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A Failed Coup on the Judicial Monarchy (Review of God and Man in the Law, by Robert Lowry Clinton)

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Book Review

A Failed Coup on the Judicial Monarchy

God and Man in the Law: The Foundations of Anglo-American Constitutionalism
by Robert Lowry Clinton
University Press of Kansas (1997)

I. INTRODUCTION

"The Imperial Judiciary lives."[1] Echoing Justice Scalia's dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Robert Clinton's *God and Man in the Law* decries the evils of a constitutional jurisprudence which has "effectively enthrone[d] the judiciary as a kind of constitutional monarchy."[2] *God and Man in the Law* attempts to debunk the legal, historical, philosophical, epistemological, and anti-theistic foundations upon which this "judicialized" constitutionalism rests. In its place, Clinton proposes a revival of a constitutional jurisprudence that presupposes a transcendent source of legal order in the world and is based upon the traditions of the common law. Clinton's vision of a naturalistic jurisprudence ultimately fails, however, for theoretical and practical reasons.

Clinton contends that the heart of modern constitutional woes lies in the prevailing judicial supremacy on constitutional matters. He posits that judicial supremacy results from the Court's simultaneous possession of two powers: (1) judicial finality ("the power to decide all—or nearly all—constitutional cases, including those that determine the constitutional authority of other agencies of government")[3] and (2) judicial freedom ("the power to select the interpretive rules according to

1. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting).

2. ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM 22 (1997).

3. *Id.* at 54.

which [constitutional] cases will be decided").[4] Clinton asserts that "the modern fusion of judicial finality with judicial freedom in constitutional law . . . has no basis in traditional legal practice,"[5] "destroys judicial accountability,"[6] and results in judicial "tyranny."[7] Accordingly, the antidote to judicial supremacy is to limit the Court's power by depriving the Court of either judicial finality or judicial freedom.[8] The former alternative was the thesis of Clinton's earlier work;[9] the latter solution is the thesis of *God and Man in the Law*.

Clinton articulates his argument for limiting the Court's power to choose its interpretive tools as an effort to bind judges to "traditional interpretive rules in the decision of all constitutional cases."[10] Such a traditional jurisprudence, argues Clinton, is not a radical proposal intended to appeal only to religious fundamentalists;[11] rather, its appeal extends to "all who wish to see the Constitution and its law standing upon the surest possible foundation."[12] In developing this goal, Clinton crisscrosses the academic landscape, drawing heavily on scholarly thought in a variety of disciplines, including judicial politics, history, political philosophy, epistemology, metaphysics, and political theology.[13]

4. *Id*.

5. *Id*. at 28.

6. *Id*.

7. *Id*. Clinton provides a cogent illustration of the potentially dictatorial nature of judicial supremacy as follows: "When the Court fails to achieve consensus, it risks falling into something approaching . . . dictatorship. For example, whenever there is a 5-to-4 split on an important constitutional ruling, one justice effectively determines the social choice for all society, regardless of anyone else's preferences." *Id*. at 54. When viewed in this light, the modern judiciary is far from the innocuous judiciary described by Hamilton in *Federalist* No. 78. *See id*. at 28.

8. *See id*. at 40 ("[T]he best way to ensure judicial accountability in a constitutional system governed by a nonelective judiciary is by tying judicial interpretation of the Constitution very closely to traditional modes of legal analysis. Alternatively, if traditional modes of analysis are rejected, then fidelity to our constitutional system requires rejection of an ultimate judicial guardianship of the Constitution.").

9. *See id*. at 54 (referring the reader to ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW (1989)).

10. *Id*.

11. *See id*. at 1.

12. *Id*. at 1-2.

13. *See id*. at xi. In attempting this challenging "merger" of academic fields, it is clear that Clinton has been no stranger to Alexander Pope's Pierian spring. As a concomitant warning, however, Clinton's book presupposes the reader's familiarity with a host of ancient and modern political thinkers, such as Plato, Aristotle, Austin, Aquinas, Hegel, Hobbes, Kant, J.S. Mill, Locke, Arrow, Harris, Adler, Gilson, and many others.

