Justice Harlan's concurrence in *Griswold* and his famous *Poe* dissent, which was a vital part of the thinking that led to the right of privacy. Instead of devoting so much energy to ridiculing "penumbras formed by emanations," George might have

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personal and private choice, based upon each individual's moral, ethical, and religious beliefs.").

29. See generally Glancy, *supra* note 14.

30. 1 Laurence H. Tribe, *American Constitutional Law* 43 (3d ed. 2000) (omission in original). But see James E. Fleming, *Securing Deliberative Autonomy*, 48 *Stan. L. Rev.* 1, 38 n.215 (1995) ("I do not concede that there is anything spooky or scary about penumbras and emanations . . .").

31. 381 U.S. at 499 (Harlan, J., concurring in the judgment).

32. Tribe, *supra* note 30, at 43 n.25 ("It is sometimes forgotten that Justice Harlan disagreed with the majority opinion in *Griswold* because he thought that Justice Douglas's approach was too restrictive!").

33. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

34. *Id.* at 542 (Harlan, J., dissenting).

35. Joseph W. Koterski, S.J., *Response to Robert P. George, Natural Law, The Constitution, and The Theory and Practice of Judicial Review*, 69 *Fordham L. Rev.* 2297, 2297 (2001).

better defended his critique of the right of privacy by responding to Harlan's defense of substantive due process. After all, substantive due process is the beast that George wants to slay, not the particular linguistic phrase that Douglas used to defend the right of privacy on other, non-substantive due process grounds.<sup>36</sup>

Unlike George, who seems to focus on the words and phrases of the Constitution to the exclusion of Justice Harlan's "rational process," Harlan emphasized many other things that go into due process. He argued that the imperative character of a constitutional provision

must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.<sup>37</sup>

Justice Harlan's approach to due process in his *Poe* dissent influenced later Court decisions, particularly the *Casey* joint opinion,<sup>38</sup> and was at the core of Justice Souter's long and careful review in *Washington v. Glucksberg* of "two centuries of American constitutional practice in recognizing unenumerated, substantive limits on governmental action."<sup>39</sup> Souter noted that even though "this practice has neither rested on any single textual basis nor expressed a consistent theory," the very "persistence of substantive due process in our cases points to the legitimacy of the modern justification for such judicial review."<sup>40</sup> Commenting on Justice Harlan's *Poe* dissent and Justice Souter's *Glucksberg* concurrence, Professor Tribe observed:

In essence, Harlan and Souter were suggesting that the Constitution's structure (as well as its history)—the way it was put together—reveal that the gaps between the rights-defining

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36. Justice Harlan's confidence in the possibility of reason and reasoning evinces what Levinson has called a "catholic" approach to constitutional interpretation, as contrasted with a "protestant" approach (which is illustrated by Justice Black's jurisprudence). See Sanford Levinson, *Constitutional Faith* 18-53 (1988). This contributes to the irony, noted by Fleming, of George embracing Justices Black and Iredell instead of Justices Harlan and Chase. See Fleming, *supra* note 2, at 2290.

37. *Poe*, 367 U.S. at 542-43 (Harlan, J., dissenting) (citations omitted).

38. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

39. 521 U.S. 702, 756 (1997) (Souter, J., concurring in the judgment).

40. *Id.* (Souter, J., concurring in the judgment).

provisions enumerated in the Bill of Rights are only apparent and do not represent substantively empty space but instead serve to juxtapose, in an almost Impressionist fashion, individual commitments in combinations also showing additional guarantees. Stripped of its twilight zone talk of “penumbras . . . formed by emanations,” Justice Douglas’s majority opinion in *Griswold v. Connecticut*, it becomes apparent, simplifies and intensifies, but remains of a piece with, Harlan’s analysis—almost frantically accumulating individual provisions of the Bill of Rights and their Supreme Court glosses so that, brought together, they frame the now apparent constitutional right of privacy. It is difficult to disagree with Harlan, Souter, and Douglas. To see the matter otherwise is to see government power everywhere except in those finite and isolated recesses where the rights of individuals have been expressly recognized. And that in turn is to assume a structure in which government has all power unless specifically told otherwise, a structure as alien to the logic of limited government as its counterpart on the federal-state stage would be alien to the logic of limited national power.<sup>41</sup>

