Justice Brennan, Judge Bork and a Jurisprudence of Original Values

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The retirement of Justice William Brennan provoked warm praise for his personality, character and integrity; but commentary about his legacy as a member of the United States Supreme Court was ambivalent, which reflected the controversies of his time.

All too often it has been said Justice Brennan did not interpret the Constitution; instead, he “made” law. The idea echoed the old cliché that a judge should not legislate. Such comments reflect a misunderstanding of Justice Brennan’s contributions. He will be remembered as one of the great Justices of the United States, because he did interpret the Constitution in the classic tradition.

Of course, it is true that Justice Brennan took issue with many versions of the argument that legitimate judicial review must always seek, discover and follow the “intentions of the Framers.” In an address at Georgetown University in 1985, the intellectual leader of the liberal faction on the Court was blunt:

In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.

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1. During the 1987 hearings on the nomination of Robert Bork for the United States Supreme Court, Senator Orrin Hatch asked the candidate, “judicial activism is when judges make law rather than interpret the law?” Judge Bork “agreed that was a fine shorthand definition.” E. Bronner, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 231 (1989).

The foremost defender of a jurisprudence of original values, former Judge Robert Bork, quoted this passage from Justice Brennan's address in his recent book, and then replied: "Of course the view described by Justice Brennan is arrogant, or would be, if anybody took such a position. . . . Justice Brennan demolished a position no one holds, one that is not only indefensible but undefended."

Judge Bork’s objection to Justice Brennan’s analysis was that a jurisprudence of original understanding—sometimes termed “interpretivism”—is not as simplistic or as simple-minded as academicians claim. Bork emphasized the concept of the “underlying premise” to demonstrate the flexibility of his jurisprudence. To do this he first sought to parry the criticism that evidence of original understanding will yield insufficient data to decide today’s cases; second, he sought to demonstrate the relevance and the reliability of this data to the changing problems posed by constitutional cases. Indeed, Bork’s emphasis in his recent book on the flexibility of “original understanding” is so pronounced—as opposed to some of his earlier writing—that his argument loses its distinctive quality. His argument becomes only a description of the proper judicial function that must be shared by anyone who accepts the fundamental premise that “it is a constitution that [the Court is] expounding.” According to Judge Bork’s most recent formulation, “all that a judge committed to original understanding requires is that the text, structure and history of the Constitution provide him not with a conclusion but with a major premise.”

Bork’s revised view threatens his own theory of judicial legitimacy. First, his claim that original understanding need only be a major premise leaves tremendous latitude for the judge. Second, his interpretations of history demonstrate that the discovery and analysis of history is usually just as subjective as any other mechanism of judicial decision-making. For example, Bork’s “major premise” rule is the key concept which explains why he endorses Brown v. Board of Education.

In prior writings and remarks, Judge Bork has offered preliminary and unconvincing explanations concerning why he endorses Brown. Now, Bork


4. To verify the justice of his complaint, Judge Bork quoted one of the prominent academic analysts of judicial review, John Hart Ely:
   What distinguishes interpretivism . . . is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.

5. See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971) [hereinafter NEUTRAL PRINCIPLES].


7. TEMPTING OF AMERICA, supra note 3, at 162 (emphasis added).


9. In 1971, Professor Bork found that the evidence of the Framers’ intent was inconclusive.
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has settled on a different solution. He now admits that there is not the slightest chance that the ratifiers of the fourteenth amendment understood that separation of the races violated the equal protection clause. Judge Bork must explain how he would justify Brown when the holding is not commanded by the specific understanding of the fourteenth amendment at the time it was ratified.

In effect, Judge Bork distills from the original understanding a slogan or an epigram: “Equality under law.” This general value, he opines, is the great lesson of the equal protection clause, and it is an adequate basis for the morally correct result in Brown. Judge Bork allows himself an important latitude as judge to refine the lessons intended by the Framers; he allows himself to ignore the specific understandings of the Framers; and he allows himself to remove all of the impurities and imperfections from this distilled and abstracted “original” value, so that as judge he can achieve the overriding objective of equality.

