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MAKERS AND RECEIVERS: JUDICIAL HERESY AND THE TEMPTING OF AMERICA

Charles Kelbley†

I. Introduction

When President Reagan nominated Judge Robert H. Bork for the position of Associate Justice of the Supreme Court in July of 1987, it was apparent almost immediately that this nomination would be a cause celebre for the United States Senate. Although the degree to which Bork’s nomination would become an extraordinary media event and, consequently, an extremely divisive issue for millions of Americans was unknown then, it was soon to become apparent. After long and dramatic hearings before the Senate Judiciary Committee, the United States Senate voted to reject Bork. Without that rejection, Bork’s recent book, The Tempting of America,¹ probably never would have been written.

If placed in Bork’s circumstances, many judges simply would have chosen to return to their chambers. As a result of his experience with the Senate Judiciary Committee, the media, and the public campaign against his nomination, however, Bork appeared to inherit a loftier mission. In early January of 1988, after serving only a few more weeks as a federal judge following the negative Senate vote, Bork resigned from the bench and assumed his present position as the John M. Olin Scholar in Legal Studies at the American Enterprise Institute in Washington, D.C. As he explained in his letter of resignation to President Reagan, “I wish to speak, write, and teach about law and other issues of public policy more extensively and more freely than is possible in my present position.”²

Bork was true to his word. In less than two years he would not only write but publish The Tempting of America, a book of well over three hundred pages, requiring extensive research, reading, and reflection on such topics as the history of the Supreme Court, the proper role of judges, legal theory and the Constitution, and, not least of all,

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2. Id. at 317 (resignation letter of January 7, 1988 to President Ronald Reagan).
the lessons to be drawn from his bitter experience with the process that culminated in the Senate’s rejection of his nomination.

Evaluating *The Tempting of America* is a challenging exercise in measuring the thought of a contemporary figure in the American conservative legal community. It is foremost, however, a task in jurisprudential systematics. Where does Bork fit into the scheme of contemporary schools of jurisprudence? How does he relate to and address the work of central figures like Ronald Dworkin, H.L.A. Hart, Richard Posner, Roberto Unger, and others? What positions does he take toward legal positivism, the law and economics movement, critical legal studies, natural law, hermeneutics and interpretation theory, and other currents that comprise the rich complexity that now characterizes jurisprudence and constitutional theory?

Bork answers few of these questions in *The Tempting of America*. He chooses instead to cultivate a fairly narrow jurisprudential path somewhat isolated from other major paths in legal theory. Bork’s principal interest in jurisprudence is largely defensive; his philosophy of originalism guards against the errors of liberal theorists and judges who allegedly distort the law in the name of morality and political outcomes. Those seeking to witness a conservative legal thinker chastising liberals certainly will have that wish fulfilled. Yet, anyone who approaches *The Tempting of America* with the expectation of finding a careful and penetrating analysis of contemporary legal theory may be very disappointed.

The judicial philosophy that Bork defends is a path that scholars had travelled long before *The Tempting of America* was conceived. Contemporary scholars in jurisprudence are generally inclined to embrace and defend quite different accounts of legal theory. They argue that the path Bork walks is worn thin, if not worn out, and that many of its identifying markers (originalism, intentionalism, textualism, moral and political abstinence, and passivism) are no longer persuasive because of frequent scholarly assault. Even Bork readily admits

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that the philosophy of originalism he defends "is now very much out
of favor among the theorists of the field." If there were hope that
The Tempting of America would provide fresh theoretical guidance in
the path that Bork has chosen to guard, rescuing it from further deter-
rioration and ultimate collapse, that hope must now be re-examined
in the face of Bork's quick study of our fundamental law and the
political seductions that allegedly are at work to corrupt it.

This Essay examines The Tempting of America in three stages. Sec-
tion II briefly summarizes the major themes of the book along three
principal lines that parallel the book's three parts: Bork's critique of
the Supreme Court, his concept of correct and incorrect legal theory
and his assessment of the treatment he received from the media and
the Senate Judiciary Committee. Each of these topics deserves serious
consideration, but the ultimate concern of this Essay is Bork's theo-
retical chapters, not his historical and political arguments.

Section III examines problems that Bork's judicial philosophy
raises from the perspectives of history, jurisprudence, and, most espe-
cially, the practice of viewing jurisprudence from alternative and com-
petitive perspectives. The pervasive question in Section III is whether
Bork is fully aware of these problems and whether he has adequately
and fairly addressed them.

Section IV attempts to relate Bork's judicial philosophy to the un-
derlying purpose of The Tempting of America, which explores "who
we are and how we live." This section suggests a comparison be-
tween Bork's metaphor of "heresy" as diagnostic of current judicial
problems and Ronald Dworkin's metaphor, "the protestant atti-
dude," as characteristic of a healthy legal culture.

Finally, this Essay requires, as Judge Bork does, the acceptance of
the premise that the role of judges in our Republic is necessarily de-

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1. JUDICIAL HERESY

II. Bork's View of History, Philosophy, and Politics

The Tempting of America contains three kinds of claims. First,
there are historical claims regarding how Supreme Court Justices
have or have not been faithful to the Constitution. These concern largely issues of fact, which are discussed in the first part of *The Tempting of America*. Second, there are theoretical claims regarding how law and the Constitution are to be understood and applied by judges. This makes up the theoretical and normative part of *The Tempting of America* and corresponds to its second part. Third, there are political-psychological claims regarding what motivates judges, senators, and law professors who fail to follow the philosophy of original understanding. These appear throughout the book, especially in its third and last part, where Bork sifts through the record of the Senate hearings as well as through collateral material and events surrounding the examination of his nomination.

In reading through *The Tempting of America*, it sometimes seems as if Bork assumes that these three types of claims are distinct and independent of one another, as though it were possible to evaluate judges' fidelity to law (a factual issue) without first subscribing to a theory of law that defines what it is to which judges have a responsibility to be faithful (the normative issue). Similarly, Bork's political claims, which rest on psychological assumptions about the motivations of judges, senators, and media representatives, appear to be based on simple insight, as if negative judgments about individual conduct could be separated from an inquiry into the norms intended to govern that conduct. There is, however, no way to avoid the normative, legal questions concerning what law and the Constitution are. These questions are primary and inescapable; the validity of Bork's historical, factual claims and his political, psychological claims depend upon the strength of his legal, normative claims. The term "law" must first be defined before it can be alleged that a judge has abused the law. Moreover, only if one knows what results law cannot legitimately endorse can one sensibly entertain hypotheses about why judges and law professors may want to reach them. One would hope that Bork would agree with the interrelated nature of his various claims and the centrality of the legal one. Yet, *The Tempting of America* begins with chapters discussing how the Supreme Court has abused its authority throughout our history,14 without first having established the limits of its authority and the limits of law on the basis of theory. For this reason, one must keep the primacy of the legal question in mind as he or she surveys the sweep of *The Tempting of America* and realize that Bork's historical and political claims remain

tentative and merely accusative until and unless his theory of law commands our assent.

A. The Central Thesis of The Tempting of America

The central thesis of Bork's work is fairly easy to state. Bork continually emphasizes that judges are bound by the law, that it is their job to apply it, not to make or remake it. Nonetheless, as exalted and noble as that limited task may be, many judges, according to Bork, have failed to fulfill it. Throughout American legal history, many Supreme Court Justices have boldly invented new law, or have made law without authority and justification. Many of these judges displayed earnest intentions; they ignored the law to achieve political results that they regarded as morally superior, more efficient, or more just than the results that would otherwise flow from the actual law. Whatever the reason, judges who make law to procure desired outcomes threaten democracy. Such judges were not appointed to lifetime positions to enact their view of what is right, good, or efficient, but to apply what duly-elected officials had already codified as law.

Thus, Bork's central thesis says nothing very controversial, for anyone who accepts some version of the rule of law can easily agree with Bork's fundamental premise that judges are bound by the law. As I shall argue in Section III, Bork's thesis becomes controversial only when he invokes his originalist theory of law in defining the limits of judicial authority and the proper boundaries of law. The reader is then confronted with questions about what law is. This is where Bork's theory either stands or falls on its own merits, and either supports or brings to naught his alarming claim about the current state of the American judiciary.

Bork's thesis is not merely a claim regarding American legal history. It is a claim about the more recent past and a fear for the immediate future. According to Bork, the threat posed by judges who practice "political judging" was not very great throughout most of American legal history simply because there were few judges who engaged in the practice. For several decades, however, roughly since the inception of the Warren Court in the early nineteen-fifties, the number of such judges has reached epidemic proportions. Moreover, several of America's best law schools, where many of the country's future judges and politicians will receive their legal training, are staffed with liberal law professors who preach the creed of political judging, based upon unorthodox theories of jurisprudence and constitutional law. Bork can sustain these charges, if at all, only on the basis of his own theory of law.
There is one other aspect to Bork’s central claim. Early in The Tempting of America, Bork sets forth a sub-thesis: he sees a conspiracy at work, a “long-running war for control of our legal culture.” Ultimately, the struggle is to gain “control of the courts and the Constitution.” But the last step toward that goal is to control the selection of judges, “[b]ecause the Constitution is the trump card in American politics, and judges decide what the Constitution means.” Bork forges the link to his own fate: “[t]he clash over my nomination was simply one battle in this long-running war for control of our legal culture.”

The “conspirators” are mostly liberal law professors and politicians who want to enact their own vision of morality into law. These “conspirators” know that their goals cannot be achieved with the Constitution as written, or on the basis of popular morality. Thus, the “conspirators” attempt to gain control of the courts by feeding the courts liberal theories of law, thereby providing judges with handy rationales to which judges can anchor their unorthodox judicial opinions.

Judges who engage in revisions of the law on the basis of these liberal theories have committed what Bork calls a “heresy;” something essential to the law, the duty of judges to be bound by the law, has been abandoned. To explain why Bork believes his thesis and sub-thesis are tenable, a summary of some of his other major claims is necessary.

B. Impure Practice, Pure Theory, Perverted Politics

1. Bork’s Review of the Supreme Court

In the first five chapters of The Tempting of America, Bork addresses how the Supreme Court has succumbed to the temptation of politics over the course of its history. Bork argues that, almost from the very first applications of the Constitution, the Supreme Court has been tempted by political considerations to strike down laws that violated no provision of the federal or state constitutions. Even Chief Justice John Marshall, in Marbury v. Madison, arguably one of the most important if not the most important case in our constitutional

15. Id. at 2.
16. Id. at 3.
17. Id.
18. Id. at 2.
20. Id. at 15.
21. 5 U.S. (1 Cranch) 137 (1803).
history, is viewed by Bork as an "activist." Marshall's "activism consisted mainly in distorting statutes in order to create occasions for constitutional rulings that preserved the structure of the United States." Because Marshall was a "powerful expositor of the Constitution," Bork concludes that Marshall was a great judge. Bork excuses Marshall's abuse of statutes because Marshall's motive in manipulating the law was "to create occasions for constitutional rulings that appeared essential to solidify the national power the Constitution had attempted to create."