The point I wish to make is that *Griswold* is defensible from a number of perspectives, only a few of which I have briefly outlined above. But in light of those perspectives, George’s single-minded emphasis on the language of “penumbras” and “emanations” is little more than caricature, hardly a fair-minded or historically informed analysis. Even if Justice Douglas’s opinion were in fact a veiled example of substantive due process (which Douglas emphatically denied),<sup>42</sup> that long-standing practice can certainly lay claim to legitimacy, as Justice Harlan’s *Poe* dissent,<sup>43</sup> the *Casey* joint opinion,<sup>44</sup> and Justice Souter’s *Glucksberg* concurrence arguably demonstrate in great detail.<sup>45</sup> Yet that very practice is at the heart of George’s attack on *Griswold*, and leading his attack is Justice Black’s dissenting opinion in *Griswold*, where Justice Black’s principal weapon is the supposedly deadly epithet of “natural law due process philosophy.” Is that epithet potent enough, however, to overcome the “reasoned judgments” of Justices Harlan and Souter?<sup>46</sup>

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41. Tribe, *supra* note 30, at 43 (alteration in original) (citations omitted). For an excellent discussion of how one might construct the structure of “deliberative autonomy” from a list of familiar “unenumerated” fundamental rights that have been recognized by the U.S. Supreme Court, see Fleming, *supra* note 30, at 7-14.

42. *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965).

43. *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

44. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

45. *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring in the judgment).

46. See *Casey*, 505 U.S. at 849 (stating that “adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment”); *Rochin v. California*, 342 U.S. 165, 171 (1952) (“To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at



## II. JUSTICE BLACK'S ATTACK ON NATURAL LAW

Before dealing with George's use of Justice Black's *Griswold* dissent, I want to comment on one aspect of the interchange between George and Fleming. I do so not to enter into their disagreements but to show that my initial reaction to George's original paper<sup>47</sup> was quite similar to that of Fleming's response to George.<sup>48</sup> Fleming read George's paper as "embracing Justice Black's legal positivist harangue against natural law in dissent in *Griswold v. Connecticut*."<sup>49</sup> Fleming was astounded to see a defender of natural law, such as George, align himself with Justice Black. So was I. However, in his response to Fleming,<sup>50</sup> George scolds Fleming for failing to "attend carefully to the different meanings assigned to [natural law and legal positivism] by different writers or by a given writer in different contexts."<sup>51</sup> George believes that the "anomaly [Fleming] thinks he finds in [George's] analysis is an illusion generated by his failure to observe that the 'natural law due process philosophy' that Black rejects has no necessary connection to the 'natural law' [George] affirm[s]."<sup>52</sup> But as I read George's original piece,<sup>53</sup> there is no discernible difference between George and Justice Black; George's embrace of Black seems complete, absent any effort on George's part "to attend carefully" to how his understanding of natural law differs from Black's.

On balance, Fleming's is the more careful reading of Justice Black inasmuch as George advances a highly unconventional interpretation of Black without acknowledging the burden of refuting the conventional interpretation (expressed by Fleming) much less carrying it. Indeed, it is only in his response to Fleming that George tries to give some indication of what he means by natural law. He does so by referring to, but not providing, an argument by John Finnis that purports to show that "[t]here are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy."<sup>54</sup>

That short proposition is the only substantive indication we have from either of George's two papers of what he means by natural law. It is that proposition, he says, that he defends against "moral skeptics" and "relativists."<sup>55</sup> I think, however, that any number of legal

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some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges . . .")

47. George, *supra* note 1.

48. Fleming, *supra* note 2.

49. *Id.* at 2285-86.

50. George, *supra* note 3.

51. *Id.* at 2301.

52. *Id.* at 2301-02.