The discussion below tracks the development of Clinton's defense of traditional jurisprudence, providing both a summary of Clinton's major points and a critical response to his analysis. Part II.A discusses Clinton's premise that the emergence of judicial hegemony in modern constitutional jurisprudence is a result of the fundamental misconception as to what a written constitution is. Part II.B considers the foundations of traditional jurisprudence in the social consensus of the common law and its societal antecedents. Part II.C attempts to capture the politico-philosophical underpinnings of Clinton's traditional jurisprudence, and Part II.D includes some thoughts on Clinton's effort to place his theory within the framework of a worldview that presupposes the existence of a God who imparts to man a legal order with transcendent structure. This Review concludes that while Clinton's articulation of the problem of judicial supremacy on constitutional matters is accurate, his proposed remedy is inapplicable as a practical matter and is couched in a metaphysical framework that escapes serious critique due to its cryptic nature.

II. DISCUSSION

A. Problematic Conceptions of the Constitution

1. Summary

Clinton asserts that judicial hegemony in the constitutional arena stems from a fundamental misconception of the Constitution as merely a written "blueprint of the good society"[14]—"a written set of general guidelines,"[15] which are to be translated into reality "under the special guardianship of particular 'rights-sensitive' institutions, the courts."[16] The justification for such an approach seems to lie in the assumption that constitutional rules were "created," *ex nihilo*,[17] by a "group of sociopoli-

This background requirement, combined with Clinton's sometimes recondite style of writing, pushes the book to the edge of incomprehensibility for the lay reader and, in all likelihood, will send even those well-schooled in these areas to their libraries on occasion.

14. *Id.* at 18 (quoting Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 394 (1985)).

15. CLINTON, *supra* note 2, at 19.

16. *Id.* at 74.

17. *See id.* at 59 (meaning, literally, "from nothing").

tical elites,"[18] interested in "perpetuat[ing] [their] long-term political and/or economic interests at the expense of other groups."[19]

Clinton argues that the "blueprint" metaphor presents a number of problems for constitutional jurisprudence. First, blueprint constitutionalism "reduces the Constitution to a plethora of empty words and phrases with ever-changing content . . . upon which courts or other deconstructive interpreters are expected to graft substantive rules and principles in order to keep an essentially meaningless text 'in tune with the times.' "[20] Such an approach "overemphasizes the prescriptive, future-oriented malleability of a constitution"[21] and places constitutional law essentially on the same level as any other law, thus suggesting that constitutional law "may be abrogated just as easily as any other law . . . when its provisions are found inconvenient."[22] Furthermore, the instability of the Constitution under the blueprint model reinforces society's " 'dependen[cy]' on the omnipresent, omnicompetent federal judge"[23] to reveal the Constitution's true meaning. This, in turn, has led to the recent increase in various forms of "textualism."[24]

In contrast to the blueprint definition of the Constitution, Clinton asserts that a written "constitution" is more appropriately conceived of as an attempt to capture "a set of fundamental precepts so widely shared as to 'constitute' the society over large stretches of time."[25] Clinton's emphasis is on a wide, multi-generational consensus of political opinion in society—i.e., tradition.[26] A constitution, viewed from this perspective, not only imbues constitutional language with a "given"[27] substantive content that logically should constrain judges engaged in constitutional interpretation, but also validates treating the Constitution as a basic governing law that binds successive generations and that justifies more vigilant

18. *Id.* at 19.
19. *Id.* at 41.
20. *Id.* at 18.
21. *Id.* at 19.
22. *Id.* at 22.
23. *Id.* at 14.
24. *See id.* at 18.
25. *Id.*
26. *See id.*
27. *Id.* at 20.

protection than less general forms of law.[28]