The same cannot be said for Chief Justice Taney, the author of the infamous opinion in *Dred Scott v. Sandford* that attempted to prove that slave ownership was a right protected by the Constitution. In Bork's view, the grave mistake made in *Dred Scott* was pouring substance into the Due Process Clause, essentially a procedural provision based on the plain meaning of the words of the clause itself. Following the error made in *Dred Scott*, substantive due process became a part of our constitutional law and, according to Bork, is the original precedent for *Lochner v. New York*, an opinion in which substantive due process was used to strike down a state law limiting the number of hours bakery employees could work, and *Roe v. Wade*, an opinion that relied on substantive due process to strike down a Texas statute criminalizing abortion.

Bork discusses how the long period of America's economic growth and industrialization after the Civil War led the Court to engage in judicial activism in the service of the values of property and free enterprise, again without constitutional warrant. This discussion is followed by a quick review of the New Deal Court and the Roosevelt attempt to reshape the Supreme Court to secure its political and economic goals without interference from the judicial branch. Perhaps the most interesting sections in the first part of *The Tempting of America* are those dealing with the Warren Court's desegregation decision in *Brown v. Board of Education*, which Bork labels the "great-

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22. THE TEMPTING OF AMERICA, supra note 1, at 21.
23. Id.
24. Id. at 27.
25. Id. at 27-28.
27. THE TEMPTING OF AMERICA, supra note 1, at 31.
28. 198 U.S. 45 (1905).
30. THE TEMPTING OF AMERICA, supra note 1, at 32.
31. Id. at 36-49.
32. Id. at 51-67.
lest case of the twentieth century,"\textsuperscript{34} and the Court's right of privacy decision in \textit{Griswold v. Connecticut},\textsuperscript{35} which the Burger and Rehnquist Courts were to inherit and grapple with in subsequent privacy contexts.\textsuperscript{36} In light of the great importance of these decisions, a brief summary of Bork's views on them will precede a discussion of his theoretical and political claims.

Bork contends that "\textit{Brown} must rest, if it is a correct decision, on the original understanding of the equal protection clause of the fourteenth amendment."\textsuperscript{37} While Bork believes that \textit{Brown} can be seen to rest on that clause, he nonetheless concedes that "those who ratified the [fourteenth] amendment did not think that it outlawed segregated education or segregation in any aspect of life."\textsuperscript{38} Moreover, Bork acknowledges that \textit{Brown} "was accepted by law professors as inconsistent with the original understanding of the equal protection clause."\textsuperscript{39} Yet, Bork argues that the result in \textit{Brown} is nevertheless consistent with the original understanding of the equal protection clause.\textsuperscript{40} The following is a distillation of his reasoning.

In 1954, when \textit{Brown} came before the Supreme Court, segregation had yet to produce equality in the form of equal physical facilities for blacks. Foreseeing endless litigation over the inequality of various physical facilities (primary and secondary schools, colleges, washrooms, swimming pools, drinking fountains, etc.), the Court also anticipated that litigation would never produce the equality guaranteed by the Constitution. Thus, according to Bork,

\begin{quote}
[\textit{t}he Court's realistic choice \ldots was either to abandon the quest for equality by allowing segregation or to forbid segregation in order to achieve equality. There was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that. Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.\textsuperscript{41}]
\end{quote}
Bork devotes less than a page of his book to explaining this unorthodox interpretation of Brown.\textsuperscript{42} Bork opposes a reading of constitutional clauses that would allow for an expanding content because such an interpretation invites judges to indulge in their own view of morality and, in effect, to exercise naked power.\textsuperscript{43} It may be unclear to the reader, however, how Bork's own endorsement of the result in Brown is distinguishable. If the ratifiers' understanding of equality was consistent with segregation, by what right does a constitutional judge substitute contemporary understanding of the ratifiers' inconsistency, as correct as it may be under new and different circumstances, without adulterating the original understanding of equality?

Bork ends his review of the Warren Court era by examining Griswold v. Connecticut\textsuperscript{44} and the right of privacy upon which that opinion relied to strike down a state statute criminalizing the use of contraceptives.\textsuperscript{45} Bork's discussion of Griswold gives the reader a sense of the constitutional theory of originalism that Bork assumes to be the correct theory of American law. Briefly, Bork believes that the flaw in Griswold is its defense of the right to privacy absent any foundation in the specific language of the Bill of Rights.\textsuperscript{46} Thus, according to Bork, Justice Douglas, who wrote for the Griswold majority, unjustifiably inferred from various provisions of the Bill of Rights that the framers intended to safeguard privacy by protecting various specific "zones" of privacy.\textsuperscript{47} Justice Douglas implied that one cannot understand the values that the framers explicitly protected unless one also recognizes a more general principle of privacy that the framers implicitly shielded from state intrusion.\textsuperscript{48} Bork's philosophy of original understanding, however, does not provide for an application broader than that which is allegedly authorized by the concrete specific intentions embedded within the actual language of the relevant amendments of the Bill of Rights.

Some readers may find Bork's close-knit reading of the Constitution in the Griswold case somewhat inconsistent with his praise for Chief Justice Marshall's opinion in McCulloch v. Maryland.\textsuperscript{49} In McCulloch, Marshall, "drawing inferences from the constitutional text,
structure, and history,"50 upheld the power of Congress to establish the Second Bank of the United States even though such a power was not explicitly granted by the Constitution. One would hope that the different treatment Bork accords these diverse topics does not turn on the type of right protected by the Court, whether a banking right as in McCulloch or a sexual freedom right as in Griswold.

The right of privacy returned to center stage during the Burger Court years and still remains there now in the Rehnquist Court. Bork observes that the right of privacy invented by the Warren Court mature[d] into a judicial power to dictate moral codes of sexual conduct and procreation for the entire nation. The Court majority adopted an extreme individualistic philosophy in these cases, seeming to assert that society, acting through government, had very little legitimate interest in such matters.51

As Bork dissects the alleged errors in the judicial reasoning of Blackmun’s dissenting opinion in Bowers v. Hardwick,52 a decision upholding a state statute criminalizing homosexual sodomy, he explains that the “mistakes” in such reasoning may be traced back to earlier privacy decisions such as Roe and Griswold.53 In this context, Bork commences an attack on the “extreme individualism” and “moral relativism”54 of several Supreme Court Justices, an attack Bork continues when he concentrates on “theory” in the second part of The Tempting of America. Thus, Bork views the right of privacy as not merely an aberration in constitutional interpretation, but rather as a reflection of a moral decay in our society that now threatens the foundations of the Supreme Court. These views shall receive attention in the discussion of Bork’s chapters on theory in Section III of this Essay.

2. Bork’s Statement on Legal Theory

The second part of The Tempting of America, entitled “The Theorists,” contains eight chapters.55 The bulk of the material in these chapters concerns various aspects of the original understanding of the Constitution, objections to originalism, a survey of various liberal and

50. THE TEMPTING OF AMERICA, supra note 1, at 27.
51. Id. at 110.
52. 478 U.S. 186 (1986).
53. THE TEMPTING OF AMERICA, supra note 1, at 120.
54. Id. at 122.
55. THE TEMPTING OF AMERICA, supra note 1, at 133-265.
conservative theories of constitutional revisionism, and remarks on moralism, relativism, and legal reasoning.

The original understanding philosophy perceives law as consisting essentially in the words and intentions of lawmakers. The “Empire” of law is analogous to a one-way street on which there exist “Makers” and “Receivers.” The Receivers are judges, who get the materials of law from the Makers. Any disputes on this street are resolved by the Receivers by referring to the meaning of the words that contain law and, when necessary, by retrieving the intentions of the Makers in enacting the laws. In this way law possesses a meaning independent of the Receivers’ desires, so that law truly governs.

In applying the law, judges must be careful to remain faithful to the level of abstraction or generality that was originally intended by the Makers. Judges who fail to adhere to that rule will inevitably produce “political” results unintended by the Makers. Bork covers this difficult subject under the heading of “neutrality” in the derivation, definition, and application of principle. Bork’s aim is to reinforce his claim that “[t]he structure of government the Founders of this nation intended most certainly did not give courts a political role.” The framers recognized the judiciary as the “least dangerous branch” of the government precisely because the judiciary was obligated to confine itself to a certain sphere of pre-existing authority, the law. Bork then concludes that “[t]he philosophy of original understanding is... a necessary inference from the structure of government apparent on the face of the Constitution.”

Bork, in his survey of several objections to the original understanding philosophy, is quick to expose what he believes are obvious misunderstandings and distortions of this philosophy. There are some objections, however, that Bork may handle too quickly. For example, in his response to the claim that the Constitution is what the judges say it is, Bork simply reiterates that there was a historical Constitution with a meaning of its own, “independent of anything judges may say. It is that meaning the judges ought to utter.” Since that response either begs the question or is obviously wrong, it can hardly persuade theorists leaning toward hermeneutics and contemporary in-

56. Id. at 146-53.
57. Id. at 154.
58. Id.
59. Id. at 155.
60. Id. at 161-85.
61. Id. at 176.
62. Id. (emphasis in original).
interpretation theory to embrace the Constitution and its independent meaning.

The only valid objection is the claim made by John Hart Ely that clause-bound interpretivism is impossible. Ely's claim, as Bork formulates it, is that the law of the Constitution "commands judges to find rights that are not specified in the Constitution." Bork's discussion and rejection of Ely's objection demonstrates how much the claims of original understanding need to rely on historical scholarship concerning key constitutional provisions such as the ninth and fourteenth amendments.

Bork then surveys "revisionist" theories of constitutional law. First he considers several liberal theorists, including Alexander Bickel, John Hart Ely, Laurence Tribe, and, more briefly, Frank Michelman, Duncan Kennedy, Paul Brest, Thomas Grey, David Richards, Ronald Dworkin, Mark Tushnet, Bruce Ackerman, Michael Perry, Sanford Levinson, Leonard Levy, and, finally, Justice William J. Brennan. Perhaps this condensed treatment of the major liberal theorists of law indicates more about Judge Bork's judicial philosophy than about the liberal theorists.