53. George, *supra* note 1.

54. George, *supra* note 3, at 2302 (alterations in original) (quotations omitted).

55. *Id.*

philosophers, of different jurisprudential persuasions, could, without more, easily embrace that proposition. Indeed, I believe Justice Black, notwithstanding his skepticism, would fully agree that the United States Constitution and the majority of state and federal laws have been uniquely secured through the practical reason of judicial and legislative institutions. So where is the difference between Black and George? Both oppose the judiciary's resort to natural law, by which they mean judicial reasoning that is, in their views, unsupported by the text of the Constitution. Of course, Justice Black's opposition to natural law is based on his view that judges who rely on natural law reasoning are simply basing their decisions on their subjective values and preferences. Although George professes ignorance about whether Black was a metaethical skeptic, it seems abundantly clear that he was. For example, Hadley Arkes, George's fellow proponent of reviving natural law in constitutional theory, noted that according to Justice Black:

[T]he vice of substantive due process was connected, inescapably, to the vice of taking natural rights seriously. Natural rights he regarded, as Jeremy Bentham had regarded it before him, as a species of "nonsense on stilts." [Black] . . . was deeply skeptical about any claim to know objective moral truths; he was convinced that all of these claims were simply reducible in the end to the personal beliefs, or the personal "values," of the judges. They could not be proven true or false; they were irreducibly matters of the most subjective belief or private taste. Therefore, they could not supply a standard, hovering above the laws or *contained in the Constitution*; a standard to which judges could appeal in measuring the legislation passed by politicians.<sup>56</sup>

Black's skepticism—ethical and metaethical—could hardly be more complete. If Black is a skeptic, however, not just about judges' ability to know objective truth, but about the very possibility of such knowledge, why does George rely so heavily on Justice Black's critique of substantive due process? Certainly if one were interested,

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56. Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* 27 (1994) (emphasis added). Justice Black was

the most implacable opponent of natural law. And on that point, there was never a shade of doubt: behind substantive due process, there had to be some notion of natural law or natural right—some claim to have access to an objective truth, perhaps a truth grounded in nature, or a truth grounded in the law of reason. But whatever the source from which it sprung, it would be a truth that did not depend on the votes of a majority. For after all, if all truth were conventional, then the only measure of truth would be found in the votes of majorities. And in that case, the function of the judge could only be as Justice Oliver Wendell Holmes described it: to assure that the herd gets its way—that the majority be allowed to prevail in some decorous manner, with the trappings of legality.

Hadley Arkes, *Lochner v. New York and the Cast of Our Laws, in Great Cases in Constitutional Law* 94, 96 (Robert P. George ed., 2000).

as George surely claims he is, in knowing whether judges are competent to explicate the explicit and implicit moral content of natural law and natural rights contained in the Constitution, one would avoid at all costs consulting a moral and epistemological skeptic, such as Black. Perhaps George himself is a skeptic, or maybe, as Fleming thinks, his position “reflects political judgments about what institutions are most likely to realize his particular conservative conception of natural law.”<sup>57</sup> Since similar questions are raised by his apparent, if partial, alliance with Robert Bork’s jurisprudence, I will defer my answer to those questions and first give my assessment of Bork’s place within George’s thinking.