Bork’s defense of Brown’s justice owes more to his need to demonstrate that his jurisprudence is acceptable in modern America, than it does to a genuine proof that the Framers were far-sighted egalitarians, whose vision of racial justice is a real justification for strict scrutiny of racial classifications. Judge Bork attacks “liberal academics” for their frequent claim that Brown cannot be justified on original understanding. Critics of original understanding must make this claim, Bork says, because if Brown was right as an interpretation of original understanding, their theories for judicial activism fall apart. Of course, the problem is that Bork himself stretches historical evidence—or ignores it—to claim that Brown is rooted in original understanding. In this claim, Judge Bork demonstrates that his defense of Brown is political. Bork’s purpose is to show that he should have been confirmed as an Associate Justice. He understands that Brown is a central test of the acceptability of his jurisprudence; and it is Bork who revises his approach to justify the result that he knows he must endorse.

To turn to another example, Judge Bork claims “we know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment.” Actually, we know a great deal. For one who has dedicated his theories to original understanding, Judge Bork is remarkably oblivious to historical research. His discussion of the first amendment in his recent book omits even a brief allusion to the most careful reconstructions of original understanding of expressive or religious liberty. Nevertheless, when deciding a defamation case focusing on the doctrines

Neutral Principles, supra note 5, at 3. This finding was the same as the conclusion announced in Chief Justice Warren’s opinion in Brown, 347 U.S. at 489.

10. TEMPTING OF AMERICA, supra note 3, at 75-76.


derived from *New York Times v. Sullivan*, Judge Bork offered a description of judicial duty that could have been written by Justice Brennan, without the slightest inconsistency with any other position he ever took. Judge Bork defended the doctrine of *New York Times*—one of Justice Brennan’s greatest cases—by arguing that the decision was only a legitimate adaptation of constitutional law to the evolving and growing dangers of state libel law:

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

> . . . .

> We must never hesitate to apply old values to new circumstances. . . . The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty.¹⁵

The potentialities of this interpretive view are glimpsed in the fact that Justice Brennan joined a plurality opinion by Justice Stevens which quoted this passage from *Ollman*.¹⁶ The case was decided the same term that the Senate rejected Judge Bork’s nomination to the Supreme Court, and it presented an issue of paramount concern to Justice Brennan: The meaning of the cruel and unusual punishment clause of the eighth amendment as applied to capital punishment of juveniles.¹⁷

Despite his occasional defense of expansive first amendment interpretation, in the aftermath of *Texas v. Johnson*,¹⁸ Judge Bork was interviewed by the media and left the impression that had he been confirmed (rather than Justice Anthony Kennedy), flag burning would be illegal in America today.¹⁹ Perhaps so. However, even if Bork disagrees with the specific logic of the flag burning cases, by his test of original values, those cases are

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¹⁷. Id. at 821.
¹⁹. See also TEMPTING OF AMERICA, supra note 3, at 126-28.
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unassailable. Indeed, to suggest, as Bork does, that the flag burning cases are only "judicial revisionism" is to ignore history. The fundamental character of expressive liberty is part of the reason why the states refused to ratify our Constitution until they received assurances that a bill of rights—and protection for freedom of expression—would be made a part of our supreme law.

Too often Americans forget that every one of those men and women who framed our Constitution had exercised their right to protest Britain's leadership and laws in ways that were just as offensive to loyal Englishmen as flag burning is to loyal Americans. The importance of expressive liberty was reaffirmed when, in 1798, the administration of John Adams passed federal laws that would make criticizing government a federal crime. The people were outraged at this attack on our liberties, and in 1800 Thomas Jefferson was elected President—quite literally on a civil liberties platform. As Justice Brennan understands, and as Judge Bork apparently does not, the experience in that "crisis of freedom" firmly established the right to attack government in the most vehement and emphatic terms. The eloquence of Justice Brennan is enough to establish the relevance of all this to the spectacle of flag burning:

There is . . . no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

20. Id. at 128.
The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . And, precisely because it is our flag that is involved, one’s response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag-burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.22