Bork is truly astounded by the kinds of results these theorists contemplate as flowing from the Constitution as they interpret it. This surely must shock the conscience of an advocate of original understanding. For example, Justice Brennan, who may be taken as a spokesman for the group, has invoked concepts that clearly are outside the language of the historical Constitution. Brennan has spoken of "dignity" as a constitutional ideal and an eternal quest that "will never cease to evolve." Bork sees this as an attempt to insert a new clause into the Constitution "that judges may apply in accordance with their own philosophies." While Justice Brennan may have contended that the concept of dignity renders a substantial purpose of the entire Constitution, Bork is constrained to see the concept as a revision of the historical Constitution, given his principles of original understanding. According to Bork, the fundamental problem with such an idea is that non-originalist concepts might well be ap-

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63. Id. at 178; see J. ELY, DEMOCRACY AND DISTRUST 11 (1980).
64. THE TEMPTING OF AMERICA, supra note 1, at 179.
65. Id. at 180-85.
66. Id. at 187-240.
67. Id. at 219 (quoting speech by William J. Brennan, Jr. to the Text and Teaching Symposium, Georgetown University, Washington, D.C. (October 12, 1985), reprinted in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11 (The Federalist Society 1986)).
68. THE TEMPTING OF AMERICA, supra note 1, at 220.
plied in accordance with nothing more substantial than the individual personal moral philosophies of the Justices. Bork draws similar conclusions in his analysis of the works of Bernard Siegan, Richard Epstein, and Justice John Marshall Harlan, who are theorists of conservative constitutional revisionism.69

One of the more interesting chapters in Bork's review of "The Theorists" is entitled, "Of Moralism, Moral Relativism, and the Constitution."70 Here, Bork cites to Regents of the University of California v. Bakke71 as an example of moralism, because Bakke held that race could be a factor in giving preferential treatment to minority medical school applicants. As with all of the Court's affirmative action and gender preference decisions, Bork interprets the result in Bakke as an example of coerced equality emanating from the commitment of individual Justices to implement a particular morality.72

Moral relativism, or the privatization of morality, is "the other prong of left-liberal ideology."73 Instead of enforcing a public morality for all, as in affirmative action, Supreme Court decisions that adopt this approach leave morality up to the individual; thus, morality is "relative" to each citizen. Each citizen has the freedom to make decisions concerning topics such as contraception, abortion, homosexuality (in some respects), and pornography. Bork sees the source of this constitutional moral relativism in Griswold, the case that gave rise to the right to privacy and the right to do as one wishes in these enumerated areas.74 Following the lead of Lord Patrick Devlin,75 Bork argues that the moral relativism that the Supreme Court has constitutionalized fails because it neglects to consider that society is a community of ideas about itself, and that what society deems harmful it should be allowed to regulate.76

Although Bork clearly opposes moralism, his opposition to moral relativism seems to require a form of moralism as the only remedy for moral relativism. Where the Supreme Court has granted moral freedom on the basis of privacy rights, Bork desires to impose moral duties. The reader may be somewhat puzzled as to how Bork himself is able to escape from the kind of criticism he directs to the moralism of the Supreme Court.

69. Id. at 223-40.
70. Id. at 241-50.
72. The Tempting of America, supra note 1, at 246.
73. Id.
74. Id.
76. The Tempting of America, supra note 1, at 249.
Bork concludes his examination of theory with two short chapters, one concerning the impossibility of all theories that depart from the original understanding\(^7\) and another concerning legal reasoning.\(^8\)

3. **The Bloody Crossroads**

   The bloody crossroads where law meets politics is the subject of the third and final part of *The Tempting of America*. This part attempts to document "the seemingly ceaseless torrent of falsehoods about [Bork's] views and record" and to show "the desperation of the American left not only to continue to influence the direction of the courts but to prevent the articulation from our highest bench of the ideas [Bork has] articulated in the past and [has] explained once more in this book."\(^7\)

   Perhaps the tone of the campaign against Bork was established when, on the day of Bork's nomination, Senator Edward Kennedy delivered a nationally televised speech from the floor of the Senate:

   Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.\(^8\)

   Bork was incredulous: "Not one line of that tirade was true."\(^8\) Regardless of its accuracy, the question remains why Kennedy's statement became a motif of the Senate hearings and the national campaign. As Bork acknowledges, various senators had remarked in their opening statements in the Senate hearings that Bork's judicial philosophy was the main issue.\(^8\) Although various senators devoted many hours of the hearings to this subject, Bork concludes that the hearings "illustrated the point that most senators would do well not to attempt to judge a nominee by engaging in a detailed discussion of

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77. *Id.* at 251-59.
78. *Id.* at 261-65. Since the material in these chapters are discussed in my overall critique of Bork's theory in Section III of this Essay, I shall not discuss it here.
79. *Id.* at 269.
80. *Id.* at 268; see 133 CONG. REC. 18,519 (daily ed. July 1, 1987) (statement of Sen. Kennedy).
81. *The Tempting of America*, *supra* note 1, at 268.
82. *Id.* at 301.
legal doctrine." Bork states:

I spent almost seven hours all told with Senator Specter, at the
hearings and in his offices, discussing constitutional law, all of it at
his request. To the end, he could not comprehend what I was say-
ing about the first amendment, the equal protection clause, the
need to construe the Constitution in the light of the original under-
standing, or the dangers of letting judges decide cases with no more
authority or guidance than a phrase not in the Constitution, such
as "fairness" or "the needs of the nation." Because I was, out of
necessity, patient with him, a lot of people not versed in constitu-
tional law got the impression that this was a serious constitutional
discussion.

Although outrageous accusations against Bork’s judicial philosophy,
opinions, and attitude toward women and blacks were made, Bork
contends that he failed to make his views understood. This conten-
tion is unclear. Bork’s constitutional philosophy is not exceedingly
complex, and his interrogators consisted mostly of lawyers extensively
experienced in law.

Even if Bork had been able to make himself perfectly understood to
the Judiciary Committee and to the full Senate, it is arguable, based
on these chapters, whether the outcome could have been any different.
The national campaign waged against Bork’s nomination and the one-
sided coverage to which Bork claims it was given by the media surely
influenced the senators who judged Bork and perhaps were ultimately
responsible for sealing his fate. Rightly or wrongly, the campaign
against Bork convinced the Senate and large segments of the public
that America was unwilling to fill a crucial Supreme Court vacancy
with Robert Bork.

Perhaps Bork’s best defense against the alleged injustice of the con-
firmation outcome is presented in the chapter, “The Charges and the
Record: A Study in Contrasts.” Here, Bork defends his record on
the civil rights of racial minorities and women, and his positions on
big business, government, labor, and free speech. If Bork correctly
assumes that this chapter demonstrates “that key charges were not
only false but should have been, must have been, known to be false,”
then his explanation as to why the campaign was mounted, to prevent
the Court from being dominated “by the neutral philosophy of origi-

83. Id.
84. Id. at 306.
85. Id. at 323-36.
86. Id. at 336.
nal understanding,\textsuperscript{87} may be true. To evaluate whether that philosophy is indeed neutral, an examination some of its major problems is necessary.

III. Problems in Bork's Underlying Philosophy

When Bork's various claims about history and politics are united with his legal theory, several problems present themselves, four of which generate some of the most serious objections to his overall philosophy: his criticism of the validity of political judging, his assessment of the objectivity and relevance of moral philosophy, his originalism, and his view of natural law.

A. The Relevance of Political Judging

It is Bork's view that "[t]he philosophy of original understanding means that the ratifiers of the Constitution and today's legislators make the political decisions, and the courts do their best to implement them."\textsuperscript{88} By the term "political decisions," Bork refers to decisions based on morality. One of Bork's objections to judges making such decisions is that they are "profoundly antidemocratic."\textsuperscript{89} This is a position he summarizes as follows:

In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter — and it is a task quite large enough for anyone's wisdom, skill, and virtue — is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.\textsuperscript{90}

This excerpt illustrates the basis for labelling Bork's position "moral positivism," for he "positivizes" law and morality. Bork is aware that law embodies morality, but the morality of which he writes is the morality of the framer or legislator, not the morality of the judge. According to Bork, whatever morality the framer or legislator posits is the limit of morality's influence on the law. Thus, the moral views of judges and citizens are simply irrelevant to what constitutes the law.\textsuperscript{91} The morality of the framer or legislator is not sep-

\textsuperscript{87} Id. at 343.
\textsuperscript{88} Id. at 177.
\textsuperscript{89} Id. at 178.
\textsuperscript{90} Id. (quoting Bork, Tradition and Morality in Constitutional Law, in THE FRANCIS BOYER LECTURES ON PUBLIC POLICY 11 (American Enterprise Institute Dec. 1984)).
\textsuperscript{91} This provides the sense of the positivist slogan calling for the separation of law
rate from law. That cannot be, however, since law and morality are fused at their inception. For Bork, the morality that must be kept isolated from law is the morality of the judge and the citizen. This has meaning only if it is broadly assumed that what law is can be apprehended independently of ongoing moral inquiry by both judges and citizens.

The self-effacing role that Bork assigns to judges is politically attractive in light of popular opinions about judges’ duty to respect the law. The more fundamental question, however, is what it means to respect the law. If judges are to respect the law by not engaging their own political morality, two conditions must be satisfied. First, it must be possible for judges to fulfill the function of judging on this model, the underlying idea of which is that “ought implies can.” If judges cannot perform their judicial duties without making judgments of political morality, it is contrary to logic to impose a duty to avoid making them. Second, even if it is possible for judges to fulfill their purpose, judges must still be able to make good sense of the law they are applying. That desideratum would seem to be a formal requirement of any method of interpretation.

Ronald Dworkin’s theory of law provides many reasons to believe that these two conditions cannot be met. According to Dworkin, to understand the law more fully, one must routinely interpret it in light of political morality. In hard cases, a judge cannot escape the necessity to observe the law from a moral point of view by asking what interpretation places the law in its best or most politically attractive light. A judge must look not merely at the explicit rules previously endorsed, but also at the principles upon which these rules depend. A judge must then ask what further principles, if any, are implicated, regardless of whether such principles have been recognized in past decisions. Interpretation, so understood, imposes a duty upon judges to invoke their sense of political morality, a duty that Bork claims judges arguably cannot discharge when they merely “translate the framer’s or the legislator’s morality.”