### III. BORK’S SKEPTICISM: LEGAL AND MORAL

George finds Robert Bork’s legal positivism at least somewhat compatible with his own views. Indeed, Fleming refers to George’s evident “attempt to wed natural law with Borkean legal positivism.”<sup>58</sup> For example, George asserts that Bork is not the kind of legal positivist, such as George finds in Hans Kelsen, who rejects “the objectivity of human goods and moral requirements.”<sup>59</sup> Instead, he says that Bork’s legal positivism “is expressly restricted to the claim that under our Constitution courts are entitled to enforce only the positive law of the Constitution and are obligated to defer to legislative judgments where the positive law does not forbid legislative action.”<sup>60</sup> So it would seem that George views Bork and Justice Black in a similar way. If we are to believe George, their devotion to legal positivism simply springs from pure reverence for the law and their justified hatred of “heretics” who depart from the orthodoxy of what the law is.<sup>61</sup> But as we saw above, Black’s positivism springs not from disinterested reverence for law but from deep skepticism; for Black, law seems to be something we must acquiesce in, *faute de mieux*. But is Bork any different? Isn’t he too a skeptic? George apparently does not think so.<sup>62</sup> I do not believe, however, one can sensibly deny that he is. Consider Bork’s views, that I quote at length below, on the possibility of moral reason in the law, and then ask yourself whether Bork is or is not a moral skeptic and whether, like Justice Black, he too rejects “the objectivity of human goods and moral requirements”<sup>63</sup> that are so central to George’s own understanding of natural law.

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57. Fleming, *supra* note 2, at 2286 n.10.

58. See James E. Fleming, *A Further Comment on Robert P. George’s “Natural Law,”* 70 *Fordham L. Rev.* 255, 255 (2001).

59. George, *supra* note 3, at 2302.

60. *Id.*

61. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 6-11 (1990) (arguing that departures from the “‘ratifiers’ original understanding of what the Constitution means” constitutes the “heresy” of “political judging”).

62. George, *supra* note 1, at 2280 n.46.

63. George, *supra* note 3, at 2302.

As the following citations to Bork's work demonstrate, he rejects the relevance of moral reasoning to the law upon two related grounds. One is fairly superficial; the mere fact that all people do not agree on such matters. The second links this diversity of opinion to the claim that, absent universal agreement, there can be no proof of the truth of any moral proposition. That is, from the fact that people disagree on moral matters he draws the conclusion that no one position *can* be right, for if it were it would convince all reasonable persons and disagreements would vanish. Bork's repeated insistence on this remarkable proposition is worth reproducing, at the price of some repetition:

[T]he idea that the public, or even judges as a group, can be persuaded to agree on a moral philosophy necessarily rests upon a belief that not only is there a single correct moral theory but, in today's circumstances, all people of good will and moderate intelligence must accept that theory. None of these things is possible.<sup>64</sup>

If the basic institution of our Republic, representative democracy, is to be replaced by the rule of a judicial oligarchy, then, at the very least, we must be persuaded that there is available to the oligarchy a systematic moral philosophy with which we cannot honestly disagree.<sup>65</sup>

The supposition that we might all agree to a single moral system . . . [is] so unrealistic as not to be worth discussion.<sup>66</sup>

[One] reason to doubt that moral philosophy can ever arrive at a universally accepted system is simply that it never has. Or, at least, philosophers have never agreed on one.<sup>67</sup>

If the greatest minds of our culture have not succeeded in devising a moral system to which all intellectually honest persons must subscribe, it seems doubtful, to say the least, that some law professor will make the breakthrough any time soon. It is my firm intention to give up reading this literature.<sup>68</sup>

In short, like Justice Black, Bork certainly embraces skepticism—moral, interpretive, and, I would suggest, *legal* skepticism. For if we cannot penetrate into the moral and normative meanings of the law, particularly key phrases of the Constitution's Bill of Rights, what we are left with are words and names that have no underlying reality; they point to nothing beyond the boundaries of their limited semantic content. Perhaps this "nominalism" was exemplified by Justice

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64. Bork, *supra* note 61, at 252.

65. *Id.* at 253.

66. *Id.*

67. *Id.* at 254.

68. *Id.* at 255.