Despite the differences between the blueprint model and Clinton's definition of constitution, however, Clinton concedes that the Constitution is not complete in and of itself. In fact, Clinton asserts that "it is . . . impossible for a single writing . . . to capture fully the whole of society's constitutional principles. At best, the provisions of a written constitution can provide an incomplete list of such principles and thus can be just a more or less adequate reflection of that society's *real* constitution."[29]

This "real" constitution is the "underlying decisional predispositions of [the] polity's citizenry,"[30] which are "so widely acknowledged and accepted as to form a significant part of society's self-definition."[31] Thus, the written Constitution is only the "real" Constitution to the extent that the constitutional symbols represented by the text correspond to the underlying constitutional experiences that they represent.[32] Viewing the Constitution in this way rejects a purely "textualist" approach to constitutional issues and requires constitutional interpreters to consider these underlying constitutional experiences.

2. Critical response

Clinton's discussion of "blueprint" constitutionalism admittedly has strong appeal. Upon closer scrutiny, however, Clinton's polarization of blueprint adherents from traditional adherents seems an overstatement at best.

First, it is doubtful that even the most liberal constitutional theorists view the Constitution as "a plethora of empty words and phrases,"[33] completely void of substantive content. On the contrary, even the ardent textualists not only admit, but even positively assert that legal texts have a "given" content, though they argue that the "given" meaning is inherent in the text itself rather than (as Clinton suggests) in the historical circumstances under which the text was produced.[34]

28. *See id.* at 41.

29. *Id.* at 21 (emphasis added).

30. *Id.* at 60.

31. *Id.* at 62.

32. *See id.* at 64.

33. *Id.* at 18.

34. Ironically, the goal of the textualists is the same as Clinton's: to impose judicial restraint in the interpretation of legal texts. *See* EVA H. HANKS ET AL., ELEMENTS OF LAW 259 (1994) ("Textualism's central claimed virtue is [that] . . . it prevents fur-

Second, even Clinton's own view of the written Constitution as an attempt to embody society's unwritten constitution recognizes that substantive content must be imposed on the text. Indeed, Clinton's constitutional conception is subject to the same criticism he heaps upon blueprint constitutionalism—i.e., Clinton all but explicitly endorses the view that, without the substantive "help" of the common law, the Constitution is indeed only a "plethora of empty words and phrases."

Finally, the stated objective of the Constitution—"in Order to form a *more perfect Union*"[35]—implies that the goals of the Constitution were, at least to some degree, future-oriented—i.e., "blueprints" for improving upon the existing constitution of society by codifying in a written constitution principles which, at least in some respects, were previously nonexistent.[36] This point is illustrated by Clinton's own example. While he enumerates a number of principles embodied in the Constitution which do in fact have historical antecedents in the common law,[37] Clinton seems, by negative implication, to admit that other constitutional provisions were without common law antecedents. For instance, conspicuously absent from Clinton's enumerated list are the ideas of due process and equal protection.

Therefore, to carry the blueprint analogy a step further, the question is not *whether* the Constitution is or is not a blueprint of sorts, upon which good societal houses have been built, but rather *what is the proper source* of the materials with which to fill out the blueprint. For Clinton, the source is the common law. This approach may indeed be valuable in cases where the constitutional provisions at issue do in fact have clearly identifiable common law antecedents. But where the common law basis for the clauses is less conspicuous (or nonexistent), Clin-

thering mere *judicial* intent. The textualist's central fear is that judges will impose their own views of sound policy under the guise of having discovered a subtly hidden legislative intent in the legislative history or purpose.").

35. U.S. CONST. preamble (emphasis added).

36. Professor Laurence Tribe describes such future-oriented provisions in the Constitution as "aspirational." ANTONIN SCALIA, A MATTER OF INTERPRETATION (C*omment by* Laurence Tribe *appearing in the same publication*) 87-88 (1997) (stating that while "some [constitutional] provisions refer quite pointedly to preserving past practices, . . . others are more plausibly read as statements of aspiration [which] the authors or ratifiers wished to make binding on their representatives into the indefinite future even if extant practices would have to be substantially revised in order to achieve that end").