When law is interpreted one is made aware of it, but only in a pro-


92. See Dworkin, “Natural” Law Revisited, 34 U. Fla. L. Rev. 165 (1982) [hereinafter “Natural” Law Revisited]. Dworkin does not give a formal definition of political morality, but it is clear that it is distinct from a judge’s private or personal morality. Political morality is therefore public, referring to the principles and “outcomes” we are committed to by virtue of our political history and the decisions already made by our government, and especially by our courts.

93. The Tempting of America, supra note 1, at 178.
visional way, because law is always open to re-interpretation from the vantage of political morality. This thesis, which makes law dependent upon interpretation, is at the heart of Dworkin's theory in *Law's Empire*, a theory which presents law as an "interpretive" concept, and not, as the positivist would have it, as a "semantic" concept. The latter concept tends to depict laws as existing "objectively" on the law shelf, ready to be taken down for application to the facts of a given case.

The essential problem of political morality (as opposed to personal or private morality) can be seen more simply and dramatically in a family situation that Dworkin employs to distinguish between "concepts" and "conceptions":

Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind.

This distinction between a concept and a conception of fairness illustrates one of the central differences between Dworkin and Bork. Dworkin would argue that the father in the above "parable" is in a situation similar to that confronted by the Constitution's framers. Thus, the Constitution expresses "concepts" that judges must often interpret, just as the children in the parable must interpret what it means to treat others as a matter of fairness. Like judges, the children must determine the meaning of the concept of fairness, not their father's particular conception of fairness. To do this, however, the chil-

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94. See infra Section III-C (a discussion of law as an interpretive concept).
95. I shall discuss semantic and interpretive concepts of law at more length in Section III-C. In anticipation of that discussion, I note that Bork's jurisprudence depends on the "semantic" view of law, according to which law does have an "objective" content. See *Dworkin, Taking Rights Seriously* 134 (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*].
96. See infra Section III-B (a discussion of objectivity in Bork's thoughts).
97. Id. See also S. Levinson, *Constitutional Faith* 77-78 (1988) [hereinafter *LEVINSON*].
98. See *LEVINSON*, supra note 97, at 77.
Children must engage their moral capacities, for the concept of fairness with which they were charged continues, in their hands, as an open moral concept, not as a concept of historically determined contents with fully fixed boundaries.

Bork, in contrast, would emphasize the particular conception of fairness that the father had in mind, or the public’s understanding of fairness at the time the father spoke to his children. Restricting the children’s interpretive possibilities to the specific contents of their father’s particular conception of fairness, however, imposes limits that enshrine contingent historical meanings. In this way Bork views constitutional law more as a matter of specific rules than as a matter of general principles. Concepts, on the other hand, are more abstract and general; they express principles with a range transcending any particular context or any specific use by a framer or, for that matter, by the father in Dworkin’s parable. Bork’s position is a form of historicism; Dworkin sees historicism as the equivalent of the Constitution absent principles: “[s]trong historicism ties judges to historical concrete intentions... it requires them to treat these intentions as exhausting the Constitution altogether. But this is tantamount to denying that the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman’s time, imagination, and interest stopped.”

Although comparing Dworkin’s and Bork’s legal theories is fruitful in many respects, only a few comparative themes are discussed in this Essay. Dworkin’s and Bork’s respective positions on judicial political morality is one theme worth pursuing further to clarify the nature of their disagreement.

Dworkin, in requiring judges to resort to political morality, and Bork, in denouncing judges who do, subscribe to different interpretations of “political morality.” Although their definitions overlap, it is important to clarify their respective emphases. Dworkin distinguishes between two types of political morality, two kinds of arguments upon which judges might draw in making their decisions. Dworkin contrasts “arguments of political principle that appeal to the political rights of individual citizens, and arguments of political policy that claim that a particular decision will work to promote some conception of the general welfare or public interest.” This is a distinc-

100. “Natural” Law Revisited, supra note 92, at 165.
101. The Tempting of America, supra note 1, at 177-78.
102. A Matter of Principle, supra note 9, at 11 (citing Taking Rights Seriously, supra note 95).
tion that Dworkin had made and defended several years earlier\textsuperscript{103} and upon which he still relies in his most recent work.\textsuperscript{104}

It is quite clear that when Dworkin speaks of judges making decisions on the basis of political morality he draws upon the first of these two senses, the political morality of principle. Dworkin argues that judges must engage in this kind of political morality to discover what the political order of rights “really” contains. This closely follows from Dworkin’s distinction between concepts and conceptions. If law, especially at the constitutional level, involves abstract concepts, and not merely specific conceptions of framers and legislators, then judges who apply those concepts must, like the children in the parable, engage their own sense of political morality to know what the legal concept at issue requires. Judges do this as an act of respect for the framers who set forth the concept. Dworkin’s focus, therefore, is not concerned with defending judges who reach desirable results as a matter of policy.

It is just as clear, however, that when Bork criticizes “political judging,”\textsuperscript{105} he relies mainly upon the second of these two meanings of political morality, the political morality of policy. On the very first page of \textit{The Tempting of America}, subtitled “The Political Seduction of the Law,” Bork announces what would become the theme of \textit{The Tempting of America}: the “temptations of politics.”\textsuperscript{106} Like “religion, literature, economics, science, journalism, or whatever,”\textsuperscript{107} law “struggles to maintain its independence”\textsuperscript{108} from politics. Law is not succeeding all that well, however, and so judges who pursue “politically desirable results”\textsuperscript{109} or the “‘correct’ political outcome”\textsuperscript{110} are the object of Bork’s attack. Bork’s overall position is summarized well in the following lines:

The philosophy of original understanding means that the ratifiers of the Constitution and today’s legislators make the political decisions, and the courts do their best to implement them. That is not a conservative philosophy or a liberal philosophy; it is merely the design of the American Republic. A theory of judging that allows the courts to choose political results is wrong, no matter in which

\begin{itemize}
  \item \textsuperscript{103} \textsc{Taking Rights Seriously}, \textit{supra} note 95, at 81-130.
  \item \textsuperscript{104} \textsc{Law’s Empire}, \textit{supra} note 3, at 221-24.
  \item \textsuperscript{105} \textsc{The Tempting of America}, \textit{supra} note 1, at 7.
  \item \textsuperscript{106} \textit{Id.} at 1.
  \item \textsuperscript{107} \textit{Id.}
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} \textit{Id.}
  \item \textsuperscript{110} \textit{Id.}
\end{itemize}
direction the results tend.\textsuperscript{111}

It is noteworthy that what Bork opposes here is fairly similar to what Dworkin has himself long opposed: judges who reach decisions on policy grounds when controlling principles exist which suggest another outcome.\textsuperscript{112}

Both Dworkin and Bork believe that judges are bound by principles. Bork believes that all principles of law have already been provided, either by the Constitution or by legislation; consequently, judges are forbidden from inventing new principles. Dworkin argues that judges not only have the power and authority to recognize new principles when they are latent in or implied by the existing law, but they also have a duty to do so in furtherance of their function as judges.

Bork's criticism of judges who make decisions on the basis of their political morality of policy is a criticism that Dworkin shares. Indeed, most lawyers and judges will undoubtedly agree that "result-oriented" judges are hardly performing their duty to "apply the law." To the extent that The Tempting of America is preoccupied with that theme, it presents the reader with an indefensible picture of judging, which Dworkin, among others, condemns.\textsuperscript{113}

The more important issue is the other sense of "political morality," the morality of political principle, where judges refer not to results, but to the legal past to discover its contents. This is performed not as a plain matter of historical fact, but as a result of their judgments of political morality and their charge to interpret the law so as to see it in its "best light." This sense of political morality is more properly what separates Bork and Dworkin in substantial ways.

The purpose of this sub-section has been to suggest that if Bork's theory of law is to win respectability as a serious critique of our judiciary and our general legal culture, it needs to respond to the arguments found in Dworkin's work on the nature of law and the need for judicial use of political morality.\textsuperscript{114} Dworkin's work deserves at least more than the scant attention Bork pays it.\textsuperscript{115} Perhaps one of the

\textsuperscript{111} Id. at 177.
\textsuperscript{112} See e.g., Taking Rights Seriously, supra note 95, at 22-31.
\textsuperscript{113} See Law's Empire, supra note 3, at 378: "Activism is a virulent form of legal pragmatism. An activist justice would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture. He would ignore all these in order to impose on other branches of government his own view of what justice demands. Law as integrity condemns activism, and any practice of constitutional adjudication close to it."
\textsuperscript{114} See A Matter of Principle, supra note 9, at 67-71.
\textsuperscript{115} See The Tempting of America, supra note 1, at 213 ("Dworkin writes with
reader's most important questions is whether Bork adequately has taken account of the twofold meaning of political morality, and whether, in rightfully scorning the political morality of policy, Bork wrongfully tars the political morality of principle with the same brush. One can criticize a court ruling as an unwarranted imposition of a judge's moral preferences only on the ground that such ruling is unprincipled, that it does not flow from past political decisions. Thus, the threat to Bork's claims is precisely the political morality of principle, a subject that pervades Dworkin's work\textsuperscript{116} and to which Bork has given insufficient attention.\textsuperscript{117}

B. The Objectivity of Political Morality

Another of Bork's criticisms of judges who reach decisions on the basis of political morality, whether as a matter of "results" or of principle, concerns the "subjectivity" of their decisions. Bork means by this that the moral values upon which judges rely are not shared by others. This, however, is not the only reason Bork deems political decisions subjective. Bork believes that moral judgments are inherently subjective because it is impossible to prove that one's moral views are "objectively" right. If proof does not exist, judges cannot justify preferring one view as a matter of law. Without authority in law, judges base their decisions on personal preferences for results supporting or opposing issues such as abortion, school prayer, homosexuality, or the death penalty.

Bork is ultimately committed to denying objectivity in the law. This is a claim that must carefully be presented lest it be misunderstood. Bork adamantly defends what might be called "descriptive objectivity" in the law. According to Bork, judges can perceive the law as a factual or linguistic matter by referring to the Constitution, statutes, or precedents. This, however, is a trivial sense of objectivity, for what is at issue is not merely the linguistic content of the law as a matter of historical fact, but the point or purpose of the law, the values it enshrines, and whether those values may be affirmed and defended rationally. Bork encounters profound difficulties with judges who resort to political morality because his theory of law does not permit such judges to engage in questioning the law's requirements. To do so would be to embark upon a form of inquiry that Bork believes is closed to rational justification.