After the Supreme Court’s decision in Texas v. Johnson, members of both political parties rushed to prove their patriotism by denouncing the Court’s 1988 decision that the burning of an American flag was a form of political expression protected by the first amendment. Congress hastily framed a statute that would punish flag burners, in the frail hope that their efforts would not violate the Constitution. Congress’ efforts were a shameful failure. When the United States Supreme Court heard arguments on the constitutionality of the 1989 federal statute, the central meaning of the first amendment was, again, put into question. Happily, the Supreme Court remained true to its word in United States v. Eichman.23 Again, Justice Brennan spoke for the Court:

We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures. “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.24

After Eichman was announced, President Bush and his allies in Congress tried again to pass a constitutional amendment to allow Congress and the States to “prohibit the physical desecration of the flag of the United States.”25 Congress rejected the proposal. It is a simple but important truth that Johnson and Eichman vindicated original values of the Constitution—

24. Id. at 2410 (quoting Johnson, 109 S. Ct. at 2544) (citations omitted).
25. The tenor of the political attacks on Johnson brought a rebuke from Justice Stevens, who dissented in both flag burning cases: “[T]he integrity of the [flag as a] symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends.” Eichman, 110 S. Ct. at 2412.
just like almost all, or perhaps all of Justice Brennan’s other great opinions. The point is that Robert Bork allows himself to modify original understanding to extract a purer value than a literal interpretation of historical materials would allow. If Judge Bork allows himself to use a blend of reason, value distillation, and wishful thinking to justify a broader interpretation of the first amendment than the original understanding of framers and ratifiers, why cannot Justice Brennan do the same to enforce the basic values of the first amendment in the flag burning cases?

If original understanding must be a specific and rigid guide, no modern decision of significance can be justified. If original understanding must only yield an underlying premise, as Bork now claims in his revised view, no decision can be authoritatively condemned. If the phrase “equal protection of the laws” can be abstracted to “racial equality under law,” is there any basis—using methods common to Bork and Brennan—to defend privacy? Judge Bork answers no. In the Senate hearings, he was more circumspect: He had not thought of a way to find privacy in original values. And yet, even Justice Douglas’ much derided opinion of the Court in *Griswold v. Connecticut* offers a logic with a “major premise” derived from the specific provisions of the Constitution. Justice Douglas’ view is supplemented by the concurring opinion of Justice Goldberg (joined by Justice Brennan), which emphasizes the ninth amendment as a major premise. In the absence of an authoritative history of “original understanding,” it becomes more obvious that Bork’s test lacks precision and consistency. Bork’s originalism leaves “utmost latitude for evasion,” and thus fails in its central purpose to remove political bias from the judicial function.

The key problem seems to be finding as persuasive a justification for a general guarantee of liberty as there is for a general guarantee of equality. There are several provisions that suggest themselves: the privileges and immunities clause of the fourteenth amendment; the protection of “liberty” in the due process clause, which requires only a plain statement that some aspects of “liberty” are so fundamental that they cannot be taken by ordinary legislative process and litigation and can only be taken with the due process of a constitutional amendment. Why not? It is at least as plausible as the notion that a bold statement of racial equality was embodied in the fourteenth amendment. Finally, there is the ninth amendment, which, as Bork senses, is a potent threat to his vision of a fixed, finite set of constitutional values, a set which never expands. Judge Bork claims that

26. R. BERGER, GOVERNMENT BY JUDICIARY 214 (1977) (quoting Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 13 (1971)) (“If the legislative history revealed a consensus about segregation in schools and all the other relations in life, I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed.”).


the ninth amendment is only an "inkblot," and does not deserve judicial attention.  Here again, Bork refuses to provide a careful reading to the historical materials upon which he says all judges must rely. Consider what he says about James Madison:

There is almost no history that would indicate what the ninth amendment was intended to accomplish. But nothing about it suggests that it is a warrant for judges to create constitutional rights not mentioned in the Constitution. . . . Nothing could be clearer . . . than that, whatever purpose the ninth amendment was intended to serve, the creation of a mandate to invent constitutional rights was not one of them. The language of the amendment itself . . . states that the enumeration of some rights shall not be construed to deny or disparage others retained by the people. Surely, if a mandate to judges had been intended, matters could have been put more clearly. James Madison, who wrote the amendments, and who wrote with absolute clarity . . . , had he meant to put a freehand power concerning rights in the hands of judges could easily have drafted an amendment that said something like "The courts shall determine what rights, in addition to those enumerated here, are retained by the people," . . . If the Founders envisioned such a role for the courts, they were remarkably adroit in avoiding saying so.  