37. *See infra* note 38 and accompanying text.

ton's reliance on the common law may not provide adequate substantive content for the blueprint.

B. The Foundations of Social Consensus in Traditional Constitutional Jurisprudence

1. Summary

Regarding the Constitution's British common law roots, Clinton suggests that

> of the twenty-one sections making up the first four articles of the U.S. Constitution, at least sixteen contain one or more provisions that are directly traceable to English sources. Similarly, at least seventeen of twenty-eight provisions in the first eight amendments of the U.S. Constitution find their ancestry in the common law of England.[38]

These principles, in turn, were the result of the constant refining process that took place as the common law developed through the decision-making of judges in individual cases. Over time, the principles of constitutional consensus emerged, while the aberrations largely snuffed themselves out.

According to Clinton, the common law's attempt to tie the law to the underlying "constitutional" principles emerging from the experience of people led to the formulation of various legal conventions and rules of interpretation,[39] which, when properly applied, effectuated the social consensus, or "constitution" of society.

A study of the development of the legal rules and conventions governing constitutional interpretation begins with an analysis of the role of intent. Clinton discriminates among four different kinds of intent. First, he distinguishes subjective intent (which asserts that "the proper way to understand the meaning of a legal text is in terms of what the makers of that text actually 'had in mind' ")[40] from objective intent (which focuses on the *object* of the makers' intentions—i.e., not on what the authors actually had in mind, but rather on "what they must reasonably be presumed to have had in mind").[41] Clinton

38. CLINTON, *supra* note 2, at 97.

39. *See id.* at 104-05.

40. *Id.* at 106.

41. *Id.* at 108.

adopts the latter as the better approach in legal interpretation, not only for the results it produces, but more fundamentally because it was the prevailing view with regard to matters of intent in interpreting other legal documents at the time the Constitution was written.[42]

Closely tied to the subjective/objective intent distinction is the correlative distinction between original intent (which assumes that the Constitution was created "*ex nihilo* (and thus a priori) pursuant to 'intentions' that plausibly may be regarded as 'original' ")[43] and remedial intent (which considers "the mischiefs meant to be addressed but left intact (or addressed unsuccessfully) under the old law that may be remedied either by enlargement or restriction under a new interpretation").[44] Clinton adopts the remedial intent approach because, "[t]hough what [the framers] had in mind is not, and never can be, fully knowable, the mischiefs and remedies are."[45]

Clinton recognizes that intentions, however viewed, are based on preferences that are always subjective.[46] Thus, in order for intentions to operate as real constraints, they must be grounded in objective legal fictions which, by continuous application, become legal conventions.[47] Clinton argues that traditional legal conventions developed from three traditional rules of textual interpretation. The first of these is the plain-meaning or literal rule, which assumes that the best indication of what the makers intended consists of what they wrote—i.e., the words themselves, "understood in their most usual and most known signification."[48] The plain-meaning rule also contains a subjective and an objective component: the subjective focus is on what the words meant to the makers of the law; the objective focus is on the plain meaning associated with the law from the perspective of the reasonable man to whom the law applies.[49]

The second rule of interpretation, subordinate to the plain-

42. *See id.* at 109.

43. *Id.*

44. *Id.* at 110.

45. *Id.*

46. *See id.* at 111.

47. *See id.*

48. *Id.* at 112 (quoting Blackstone, *in* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 18 (1986)).