\textsuperscript{116} See generally A MATTER OF PRINCIPLE, supra note 9.
\textsuperscript{117} THE TEMPTING OF AMERICA, supra note 1, at 213.
For Bork, there is no dispute about what the law is in the sense of descriptive objectivity. If the Constitution sets forth a right of privacy, then such a right exists. If the Constitution does not provide for such a right, however, then no such right exists. When Bork denies objectivity in the law, he is denying "normative objectivity." That is, Bork professes not to know how one can determine what the law means as a set of norms and values apart from its plain historical meaning. Indeed, Bork seems to deny that anyone can grasp the meaning of law in its normative sense.118

In this respect, only a thin thread prevents Bork from falling into the bottomless checkerboard picture of law represented in various strands of the Critical Legal Studies movement. Bork's position is virtually indistinguishable from that movement's radical claims regarding the indeterminacy, arbitrariness, and absence of foundations in law.119 What prevents the thread from breaking is Bork's moral positivism. Unlike the critical scholars, however, Bork's skepticism and moral agnosticism has led him to abandon any substantive inquiry into the nature of law.120 In that sense, Bork's jurisprudence may be even more radical than Critical Legal Studies; his skepticism is so deep that it seems to require jurisprudential sterility.

The ground for Bork's denial of normative objectivity is prepared by his positivism and skepticism. In discussing the status of the Constitution and statutes as "law," Bork observes:

[A]ll these writings become law because they are made in ways that the people of this nation assume to be ways of making law. Why should that assumption produce law? I do not know of any ultimate philosophic reason why it should. A legal system cannot operate if the perplexing issue of the nature of political obligation must be rethought every time somebody cites a statute or a case. Law is a very practical instrument for organizing a society into a

118. Bork's theory of law appears to be philosophically closed. Stripped of its historical references, his theory could have been formulated two hundred years ago essentially as it is today. The relevance of theory to law is virtually nonexistent for Bork. Indeed, the deliverance of common sense seems to be a sufficient basis of law. See id. at 5 (affirming the common sense, everyday view of what law is). In a book that scorns many of the interpretations of the law that have come out of our Supreme Court, Bork shows virtually no interest in what current scholars have to say about the nature of interpretation. Bork has even declared his lack of interest in knowing. See infra note 126 and accompanying text. All of this is disturbing and necessarily throws doubt on the validity of his general claims about law.

119. See generally UNGER, supra note 6; CRITICAL LEGAL STUDIES (A. Hutchinson 1989); M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys 1982).

120. See infra notes 122-26 and accompanying text.
polity, and it is necessary to any polity that there be ground rules or assumptions that identify certain propositions as laws if they are produced in certain ways.\textsuperscript{121}

This statement renders a key positivist doctrine, the idea that enshrines the process that leads to law but simultaneously segregates normative evaluation of law's meaning and reach from the realm of law itself. Bork's observation also explains why he would oppose what Dworkin's "naturalism" demands, that "no doctrine or practice [is] immune from re-examination."\textsuperscript{122} Crucial to Bork's jurisprudence, therefore, is the absence of restrictions on the content or substance of the law; this is the heart and soul of positivism. What popular or legislative majorities enact as law is law. Once such majorities have spoken, the law is established and cannot be altered except by "reverse engineering;" the popular or legislative majorities endlessly can reverse their decisions. Whether majorities ratify or amend a Constitution, or enact or repeal legislation, their morality is unquestioned because, according to Bork, it can be neither rationally nor legitimately questioned by anyone who stands outside the process that led to their actions. Law is a one-way street, running from Makers to Receivers. Judges are officials standing apart from that process; their office, however, places them in the peculiar position of having de facto power without the authority to question and change the enactments of others. That, for Bork, is the "temptation" confronting the American judiciary and the "political seduction" that judges must resist.

Joining together the meaning and process of law helps prepare the reader for Bork's agnosticism on law's objectivity (in the normative sense), but fails to explain it. To understand why Bork rejects "normative objectivity" (what law is beyond mere description) one must examine his views on moral philosophy. Bork's rejection of moral philosophy is rooted in profound skepticism about the very possibility of moral knowledge. When, however, one examines the bases of that skepticism, it becomes extremely doubtful whether they warrant the drastic conclusions that Bork embraces.

Bork rests his rejection of the relevance of moral philosophy to the law upon rather surprising grounds: the mere fact that all people do not agree on such matters. Because people disagree on moral matters, Bork draws the conclusion that no one position can be right, for if it were, it would convince all reasonable persons, thus eliminating

\textsuperscript{121} The Tempting of America, supra note 1, at 173-74.
\textsuperscript{122} "Natural" Law Revisited, supra note 92, at 179-80.
disagreement. Bork's insistence on this point is worth reproducing at the price of some redundancy:

[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.\textsuperscript{123}

* * *

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.\textsuperscript{124}

* * *

The supposition that we might all agree to a single moral system is . . . so unrealistic as not to be worth discussion.\textsuperscript{125} [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.\textsuperscript{126} 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.\textsuperscript{127}

Bork's arguments are controversial; nonetheless, Bork is willing to impose his own philosophical conclusions on judges and on the American people as if his conclusions were inevitable philosophical premises from which all rational people must begin their legal reasoning. Bork thus seems to affirm that which he denies. Bork's skepticism about moral knowledge logically should prevent him from affirming his philosophical recommendations, for the premises of originalism are highly controversial.

Bork's opinions may seem rather surprising, as they come from someone well aware that judges routinely make decisions contrary to those of other judges. Indeed, lawyers and judges have always disagreed among themselves and with the public on countless important legal issues, without that disagreement disqualifying the enterprise in which they are engaged. One may question what difference there may

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\item[123.] \textit{The Tempting of America}, supra note 1, at 252.
\item[124.] \textit{Id.} at 253.
\item[125.] \textit{Id.}
\item[126.] \textit{Id.} at 254.
\item[127.] \textit{Id.} at 255.
\end{itemize}
\end{footnotesize}
be between lawyers and judges disagreeing over the nature of the single correct jurisprudence or over specific rules and principles within a department of law such as contracts or torts, and moral philosophers disagreeing over the nature of the single correct moral theory or some isolated topic within the field. That someone must make a final decision regarding legal matters is not an adequate basis for ignoring moral issues, for someone, a judge or legislator, can temporarily halt the discussion by making a final decision about these matters as well. The supposition that all people might agree on a single legal system is as unrealistic as the supposition that all people might agree on a single moral system. Lawyers, judges and citizens disagree about law; thus, it is unlikely that the greatest minds of our legal culture will soon succeed in devising a legal system to which all intellectually honest persons subscribe. Bork's analysis of the normative content of law and morality is brought to a standstill by his skepticism.

Bork would respond that the philosophy of original understanding, correctly followed, eliminates all disagreement about law. That philosophy, however, is the very issue in dispute. Readers of The Tempting of America will not conclude that Bork believes his position is merely his own "subjective" view of law; rather, the reader will quickly appreciate that Bork believes originalism to be true and "objective."

Bork's views on subjectivity appear peculiar and self-contradictory. If Bork were to apply his thesis about disagreement to his own position on the original understanding, he would certainly have to abandon it, for there is widespread rejection of that philosophy, as he acknowledges. If Bork is correct in his estimate of the degree of opposition to original understanding, then almost no one within the academy now agrees with his position. Yet, that does not deter Bork, nor should it, from arguing for its truth, despite that he and others have been unable to prove the truth of original understanding. Bork's position is incoherent and self-contradictory.

Bork's general views on the impossibility of finding guidance from moral philosophy depend on the views of a particular moral philosopher, whom he finds persuasive and whose views he has apparently decided to adopt. Bork is convinced by that scholar's assessment of the current state of moral philosophy, but is unable to prove that such assessment is correct by the standards he would impose on other judges who also invoke moral reasoning.

128. Id. at 256 (relying on A. MacIntyre, After Virtue 51 (2d ed. 1984)).
129. See supra notes 122-26 and accompanying text.
Bork's philosophical positions depend upon two related and highly contested arguments: the "demonstrability thesis" and the "argument from diversity." The demonstrability thesis holds that a proposition cannot be true unless a method exists that is capable of showing it is true, so that all rational persons who know the language would accept it. Bork implicitly relies on this thesis when addressing moral philosophy. Even if the demonstrability thesis is correct about the truth conditions for propositions of moral philosophy, however, it does just as extensive damage to legal arguments as it does to moral arguments.

The same analysis applies to Bork's implicit reliance on the weaker argument from diversity. Bork argues that because people view moral questions differently, one may conclude that there can be no right answer to these questions. It follows, according to Bork, that judges cannot rely on any moral view on which people disagree. The demonstrability thesis and the argument from diversity are two sides of the same coin. Moreover, both arguments necessarily destroy themselves; because they are controversial and have failed to win the universal agreement that Bork's theory of knowledge appears to require, neither argument is sound.

Adopting either the demonstrability thesis or the argument from diversity endorses a piece of metaphysics that is no more necessary in the law than it is in moral theory. Bork demonstrates that he is an engaged thinker who values moral arguments in their own right and who is willing to defend such arguments as a matter of political morality, regardless of the disagreement of others. Yet, Bork forbids other judges from doing the same. The reason for this double standard may be found not only in Bork's positivism and skepticism, but also in his originalism, which represents law as a one-way street running from Makers to Receivers.

Although Bork assumes the practical value of the concept of objectivity, Dworkin contests its relevance and utility, whether in jurisprudence or elsewhere.\textsuperscript{130} Dworkin thinks the whole issue of the objectivity of legal, moral, political, and aesthetic judgments is "a kind of fake."\textsuperscript{131} There are "no argument[s] for the objectivity of moral judgments except moral arguments, no arguments for the objectivity of interpretive judgments except interpretive arguments . . . ."\textsuperscript{132} Should one argue that affirmative action is morally and legally wrong, the arguments supporting that allegation must be in-

\textsuperscript{130} See generally \textit{Law's Empire}, supra note 3, at 76-85; \\textit{Berger}, note 8, at 167-77.
\textsuperscript{131} \textit{A Matter of Principle}, supra note 9, at 172.
\textsuperscript{132} \textit{Id.} at 171.
spected. If one agrees with those arguments, one may be tempted to conclude that affirmative action is "really" or "objectively" wrong, which "is not a further claim at all but just the same claim put in a slightly more emphatic form." In using this emphatic language, it is meant that the immorality of affirmative action is not just one person's opinion but that it should be subscribed to by all people because they, too, have reasons to oppose it. This does not mean that the immorality of affirmative action is part of the "furniture of the universe," but simply that the grounds of holding affirmative action immoral are moral grounds, which can be defeated only by alternative and better moral arguments.