Now compare those remarkably dogmatic characterizations of Madison's thought with what Madison actually said in his speech proposing the ninth amendment to the House of Representatives. First, Madison discussed the ninth amendment:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government. . . . [This] may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.  

Second, in the next paragraph of his address to the House, Madison did foresee and predict a special role for the courts in the enforcement of the Bill of Rights:

If [basic rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar

30. E. Bronner, supra note 1, at 269, 302.
31. Tempting of America, supra note 3, at 183 (emphasis added).
manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.\textsuperscript{33}

Unless Madison's words were carelessly blurted out,\textsuperscript{34} they seem to be expressions of "absolute clarity." There seems to be no basis for concluding that courts were to enforce expressive liberty, religious freedom, and the procedural guarantees of fairness, and the other aspects of the first eight amendments, but not the ninth (or, for that matter, the tenth) amendment. Even if Madison's words are deemed to be ambiguous,\textsuperscript{35} they are clear enough to shift the burden of persuasion to those who deny that the courts have a special role to enforce the ninth amendment. Ultimately Bork, the self-professed originalist, is actually ahistorical, \textit{when he must be to avoid a result he does not wish to adopt}. Judge Bork denies the possibility that the Constitution protects a substantively-defined liberty that is broader than specific provisions of the Bill of Rights. And so he ignores all historical evidence to the contrary.

Judge Bork defends tactical judicial latitude in defense of original values. This corresponds to Madison's view that checks and balances should block excessive power. Innovations by ambitious politicians may require innovative judicial defenses.\textsuperscript{36} If so, much follows—almost the entirety of twentieth century constitutional law. In the era of modern constitutional jurisprudence, no event in human history cast more of a shadow than the holocaust. The spectre of totalitarian government teaches the need for a principled, consistent and generous definition of equality and individual liberty. If there are some realms "where majorities govern for no reason better than they are majorities," the protection of the individual requires that there must be some aspects of living where government must not exercise total dominion, "no matter how democratically."\textsuperscript{37} In tactical defense of liberty and equality, judges must look to the future; they must sense the potential for totalitarian

\textsuperscript{33} Id. at 224.

\textsuperscript{34} Madison's explanations reflect ideas he discussed in his correspondence with Thomas Jefferson on the need for a bill of rights. Madison, writing to Jefferson, had expressed reservations about a bill of rights because he feared "a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." James Madison, Letter to Thomas Jefferson (October 17, 1788), reprinted in \textit{MIND OF THE FOUNDER, supra} note 32, at 205-06. The ninth amendment appears to be a clearly drafted solution to his concern that the text might prove to be too narrow and too uncertain a guarantee of individual rights.

\textsuperscript{35} John Hart Ely sees an element of confusion in the words because two concepts were "telescoped": the inference that unenumerated rights do not exist; and the inference that matters beyond the enumerated rights were delegated to the national government. J. Ely, \textit{supra} note 4, at 35-36.


\textsuperscript{37} \textit{Neutral Principles}, \textit{supra} note 5, at 1, 2-3.
and holocaustal events, and they must do so generations before the worst of tyranny is upon us. They should devise principles to obstruct the accumulation of excessive power. There is little, if anything, in Judge Bork’s revised originalism to deny this expansive view of judicial duty.

In a similar vein, Justice Brennan has argued that the Bill of Rights and the principles of equality embodied in the Civil War amendments, read as a whole, defend “human dignity” against government oppression. Justice Brennan believes that the eighth amendment in particular justifies a contemporary interpretation that capital punishment is inconsistent with human dignity. Justice Brennan’s view is a target even for critics who do not adhere to the view that the Court must interpret a constitutional provision as understood at the time of ratification. Unquestionably, as Judge Bork argues, the abolition of the death penalty is not a result that follows inevitably from a discovery that the framers and ratifiers of the Bill of Rights sought to protect and care for the dignity of the individual. However, by denying that “human dignity” is an original value that is sufficiently specific (presumably as opposed to the precise and scientifically measurable concept of “equality”), Judge Bork fails to confront the real character of Justice Brennan’s case and the real issue posed by efforts to articulate a more sophisticated jurisprudence of original understanding.