49. *See id.* at 113.

meaning rule, is the "mischief" or "social purpose" rule.[50] This rule, which applies only when the plain-meaning rule is inadequate to resolve the issue, authorizes (for interpretive purposes) "reliance upon the 'evils' which the law was designed to remedy."[51] The burden under the mischief rule is to show that the departure suggested would have been agreed to by the makers of the law if they had considered the issue in the given context.[52]

The third and final rule of interpretation is the "golden" rule.[53] This rule is "a rule of consistency, which authorizes departure from the literal interpretation even when the language is unambiguous, where . . . 'the words bear either none, or a very absurd signification, if literally understood.' "[54] The absurdity involved must be "a matter of logic" (e.g., colliding provisions in the same statute), "not merely one of policy."[55]

These traditional rules of interpretation undergird the use of another important legal convention which is a product of the common law: the principle of stare decisis or adherence to precedent.[56] Original intent, with a focus on the objective intent aspect, requires consistency in the law. This need for consistency finds its satisfaction in the practice of stare decisis.

Proponents of modern constitutional theory view adherence to precedent as "a reactionary device designed to retard social progress by allowing the past to govern the present."[57] In response, Clinton asserts that adherence to precedent does not shackle the present to the past; rather, it consists of " 'trusting to a consensus of common human voices rather than to some isolated or arbitrary record.' "[58] Under this view, we are not governed by the dead, but rather "have the dead at our councils."[59]

Clinton concludes that these traditional conventions and rules of legal interpretation form the basis of the common law

50. *See id.* at 112.
51. *Id.*
52. *See id.* at 113.
53. *See id.* at 112.
54. *Id.* (quoting Blackstone, *in* WOLFE, *supra* note 48, at 19).
55. *Id.* at 112; *see also id.* at 114.
56. *See id.* at 119.
57. *Id.*
58. *Id.* at 16 (quoting GILBERT K. CHESTERTON, ORTHODOXY 84-86 (1908)).
59. *Id.* at 119.

jurisprudence through which the constitutional principles of societal consensus have emerged over the centuries. Thus, they have proved, through experience, to be effective methods of obtaining reasoned results that comport with the basic notions of justice as held by society as a whole. Clinton contends that when the Supreme Court has relied on them in its own jurisprudential thought, its actions have generally been validated over time. On the other hand, when the Court has deviated from these principles in the past, the results have been disastrous[60] and will likely be so again under the current constitutional jurisprudence.[61]

2. Critical response

The central problem with Clinton's call for the implementation of traditional conventions of textual interpretation is that even if the courts could be required to abide by such standards, there is no evidence that they would remedy the judicial supremacy which Clinton so vehemently opposes. An analysis of these rules and conventions bears this out.

a. The plain-meaning rule. First, as Clinton admits, the conventional rules of interpretation are susceptible to abuse.[62] On the subject of plain meaning, Justice Holmes once remarked that "[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[63]

Indeed, one does not have to look very hard in a law student's first-year contracts text to find cases on parol evidence in which one judge argues vehemently that the "plain meaning" of a particular legal text is thus and so, while her colleague, with equal vigor, argues that the same language is unquestionably ambiguous.[64] Such contradictions call into question the validity

60. *See id.* at 31 (citing to cases such as *Dredd Scott*, *Plessy v. Ferguson*, *Lochner v. New York*, and stating that "most (if not all) such . . . 'bad' decisions were founded upon departures from traditional interpretive rules").

61. *See id.*, at 32.

62. *See id.* at 115 (noting that misapplication of the three basic rules of interpretation has resulted in the "intrusion of the private moral convictions of judges upon our constitutional law"); *see also id.* at 116 (noting that the rules of interpretation have been, on occasion, "questionably applied").

63. Towne v. Eisner, 245 U.S. 418, 425 (1918).

64. The California Supreme Court summarized the problems with the plain-meaning rule as follows:

of wholesale acceptance of the plain-meaning rule and support the view that "[a] sentence that seems to need no interpretation is already the product of one."[65] Moreover, it seems ironic that Clinton would advocate the plain-meaning rule since its application, by definition, precludes an analysis of the common law underpinnings of supposedly "plain" constitutional text in all cases except those in which the plain meaning leads to logically absurd results. It would seem that Clinton's theory would get more theoretical mileage from an *attack* on, rather than an endorsement of, the plain-meaning rule. Indeed, the plain-meaning rule is the fundamental tenant of the textualist approaches which he opposes.