Bork's troubles begin when he leaves the terrain of moral judgment and steps into an external metaphysical position. Bork steps aside from the diversity of moral judgments and, noticing this diversity, is overpowered by it. He disengages himself from any particular argument and imagines that if any position were right it would command universal agreement. That is a costly mistake. According to Bork's reasoning, children cannot meaningfully engage in the moral enterprise of interpreting the range of the concept of fairness with which their father charged them. The children cannot do this because the inevitable disagreements they will have mark the enterprise as "subjective." Should one of the children, acting as a judge, decide upon an interpretation of fairness that fails to accord with the father's concrete intentions or the public understanding contemporary with the father's rule, that "judge" has engaged in the "political judging" that must be condemned.

Does Bork's idea of objectivity make sense? Can a doctor practice medicine or can a scientist conduct research on the basis of that idea? Do literary or art critics make valid judgments within their fields only if their values and judgments meet with universal agreement? And if such critics fail that requirement, are their values and judgments merely subjective? These and other such questions must be asked and answered before Bork's theory can hope to be intellectually acceptable.

C. Bork's Originalism and the Semantic Attitude

It is difficult to find a clear and consistent statement of Bork's thoughts regarding the original understanding. At the outset of his

133. Id.
134. Id. at 172-73.
135. See LAW'S EMPIRE, supra note 3, at 428 n.27 ("A moral view can be damaged only by moral argument.").
discussion, Bork observes that "[w]hat was once the dominant view of constitutional law — that a judge is to apply the Constitution according to the principles intended by those who ratified the document — is now very much out of favor among the theorists of the field." This statement defines the original understanding as consisting of "principles" "intended" by the ratifiers. Bork neglects to define "principles," but one suspects that his definition is closely tied to the specific "conceptions" of the ratifiers, rather than to the more abstract "concepts."

Bork later advances a somewhat different line of reasoning, apparently unaware of a change. He states that law refers to "a rule that we have no right to change except through prescribed procedures," which "assumes that the rule has a meaning independent of our own desires." Bork observes that to change a rule, one must presuppose that the rule has a meaning which would also necessarily change if the rule were changed. Here, Bork's ultimate jurisprudential elements, which it is the office of "original understanding" to guard, are rules with meanings.

Bork presents a third and still different sense for originalism when he asks "[w]hat is the meaning of a rule that judges should not change?" He answers, somewhat surprisingly, that the meaning is not the understanding of the ratifiers of the Constitution: "that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean." Bork does not pause to explain his use of the word "must," which is a leap into necessity that should bother even the most predisposed supporter of originalism. Bork states that if the ratifiers' understanding differed from that which others understood, "what counts is what the public understood." Bork emphasizes that "[t]he search is not for a subjective intention," of individual ratifiers or of all the ratifiers. "[W]hat mattered was public understanding, not subjective intentions." Bork's originalism is not coextensive with the "original intent" of the framers or ratifiers, nor is it coextensive with an original

136. THE TEMPTING OF AMERICA, supra note 1, at 143.
137. Id.
138. Id.
139. Id. at 144.
140. Id.
141. Id. (citing Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 725-27 (1988)).
142. Id.
143. Id.
intent of the public at the time. His originalism refers instead to a hypothetical public understanding. Thus, Bork’s presentation of originalism moves from ratifiers’ intentions, to words with meanings, to what the public would have understood by the words in a law or a constitutional provision.

That Bork’s theory involves a “semantic” concept of law becomes clearer when he observes that “[w]hen lawmakers use words, the law that results is what those words ordinarily mean.” 144 “The original understanding is thus manifested in the words used and in secondary materials, such as debates at the convention, public discussion, newspaper articles, dictionaries in use at the time, and the like.” 145 According to Bork, originalism as a doctrine applies not only to constitutional law, but also to all law, because “lawyers and judges should seek in the Constitution what they seek in other legal texts: the original meaning of the words.” 146

Although Bork’s explanations of originalism are varied and somewhat inconsistent, each exemplifies what Dworkin refers to as a semantic concept of law. 147 Whether the meaning of constitutional provisions is located in the intentions of the ratifiers or in their words, or, as Bork ultimately seems to think, within the hypothetical public understanding at the time of enactment, constitutional law rests upon semantic meanings. To look at the law in this way is to adopt the “semantic attitude,” an attitude that colors one’s approach to law.

It is helpful to define the two components of this attitude. The first component is the assumption that the meaning of a law must be found within the words themselves and the underlying intentions of the people who made the law, or within the public understanding of what was meant in making the law. Whatever value may have animated the creation of that law is absorbed into and merges with the law itself. The meaning of a law is fixed at that moment and remains the law unless and until it is repealed or amended; the only authorities who can do that are legislative majorities, ultimately, the people. The second component is the warning contained in the further assumption that whatever value people may give to a law and whatever purpose people may ascribe to it, such values and purposes in no way affect the meaning or present requirements of the law. This is so because the meaning and requirements of a law are fixed at its creation.

One of the most salient characteristics of this attitude is the effect

144. Id.
145. Id.
146. Id. at 145.
147. LAW’S EMPIRE, supra note 3, at 31-44.
that it has on the issues of controversy in law. If this attitude is adopted, one cannot meaningfully argue about what law is no more than one can sensibly argue about what "house" or "book" means once the semantic criteria for defining the meaning or use of those terms is agreed upon. This provides an extrinsic reason for Bork's opposition to judges who invoke political morality. Bork insists that law must be beyond controversy; taking the semantic attitude toward law helps to insure that it is.

Dworkin argues that the semantic attitude fails to fit one's experience of law. When one examines legal briefs or judicial opinions, one notices immediately that lawyers and judges argue about what law is. People argue about what statutes and precedents "really" require. Dworkin suggests that their disagreements cannot be sensibly understood as merely semantic in nature.148

The task, then, is to demonstrate that law is an interpretive concept. To this end, Dworkin draws upon key insights from the works of Gadamer149 and Habermas150 to help establish the place of the "interpretive attitude" in law, analogous to the place of that attitude in art and literature. In its simplest form, the interpretive attitude has two components. One is the assumption that a law or a social practice has value, "that it serves some interest or purpose or enforces some principle — in short, that it has some point — that can be stated independently of just describing the rules that make up the practice."151 The second component is the additional assumption that the requirements of a law or practice — the kinds of conduct or judgments it mandates or authorizes — are not what they have always been in the past, "but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point."152 So long as this interpretive attitude is in force, people "try to impose meaning" on a law or practice, "to see it in its best light — and then to restructure it in the light of that meaning."153 This is precisely the task of the children in the "fairness" parable: To grapple with the purpose of the concept of fairness to determine what it requires of them.

Interpretive theories, therefore, do not hold that law has some

148. Id. at 15-30.
151. LAW'S EMPIRE, supra note 3, at 47.
152. Id.
153. Id.
meaning that can be isolated and held constant in shared semantic or use criteria. This may be possible for words like “tree” or “house,” but not for law. Interpretation, according to Dworkin, forces one to see the meanings of law and other normative concepts as essentially dependent upon interpreters who “impose,” and reimpose, meaning on them. This is not an attempt by such interpreters to impose their own will or biases, but is an effort to understand law in its best light. Thus, one of the interesting facets of Dworkin’s description of the interpretive attitude is the way in which it surpasses the subject/object dichotomy. Law is not objective in the sense of having a wholly impersonal meaning independent of interpreters (which is why some versions of natural law and positivism may be wrong), but neither is it subjective in the sense of reflecting or depending upon judges’ or legislators’ personal opinions (which is why legal realism may be incorrect).

The two components of the interpretive attitude are independent of one another in the sense that some practices, like games, illustrate the first component but not the second. One may argue about the purpose of a game or rule within a game. “We appeal to the point of these practices in arguing about how their rules should be changed, but not . . . about what their rules now are; that is fixed by history and convention. Interpretation therefore plays only an external role in games and contests.” One might contend that the content of the game is not “sensitive” to the purpose seen in the game. One can argue about how the rules should be changed in light of a particular interpretation of the game’s purpose, but one can hardly expect the rules to change on that account. Bork seems to argue that law is analogous to the rules of a game. Laws cannot be changed merely because one now understands their purpose to be different. Thus, according to Bork, interpretation plays only an external role in the law.

Dworkin, however, believes that interpretation plays an internal role in the law. Law is vulnerable to change as a result of a new interpretation. The first component of interpretation, what might be called the “value” component, involves recognizing a new value, a new appreciation of the “true” purpose underlying the law. As a result, the second component, the “content” component, undergoes change because the requirements of law are sensitive to the purpose of

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154. See id. at 46-49 (Dworkin’s discussion of the fictional community of “courtesy”).
155. See supra Section III-B (the discussion of objectivity).
156. LAW’S EMPIRE, supra note 3, at 36-37.
157. Id. at 47-48.
law. "Value and content become entangled."\textsuperscript{158}

So defined, interpretive theories of law give more power and responsibility to judges than semantic theories do. Interpretive theories have far-reaching consequences for the content and meaning of law. If law is an interpretive concept, it cannot be understood as an album of facts that enjoy semantic independence from the central human purpose of defining and redefining values. Against the alleged neutrality of Bork's philosophy of original understanding, Dworkin argues that even the narrowest "text-bound" theory of constitutional adjudication is based on political morality. Dworkin contends that text-bound theorists

\begin{quote}
must have . . . reasons supporting their "four corners" theory. But these reasons cannot themselves be drawn from the text considered in isolation; that would beg the question. They must be taken from or defended as principles of political morality which in some way represent the upshot or point of constitutional practice more broadly conceived.\textsuperscript{159}
\end{quote}

If Dworkin is correct, then Bork, to defend his theory of originalism, has had to engage in political morality to reach that position. Bork had to approach the Constitution with a value perspective, just as the children in Dworkin's parable had to interpret the concept of fairness by engaging their moral capacities, and not by trying to determine what their father's conception of fairness originally included.

\section*{D. Bork and the Dark Side of Natural Law}

Most theories of law take some position on natural law. Dworkin, for example, makes an intelligent exploration of the appropriateness of the natural law label for his theory of adjudication.\textsuperscript{160} Bork, however, mentions natural law only to dismiss it as a viable component of jurisprudence. Thus, it is difficult to ascertain Bork's thoughts on natural law. There are some telling clues, however, suggesting that Bork's reluctance to discuss natural law rests on skepticism.