If the Bill of Rights was intended to protect the original value of human dignity from the excessive legislative and executive power, is it legitimate for a judge who knows of the history of the death penalty, its role as a tool of racist policy, and the tragic miscarriages of justice caused by a popular hunger for retribution, to interpret the provisions of the Bill of Rights to abolish capital punishment? Actually, before reading Judge Bork’s book, many might have assumed that his approach could not possibly lead to such a result. And yet, it appears that judicial hostility to the death penalty system may depend on a “major premise” that is just as deeply rooted in the original understanding of the framers as “equality under law.” Indeed, the concept of equality may be the premise for judicial restriction of capital punishment. Even the strict interpretivist view of the equal protection clause holds that the fourteenth amendment was designed to abolish dual systems of criminal punishment—one harsh law for blacks, another for whites. With that as a “major premise,” it is not a particularly long or problematic journey to the decision that Justice Brennan would have preferred in McCleskey v. Kemp. His eloquent dissenting opinion establishes the necessary logic that could lead from original values to abolition, at least as long as race prejudice taints the legal system:

40. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY 191-92, 211-12 (racial discrimination in statutes and administration of the laws was banned so that “State justice had to be nondiscriminatory”).
[T]here is a significant chance that race . . . play[s] a prominent role in determining if [a capital defendant] live[s] or die[s].

. . . .

Georgia’s legacy of a race-conscious criminal justice system, as well as this Court’s own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicate that McCleskey’s claim is not a fanciful product of mere statistical artifice.42

If the judicial duty encompasses a tactical discretion to respond to new and unanticipated threats to original values, as Judge Bork concedes when the issue is libel law, it is difficult to distinguish the danger posed by policies that perpetuate the old dangers to “equality under law” and “human dignity.” Logic may or may not compel Justice Brennan’s hostility to death sentences. Yet whether one accepts Justice Brennan’s logic or not, there can be no serious doubt that his starting point is the Constitution and his major premise is the fundamental value of equality under law.

In short, despite all assumptions to the contrary, Judge Bork and Justice Brennan share much common ground. Both men expect the courts to respond to new dangers to established values; both men expect contemporary interpretations to be informed by historical experience as well as original understanding.

It is a telling fact that Judge Bork’s evolving constitutional views can be articulated in a way that so plainly justify most of what Justice Brennan has tried to do as a member of the United States Supreme Court. In this light, the endless clash between those who “interpret” the Constitution and those who are accused of “making law,” between those who profess to be faithful to original understanding and those who search for the fundamental values of the document in the traditions and morality of our people, may be only “sound and fury . . . signifying nothing.” For when Bork’s originalism justifies Brennan’s constitutionalism, it is manifest that the differences between the supposed polarities are really only differences of degree, not of fundamentals.

The real differences between judges have little to do with whether they select a “major premise” from the Constitution’s values. The deeper conflicts derive from disagreements about what must be done after “discovery” of a “major premise” in the Constitution’s text, structure or history. A judge’s analytical method, a judge’s perception of the Constitution’s priorities, and a judge’s humanity become more important than whether a specific doctrine has a root in a value cherished by the Framers. These qualities of reason and judgment define the difference between a Judge Bork and a Justice Brennan.

Justice Brennan never ignored the Constitution; he always sought to interpret it. His opinions vindicate our supreme law as an instrument of progress, designed to push our nation toward a finer justice. To the con-

42. Id. at 321.
founding details and painful dilemmas of judging, Justice Brennan brought a deep understanding of American history, a compassion for the victims of America's past and present, a principled commitment to the steady growth of individual liberty, and a respect for human dignity. As a result, Justice Brennan’s record will be remembered for what it is: A record of achievement and wisdom.