Black's well-known First Amendment absolutism, which he expressed in his belief that the Amendment's words "'Congress shall make no law' [simply] means Congress shall make no law."<sup>69</sup> It is also exemplified, however, by Bork's narrow originalism and his constriction of the morality of law to the positive morality of framers and ratifiers who are the unique Makers of the law for us, the passive Receivers. The practical effect of that semantic approach to constitutional meaning is to encourage a "plain fact" view of law that seems largely to deny the ongoing process of seeking the "integrity in law" that is arguably one of its cardinal properties.<sup>70</sup> It does not allow us to view the Constitution as adumbrating a set of substantive principles that we can build upon as we extend the Constitution into the future.<sup>71</sup> Its time-preference is decidedly for the past, which ignores the claim that the Constitution is a never finished affair that is necessarily elaborated over time—past, present, and future.<sup>72</sup>

I believe that Bork's brand of skepticism, like Justice Black's, is captured by what Ronald Dworkin has called "external" skepticism in contrast to "internal" skepticism.<sup>73</sup> Let me explain the distinction. The internal skeptic is a participant in some enterprise, such as the interpretation of art, literature, morality, or a social practice like law. Such a skeptic may doubt a given interpretation of a text or practice; she may even deny that there is or can be any unified and acceptable interpretation of a given novel, play, social practice, or law. In that case her skepticism, as Dworkin says, is "global." But it is important to recognize that her skepticism, partial or global, arises in and through her exercise of a commitment to an interpretive endeavor—her active participation in and concerted effort to render the "right" interpretation of a play, practice, or the provisions of a document such as the U.S. Constitution. Her skepticism is a result of embracing, rather than rejecting, an active interpretive attitude. If her skepticism is "global" with respect to law, it must be taken quite seriously. But first we will want to examine her arguments.

The external skeptic is quite different. Her skepticism is external because she stands outside the interpretive enterprise. She is disengaged because she is paralyzed by a metaphysical view that demands, as Bork does, universal agreement as the touchstone of acceptable moral reason. Since that criterion will never be met, we must simply accept the morality of law that has been ingrained in it by

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69. Hugo LaFayette Black, *A Constitutional Faith* 45 (1969).

70. See generally Ronald Dworkin, *Law's Empire* (1986).

71. See generally James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211 (1993) (constructing a substantive political theory that best fits and justifies our constitutional document and underlying constitutional order).

72. See generally Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (2001).

73. See Dworkin, *supra* note 70, at 76-85 (distinguishing between external and internal forms of skepticism about interpretation).

past lawmakers. Departures from that morality constitute “heresy” and involve “moral relativism.” Bork himself, of course, is a critic of moral relativism, but it is important to see that what he means by that term is largely any departure from the positive morality that is entrenched in a community’s law at a particular moment in time.<sup>74</sup> As an example of “extreme moral relativism” he cites various positions advocated by the American Civil Liberties Union (“ACLU”) on homosexuality, gambling, pornography, and other issues that oppose the status quo morality entrenched in the law.<sup>75</sup> But whatever the merits of specific issues within ACLU advocacy, Bork seems to condemn them merely because they differ from the status quo morality of law. In this respect, he exhibits the marks of the external skeptic, disengaged from the enterprise of interpretation and reasoned argument. If Bork thinks the ACLU’s positions are mistakes, poor performances within the enterprise of interpretive practices in the law, he needs to match the ACLU’s reasons and arguments for their positions with contrary reasons and arguments of his own.<sup>76</sup> Labels alone convince no one who takes morality and legal rights seriously.

I emphasize Bork’s skepticism and his endorsement of status quo positive morality because George, too, has tendencies in this direction. Like Bork, he thinks that “judges will generally come to share elite views [another label] where salient divisions develop between elite and popular opinion.”<sup>77</sup> And he thinks that “today elite opinion tends to be on the liberal side of moral and cultural issues.”<sup>78</sup> He wonders whether “anyone doubt[s] that a poll of the Princeton or Fordham faculty on ‘partial birth abortion’ or ‘same-sex marriage’ will produce results rather different from a poll of the first seven hundred names in the Trenton or Pelham telephone book.”<sup>79</sup> While that is not an unqualified endorsement of popular, status quo moral views, it does seem to express a distinct preference for those views over “elite” views expressed in and through judicial reason, and that raises the specter of either skepticism or politics. If George is a skeptic along the lines of Justice Black and Bork, we can understand his embrace of the positive morality located between the covers of telephone books.<sup>80</sup> But if George is playing politics, in the sense of making a political judgment about which group or institution is most likely to endorse his conservative moral and legal views about natural law, that is quite

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74. Bork, *supra* note 61, at 241-50.