In his discussion of \textit{Skinner v. Oklahoma},\textsuperscript{161} Bork criticizes the Court for recognizing procreation as a "fundamental" right even though it is not a right guaranteed explicitly or implicitly by the Constitution.\textsuperscript{162} Bork observes that

\begin{flushright}
\textsuperscript{158} \textit{Id.} at 48.
\textsuperscript{159} \textit{A Matter of Principle}, \textit{supra} note 9, at 36.
\textsuperscript{160} See "Natural" Law Revisited, \textit{supra} note 92.
\textsuperscript{161} 316 U.S. 535 (1942) (striking down on equal protection grounds state criminal statute authorizing involuntary sterilization of habitual criminals).
\textsuperscript{162} \textit{The Tempting of America}, \textit{supra} note 1, at 66.
\end{flushright}
to justify Skinner's approach the Court must decide that there are fundamental rights that the Court will enforce and that it knows how to identify them without guidance from any written law. This is indistinguishable from a power to say what the natural law is and, in addition, to assume the power to enforce the judge's version of that natural law against the people's elected representatives. I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us. Judges, like the rest of us, are apt to confuse their strongly held beliefs with the order of nature.163

Bork's statement is important because it suggests a metaphysics that weighs heavily on his theory of law. His statement arguably invites us to think that he subscribes to a natural law "above the law." Consequently, one judge's opinion of natural law is as good as another's, since there is no ascertainable method to prove its existence. Thus, a judge cannot be allowed to enforce natural law by recognizing "fundamental" rights that are not set forth in the Constitution.

Bork's position on natural law seems to dictate his adoption of positivism, and his skepticism about natural law is joined to his skepticism about moral philosophy. A genuine moral philosophy could guide judges' decisions if agreed upon by all, just as a natural law could guide judges if it were clearly known. Diversity of opinion about the natural law is as fatal as diversity about moral philosophy. According to Bork, it is impossible to determine what rights are fundamental. Thus, a state statute, like the statute reviewed in Skinner authorizing the sterilization of habitual criminals, cannot be struck down on federal constitutional grounds, no more than a state statute requiring the removal of a person's tongue for the offense of perjury. That seems consistent with Bork's skepticism about protecting moral values, such as procreation, that lack constitutional support.

Commenting on Bork's statement that moral opinions are merely sources of "gratification" and that "[t]here 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," Dworkin observes: "[t]aken at face value, that means that no one could have a principled reason for preferring the satisfaction of charity or justice, for example, to those of racism or rape."165

163. Id.
164. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 10 (1971).
What undoubtedly unites Bork’s negative position on natural law to his negative position on moral philosophy is metaphysics; the natural law is beyond our reach, presumably in a different realm. Similarly, Bork’s difficulty with moral philosophy concerns knowing and proving which moral position is the correct one, as if the answer existed in an inaccessible mind-independent state. Bork’s problem with morality and natural law is therefore only secondarily a problem of uncertain knowledge. His initial problem is metaphysical, for he believes that there is a natural law and that there are right answers to moral questions.

As a consequence of Bork’s skepticism, his jurisprudence has no effective place for natural law. Nonetheless, the inaccessibility of natural law provides him with a rationale for endorsing originalism, just as his moral skepticism led him to embrace moral positivism. Bork’s position on natural law is relevant to explaining why he views originalism as the only option. If one is unable to know the natural law, the morality of law is not natural but merely positive. Because Bork is skeptical of ever achieving the one true morality, he sees no alternative to accepting the “morality of the framer” or legislator as ultimately decisive. In a very real sense, one must accept what is received from the lawmaker, faute de mieux.

Although Bork is a positivist, he takes positivism one step further by “positivizing” morality. Whereas the positivist separates law and morality, Bork, like the natural lawyer, unifies them. For Bork, however, the morality that informs law does not necessarily reflect what the law should be; it is merely the morality of law. Thus, it appears pointless to attempt to discover what the law should be. That is the “order of nature” which is inaccessible and beyond one’s capacity to know. One must take what is offered and be satisfied with it.

Bork appears to be in the awkward position of having one foot in the positivist camp and the other in the natural lawyer’s camp. He agrees with the positivist that one cannot argue about what law is for that has been settled by the convention of the original agreements of lawmakers. Bork agrees with the natural lawyer that one cannot argue about the morality of law, for that too is fixed, albeit by lawmakers’ agreements. Thus, unlike the positivist, Bork does not separate law and morality, except in the sense that he recognizes that judges (and others) are frequently tempted by politics to substitute

166. THE TEMPTING OF AMERICA, supra note 1, at 20 (quoting with approving emphasis Calder v. Bull, 3 U.S. (3 Dall.) 386, 398-99 (1798) (Iredell, J., concurring): “The ideas of natural justice are regulated by no fixed standard: the ablest and the purest of men have differed upon the subject.”).
their own morality for that of the lawgiver. Unlike the natural lawyer, Bork contends that the union of law and morality is merely a positive, factual union, not a normative union of law and conviction about what "should" be.

Bork has been trading quite heavily in the stock of moral philosophy, the very subject he wants to banish from the law and a topic about which he has made a firm resolution to stop reading.\textsuperscript{167} In virtue of his position on natural law, the traces of a latent metaphysics, one that renders him radically skeptical about truly knowing the law or morality in an "objective" way, are evident. Given the moral and metaphysical characteristics of his jurisprudence, one must ask whether Bork's criticisms of moral theory and philosophy can be taken seriously and whether Bork can still sustain his "common sense" view of law against the "theorists," which \emph{The Tempting of America} criticizes.\textsuperscript{168}

\section*{IV. What Kind of People Are We?}

The contrasts between Bork's and Dworkin's jurisprudence have been pursued in this Essay because their positions are mutually illuminating. What Bork is arguing for and against becomes more evident by examining several strands of Dworkin's theory of law.

First, Dworkin defends a version of natural law, called naturalism,\textsuperscript{169} which requires judges to seek, in principles of political morality, the soundest solution to legal issues, thereby placing the law in its best light. In this sense, legal decisions are transparent; they open onto the larger field of law, requiring judges to search for the integrity that is internal to the law. Judges, however, may not always find the integrity for which they seek, because the law presently may not include it. In such cases, judges' hands are tied; they must respect the law.

Bork's positivism is the counterpoint to Dworkin's naturalism. It is a form of positivism that I refer to as "moral" because lawmakers, according to Bork, are the sole determiners of the moral content of law, whether or not they are aware of what they are doing. Whatever lawmakers posit becomes the morality of the law. As a consequence of Bork's positivism, judges have no authority to seek the soundest solution to legal puzzles; they are bound by whatever solutions the past has explicitly endorsed. If no such solutions exist, judges should

\begin{itemize}
  \item \textsuperscript{167} \textit{See supra} note 126 and accompanying text.
  \item \textsuperscript{168} \textit{The Tempting of America}, \textit{supra} note 1, at 5.
  \item \textsuperscript{169} \textit{See Law's Empire}, \textit{supra} note 3, at 11.
\end{itemize}
abstain from making law. Thus, past legal decisions are opaque; they do not open onto the larger integrity that Dworkin defends as the essence of law. Furthermore, according to Bork, integrity is not a virtue of law.

Second, Dworkin’s theory of adjudication requires judges to engage their sense of political morality precisely to discover what the law is. This is a consequence of the first point regarding the transparency of legal decisions. In contrast, Bork’s jurisprudence, consistent with his moral positivism, requires judges to practice moral abstinence and judicial restraint, which I refer to as moral neutrality, because the law is fixed and opaque.

Third, Bork’s jurisprudence presupposes a semantic attitude toward law. This attitude is the indispensable basis for his originalism and moral positivism. According to Bork, the law is incontrovertibly given in the words of lawmakers or in the public understanding surrounding the enactment of law. Dworkin, on the other hand, argues for the interpretive attitude, which is constructive of law’s requirements and wholly incompatible with the semantic attitude, originalism, and moral positivism.

Fourth, Dworkin’s overall theory depends on the political virtue of integrity. If law is to speak with one voice, the virtues of justice and fairness must be supplemented with integrity guaranteeing the unity of voice that American legal practices already endorse. For Bork, integrity, in Dworkin’s sense of an ongoing process, is made impossible by the historical virtue of originalism, which isolates law into discrete but non-communicating segments, not one of which necessarily need complement the others. Even if Bork were to agree that integrity is desirable (and it is not clear that he could so view it given the elements of his jurisprudence), the American legal system simply cannot endorse it, for such a concept would make the expansion of law dependent on judges’ developing sense of political morality.

Whether these interconnected strands of contrast exhibit an underlying unity or internal coherence remains unanswered. One may ask whether there is a theme to which each of these diverse strands contribute, enabling Bork to picture their opposition in a more dramatic way. Perhaps there is not. It may be that Bork and Dworkin provide no more than warring theories intersecting each other at right angles in various odd and jagged ways. Yet, two things should be kept in mind. First, Bork claims that The Tempting of America is not “ultimately about legal theory [, but] . . . about who we are and how we
live.” Second, Dworkin claims that “[i]f we understand the nature of our legal argument better, we know better what kind of people we are.” According to Bork and Dworkin, then, who are the American people and how should they live?

Both Dworkin and Bork effectively use revealing religious metaphors in their books. Bork conjures up the word “heresy” to characterize what is wrong with the law, while Dworkin sees in the phrase “the protestant attitude” an apt metaphor for capturing what is right about the law. Before attempting to show how their respective theories rest on these quasi-religious grounds, it is important to emphasize that neither Bork’s nor Dworkin’s legal theory explicitly relies on any recognized religion or religious tenet, nor do their theories appear to be directly influenced by religious faith. Moreover, neither Bork nor Dworkin affirms any connection between law and religion, or a dependence of the former on the latter. Yet, both use a religious metaphor that marks their theories of law in fundamentally different ways, which suggest alternative and competitive ways of life.

A. Heresy in the Law

[I]t is crucial to recognize a heresy for what it is and to root it out.172

At the outset of The Tempting of America, Bork analogizes what has happened to the law to the effects of a “heresy.”173 Before explaining what Bork means by heresy it may be instructive (and corroborative of my interpretation of Bork) to describe the context in which he applies this label to the law. As a federal court of appeals judge in Washington, D.C., Bork often observed from the windows of his chambers massive marches by pro-life and pro-choice demonstrators:

[T]he demonstrators march past the Houses of Congress with hardly a glance and go straight to the Supreme Court building to make their moral sentiments known where they perceive those sentiments to be relevant. The demonstrators on both sides believe the issue to be moral, not legal. So far as they are concerned, however, the primary political branch of government, to which they must address their petitions, is the Supreme Court. There is something very disturbing about those marches, for, if the marchers correctly perceive the reality, and I think it undeniable that they do, a

170. THE TEMPTING OF AMERICA, supra note 1, at 11.
171. LAW’S EMPIRE, supra note 3, at 11.
172. THE TEMPTING OF AMERICA, supra note 1, at 11.
173. Id. at 4-11.
major heresy has entered the American constitutional system.\textsuperscript{174}

Nearly all of the elements of Bork’s judicial philosophy are impliedly present in these few lines: moral positivism (Congress makes the laws), moral neutrality (the Court should eschew moral questions), and originalism (whoever makes the law determines its contents). Bork’s semanticism is also present, for his criticism of \textit{Roe v. Wade} is that the Supreme Court, without authority, created a right of privacy that clearly was not within the plain meaning of the Constitution.