b. The mischief rule. Second, the mischief rule is subject to similar criticism. While it can be admitted that existing historical records give some indication as to the evils which the law was designed to remedy, the evidence of "remedial intent" often seems no less insulated from subjective interpretation than the subjective intent of those enacting the law.[66] As with the search for subjective intent, the central problem with the mischief rule is that it fails to recognize that, like Congress, the framers "[were] a they, not an it."[67] One commentator questioned the validity of the use of "purpose" in statutory interpretation as follows:

> [I]s it any more meaningful to refer to "the" purpose than it is to refer to "the" intent? Statutes are not the product of a single lawmaker but of a collegial body with a rather large membership. Might not individual legislators have different, even

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> "A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, ..." The meaning of particular words or groups of words varies with the ". . . verbal context and surrounding circumstances and purposes . . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning."

Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644-45 (Cal. 1968) (citations omitted).

65. Stanley E. Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625, 637 (1978).

66. As for example, in the case where one legislator votes to enact a moment of silence in the public schools in order to "remedy" the absence of God from the classroom, another legislator might vote to enact the moment of silence in order to "remedy" a perceived lack of student focus on their studies at the beginning of each school day. The fact that both legislators view the legislation as a remedy to an existing mischief does not make their subjective intent any more objective.

67. HANKS ET AL., *supra* note 34, at 249.

> conflicting, purposes in mind? Suppose only a portion (a majority? a majority of the majority? a few dozens?) of the legislators had a particular purpose in mind—can that be "the" purpose of the Act?[68]

Like statutes, the Constitution, as ultimately drafted, represented a number of compromises among the various "mischiefs" the individual framers intended to remedy. Thus, resort to Clinton's mischief rule seems to open rather than close the door to the interpolation of judicial will in constitutional interpretation.

c. The golden rule. Third, Clinton's "golden" rule is inadequate as a rule of judicial constraint. The golden rule only operates as an exception to the plain-meaning rule when adherence to the plain meaning creates a "logical" absurdity.[69] Thus, judges are still constrained by the plain-meaning rule where its application results "merely" in a policy-based absurdity. Using Clinton's own example, a logical absurdity exists when a statute contains conflicting provisions. The absurdity is logical since it would be impossible for a judge to enforce one provision without doing violence to the other provision. Certainly, the appropriateness of rejecting the plain-meaning rule under such circumstances is unassailable. What if, however, the absurdity does not require a logical violation of the statute, as in the case where the facts unmistakably fall within the plain meaning of the statute, but clearly violate "the spirit" of the statute?

To draw upon a famous example, the court in the case of *Riggs v. Palmer*[70] addressed the question of whether a grandson who murdered his grandfather should be allowed to inherit his estate under an intestate succession statute whose "plain meaning" required such a result. Under Clinton's golden rule, the judge would be required to grant the son his inheritance,[71]

68. *Id.* at 352.

69. *See supra,* notes 53-55 and accompanying text.

70. 22 N.E. 188 (1889).

71. Indeed, some courts, adhering to Clinton's golden rule, did in fact reach such a conclusion. See, for example, the (in)famous case of *Deem v. Milliken,* in which a murdering son was granted his mother's inheritance. 6 Ohio C.C. 357 (1892), *reprinted in* HANKS ET AL., *supra* note 34, at 249. In arriving at this conclusion, the *Deem* court stated that "when the legislature . . . speaks in clear language upon a *question of policy*, it becomes the judicial tribunals to remain silent. . . . Judicial tribunals of the state have no concern with the *policy* of legislation." *Id.* (emphasis added). Critical of such views, Justice Cardozo once remarked that "[j]udges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, nonetheless, with averted gaze,

since the absurd result was one of "mere" policy, rather than logic.[72] In other words, adherence to the plain meaning of the descent statute would not result in a *logical* violation of the statute; rather it was the *policy* underlying the statute which would be violated by strict adherence to the statute's plain meaning.[73] Despite Clinton's golden rule, the *Riggs* court looked beyond the plain meaning of the statute and, by applying "maxims . . . dictated by public policy,"[74] reached the undeniably just result of denying the grandson his inheritance. The justness of results achieved in the breach of the golden rule discredits Clinton's reliance on the distinctions between logic and policy as indicators of when deviance from plain meaning is appropriate.