75. *Id.* at 243-44.

76. See Dworkin, *supra* note 70, at 83. In referring to Bork’s criticism of ACLU positions, I do not mean to defend any particular positions of the ACLU but simply to note the need for interpretation and argument in opposing them.

77. George, *supra* note 3, at 2307.

78. *Id.*

79. *Id.*

80. Again, there is irony in the fact that George, a persistent proponent of reviving natural law, would come across as such a positivist and even a skeptic.

another matter. In either case, we seem to lose contact with the historical understanding of natural law as a set of normative ideals of the Constitution and enforced through the reasoned judgment of judicial review.

### CONCLUSION

I conclude with a synthetic account of George's position as I understand it. George is skeptical of the current practice of judicial review because it has, from his perspective, so often led to liberal results—results which he thinks cannot be right, either because of his extra-legal value judgments and/or contrary philosophical commitments. To avoid liberal court decisions, which he thinks are now in vogue, George proposes to strip the Constitution of its abstract moral provisions, for they are simply open invitations to what he views as free wheeling judicial review. Of course, that more or less drains from the Constitution the normative and aspirational ideals of natural law and natural rights. To avoid that particular criticism, George proposes that wherever Courts apply the Constitution in a straightforward and literal manner, they *are* enforcing natural law and natural rights. That way he can have his cake and eat it too: He still honors, at least nominally, our natural law heritage but avoids the liberal results that that heritage, on his view, has so often endorsed. And to further ensure that natural law beyond the Constitution continues to flourish, he will entrust its elaboration primarily to the legislative branches of government. Just what natural law legislation will look like is not at all clear. But I suspect that it will largely consist in affirming status quo morality, or in what Justice Holmes described as letting the herd get its way.<sup>81</sup> At the present moment, George is apparently confident that the people's representatives will not endorse such liberal causes as same-sex marriage and partial birth abortion (based on his estimate of the positive moral views of ordinary citizens). One has to imagine that it is also his hope to see the reversal of many liberal decisions that are now part of our law. With the help of allies such as Bork, Justice Black, and Justice Scalia, he may think that the reversal of *Griswold* privacy may one day be accomplished. But first George needs to slay the dragon that is substantive due process, which is the source of so many of the liberal results that stem from what he views as free wheeling judicial review.

Finally, is George a skeptic, along the lines of Justice Black and Bork, or does his position reflect, as Fleming thinks, "political judgments about what institutions are most likely to realize his particular conservative conception of natural law"?<sup>82</sup> I think the answer is a little of both, which results in not a little incoherence in

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81. See *supra* note 56.

82. Fleming, *supra* note 2, at 2286 n.10.

George's views. If George were a skeptic to the core, his commitment to defending natural law would be illusory, even hypocritical. Yet his embrace of Black and Bork points in that very direction. For if not for their radical skepticism about "reasoned judgment," Black and Bork would not be legal positivists. To embrace *their* legal positivism therefore entails embracing *their* skepticism. George will, of course, deny that he is a skeptic, despite the fact that his limited view of judicial reason is, as I have suggested, so alien to the natural law tradition that he otherwise defends. On the other hand, it may be that whatever skepticism we can attribute to George is pure posturing, deriving from his political judgment that the legislative branches of government will better realize his view on what the natural law requires. However, skepticism, real or feigned, about judicial reason, but not about legislative reason, has its price. For what Fleming said in criticism of Corwin may well extend to George's putting so much of the natural law's elaboration into the hands of legislators, whose political survival is so often dependent upon voting their constituents' status quo morality into law. I refer to Fleming's observation that

the course of human history, including that of American history, . . . is strewn with both atrocities committed against, and appalling neglect for, basic human rights, dignity, and needs. And so, we should be skeptical about any theory that treats our historical practices or laws themselves as the repository of natural law or natural rights.<sup>83</sup>

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83. *Id.* at 2291.



*Notes & Observations*