From Bork’s point of view, the mistake of the marchers is in thinking that their moral views should be addressed to the Supreme Court. Congress makes the laws based on its members’ moral convictions; thus, Congress is the proper forum in which the demonstrators should express their moral convictions. The Supreme Court, according to Bork, has the different responsibility of addressing legal issues. Nonetheless, according to Bork, the marchers are correct in thinking that the Supreme Court engages in moral decision-making. This is the essence of the heresy now afflicting America’s judiciary: courts are engaging in decision-making based on the morality of individual judges.

Defining what Bork means by a heresy gives one insight into Bork’s vision of who the American people are and how they should live their lives. Such an explanation may also help to construct a unity of meaning from the various strands of Bork’s legal theory, a unity that sharply contrasts with the unity of meaning composed from the elements of Dworkin’s legal theory. There is much in what Bork says of heresy that puts his legal theory into clearer perspective:

“Heresy,” Hilaire Belloc reminds us, “is the dislocation of some complete and self-supporting scheme by the introduction of a novel denial of some essential part therein. We mean by ‘a complete and self-supporting scheme’ any system of affirmation in physics or mathematics or philosophy or what-not, the various parts of which are coherent and sustain each other.” The American design of a constitutional Republic is such a “complete and self-supporting scheme.” The heresy that dislocates it is the introduction of the denial that judges are bound by law.\textsuperscript{175}

The key words in the above excerpt are the “complete and self-supporting scheme” that results from the “American design” of government. The premises that support Bork’s thesis are supplied by semanticism, originalism, positivism, and moral neutrality, all of

\textsuperscript{174} Id. at 3-4.

\textsuperscript{175} Id. at 4 (footnote omitted).
which come from Bork’s philosophical choices, not from the Constitution. The whole structure of Bork’s conception of law may be condensed into one sentence: Thanks to the semantic nature of law, one can know its original meaning or the original intentions or understanding behind law, all of which is infused with a moral content that legislators enacted and that judges have no right to change.

Throughout The Tempting of America, Bork implicitly maintains that the “American design of a constitutional Republic” is a “complete and self-supporting scheme, . . . the various parts of which are coherent and sustain each other.”176 Bork implies that America has a “complete and self-sustaining system” that requires neither additions nor modifications to insure a workable and coherent body of law. The semantic attitude provides ready access to the law, which exists as a plain historical fact; its meaning is therefore incontrovertible for those who will fairly inspect the texts in which the law is set forth or who will look to the public understanding of those texts when written. That is the original truth from which all subsequent legal truths derive. Although one may disagree with the moral vision that informs those texts, one is not to question. Every law that is duly enacted in conformity with constitutional safeguards is a “sacred text” for that reason alone, and therefore, simply must be respected until and unless it is amended or repealed.

The “American design” of the “complete and self-sustaining scheme” that Bork mentions is quite simple: legislatures make the laws and courts apply them. Law, in other words, is a one-way street; it begins with Makers and ends with Receivers. Judges and all other citizens are the Receivers, all bound by the law. Where there is a “dislocation” of this “scheme,” there is a heresy.

From Bork’s theory, one may recognize a principle of “integrity,” a form radically different from the virtue of integrity defended by Dworkin. If the “complete and self-sustaining scheme” in the “American design” is expressive of integrity at all, it is an historical idea that Bork effectively asks the reader to accept on faith. Bork is precluded from undertaking a defense of the individual components of this “scheme” by his radical skepticism. Thus, it appears as though the reader is asked to accept the components on blind faith, as if they were unquestioned elements of a secular religion. Just as individual laws are opaque, the system itself, the “American design of a constitutional Republic,” is flooded with opacity, so that not even moral phi-

176. Id.
losophy may penetrate it. Indeed, Bork does not wish to explore the tenability of this "scheme."

B. Law and the Protestant Attitude

More than once in Law's Empire, Dworkin refers to the "protestant character" or "attitude" of law. These terms derive from the emphasis that his theory of law as integrity places on individual responsibility to identify not simply the rules that authorities have laid down to guide conduct in human society, but also the implicit content of the principles on which those rules rely, even those principles that may not have been previously considered. A statement characteristic of Dworkin's legal philosophy prepares the ground for the protestant attitude in law:

If people accept that they are governed not only by explicit rules laid down in past political decisions but by whatever other standards flow from the principles these decisions assume, then the set of recognized public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in new circumstances, without the need for detailed legislation or adjudication on each possible point of conflict.¹⁷⁸

Dworkin suggests that a community following the standard of integrity, understood in this fashion, has a way of achieving organic change thereby effecting a kind of self-government, because integrity "insists that each citizen must accept demands on him, and may make demands on others, that share and extend the moral dimension of any explicit political decisions. Integrity therefore fuses citizens' moral and political lives. . . ."¹⁷⁹ Government exists by and through law, law that judges and citizens extend and expand as they see deeper into the implications of the principles to which their community is committed, expressed by its explicit rules. The conventional divorce between one's personal and public life, and between private and public morality, becomes problematic. Where citizens see one another as attempting to expound the requirements of political integrity, even where they disagree about such requirements, they have less reason to distinguish their private from their public morality.¹⁸⁰ This naturally leads to the protestant character of law:

¹⁷⁷. Law's Empire, supra note 3, at 190, 252, 413.
¹⁷⁸. Id. at 188.
¹⁷⁹. Id. at 189.
¹⁸⁰. Id. at 190.
Political obligation is then not just a matter of obeying the discrete political decisions of the community one by one, as political philosophers usually represent it. It becomes a more protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme.181

Perhaps what Dworkin describes is equally applicable to both judges and the children described in his parable.182 From Dworkin's point of view, one is led to believe that neither judges nor the children can sensibly confine their interpretive obligations to the "discrete political decisions" of some authority, to other judges and legislators or, in the case of the children, to their father. Thus, when authorities use moral concepts, they cannot hope to fathom their meaning. By their very nature, moral and legal concepts are inexhaustible. They precede and survive the efforts of the centuries, and to grasp their meaning, the efforts of all citizens are indispensable in defining them.

V. Conclusion

To the extent that law is founded on belief, what one believes can be seen in at least two different ways. One may believe that the law is exhausted by the set of external rules enacted by others either recently or long ago. What one then believes from this point of view is independent of internal moral capacities, which are irrelevant to what the law is. This is the belief to which the law commits one, from Bork's perspective. It pictures the Constitution as a contract of adhesion; subsequent generations of Americans, who are parties to the contract, have no say over the meaning of the contractual terms that bind them, except through the unlikely, cumbersome, and time-consuming amendment process. Such a contract, however, is without the saving feature of a conventional contract of adhesion: we cannot "take" the Constitution or "leave it," for leaving it virtually requires us to abandon our country. Because such an action would force citizens to forsake their moral capacities, it may be an act of ultimate tyranny.

An alternative way to picture belief in law honors citizens' moral capacities, for it recognizes that fundamental law provides moral and legal concepts that are not exhausted by historical statesmen's "time, imagination, and interest."183 Belief in the law is consistent with encouragement of reinterpretations by judges, lawyers, and citizens of

181. Id.
182. See supra note 96 and accompanying text.
183. LAW'S EMPIRE, supra note 3, at 369.
the fundamental terms of our social bond, without those novel interpretations being seen as "outside the law."

"Heresy" and "the protestant attitude" are powerful metaphors of incalculable and symbolic power that aptly characterize these two pictures of the law. Even if they lose their religious connotation in being transferred to law, they nevertheless retain the core ideas that, for historical reasons, have become almost exclusively associated with the attitude of certain religions. Though they may be used for non-religious reasons in the course of discussing secular theories of law, the powerful hold that these metaphors have on the minds and hearts of many people will not weaken. To suggest that a theory of law combats heresy or that it incorporates the protestant attitude means something distinctive, and one of the things these terms suggests is a way of life that is indicative of the kind of person one is, or should be, if one desires to be thought of as law-abiding.

There is no necessary connection between the kind of person one is in theology and in the law. One can be protestant in law and catholic or Jewish in theology. Or, one can be an atheist and still be protestant or catholic in law. Yet, the metaphors of "heresy" and "the protestant attitude" subtly tint Bork's and Dworkin's claims in the faint colors of subdued religious passions. Taken together, they resurrect a basic historical division on how one should lead his life. The transfer from religion to law is not entirely inappropriate, for in a sense, law is a secular religion. It provides the "bonds" that link one another together for better or worse, and it defines the locus and degree of authority, the boundaries of our liberty and the point where one must finally submit or face penalty or punishment. Thus, Bork, who believes in law in the first sense, avails himself of an incalculably powerful tool. Heresy rings a universal alarm; it indicates that something has gone radically wrong. More than a grave danger of subverting the truth exists. The truth already may have been subverted, and the real risk lies in losing it altogether. The word "heresy" urges one to rally to defend the faith or the law, for once either is lost, it never may be regained. One who is led to believe no longer in what is presently at risk will subscribe to a new belief, and that will be the new faith, the derivative of a heresy. This new faith will be as hard to dissolve as the former faith was resistant to change before the onset of the heresy.

Similarly, one who uses the "protestant attitude" or "protestant character" announces a major change in our conception of authority's rightful sphere. Transplanting that phrase into the law helps to explain the sea-change in the way many lawyers, judges, law professors, and citizens see the law. Each person is an interpreter and has an
inalienable responsibility to exercise the interpretive attitude if he wants to honor the kind of person he is. One can no longer accept the rigid dichotomy between "first-order" Makers, who decide what the moral content of law is, and "second-order" Receivers, like judges, who merely apply that content to the cases and controversies they encounter.184 From this perspective, law is not a one-way street; it is bi-directional, requiring Receivers to be Co-Makers if law is to be truly the law of America.*

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184. See LEVINSON, supra note 97, at 80-81 (a discussion of this distinction).

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