d. The principle of stare decisis. Finally, as any student who has read a legal casebook can tell you, the principle of stare decisis is highly malleable in the hands of a creative judge. In determining the precedential value of a case, the creative judge may elude the constraints of stare decisis by finding (or creating) a basis upon which to distinguish the previous case from the present one. This ability to confine prior cases to their facts allows courts to wiggle out of tight spots by deciding that "[t]his rule holds only for redheaded Walpoles in pale magenta Buick cars, [and thus has no application in the case at bar]."[75] In

convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the alter of regularity." BENJAMIN CARDOZO, THE GROWTH OF THE LAW 66 (1924).

72. One might argue that an absurd result in *Riggs* might easily be avoided by application of Clinton's mischief rule. However, under Clinton's taxonomy, the mischief rule is only activated when the statute is ambiguous on its face. Thus, since the plain meaning in this case was clear, the mischief rule has no direct application. Alternatively, a finding that the statute in *Riggs* was ambiguous could only be arrived at by considering the underlying policy rationale for the statute. Allowing this would amount to a total abrogation of the plain-meaning rule, since the mischief rule would, in effect, be permitted to invoke itself by its own bootstraps.

73. That this was a question of policy rather than logic is supported by noting that, as a matter of logic, it would be untrue to say that the law "never permits a man to profit from wrongs he commits. In fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession—if I trespass on your land long enough, some day I will gain a right to cross your land whenever I please." Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967), *reprinted in* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14-80 (1978). Thus, the decision as to whether one should benefit from her wrongs depends on a choice of policy rather than one of pure logic.

74. *Riggs*, 22 N.E. at 190.

75. KARL LLEWELYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 66-67 (3d ed. 1960).

other words, when referring to precedent, judges tend to take full advantage of Clinton's notion that the dead are only "counselors" rather than "rulers."[76] This ability of judges to manipulate past decisions by reading precedent broadly or narrowly limits the value of stare decisis as a tool for imposing judicial restraint.

Once it is admitted, based upon the observations above, that the rules of interpretation (traditional or otherwise) and the principle of stare decisis are subject to "corrupt" application,[77] it becomes difficult to accept Clinton's thesis that imposing traditional rules of constitutional interpretation on the courts will significantly reduce the amount of judicial hegemony in constitutional jurisprudence. Moreover, in light of the Supreme Court's existing judicial freedom in *choosing* rules of interpretation, the *imposition* of traditional jurisprudential restraints on the Court is impossible, as a practical matter, since the implementation of such a plan would require the consensual submission of the Court to such restraints (and thus, is a result of, rather than a remedy for, judicial freedom).

C. The Philosophical Underpinnings of Traditional Jurisprudence

1. Summary

With respect to practical implications for constitutional jurisprudence, Clinton's theory need not include the final two sections of *God and Man in the Law*. However, since most political theorists refuse to swallow the tautology that we should adhere to tradition simply because "that is the way we have always done it," Clinton devotes the rest of his book to establishing an appropriate philosophical, epistemological, and metaphysical foundation for his theory of judicial restraint through the imposition of traditional rules of interpretation.

In the fairness of conceding my scholarly weaknesses, I[78]

76. *See supra* note 59 and accompanying text.

77. As Judge Richard Posner has pointed out, "[T]he irresponsible judge will twist any approach to yield the outcomes that he desires, and the stupid judge will do the same thing unconsciously." RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286 (1985).

78. I apologize to the reader for this sudden shift in rhetorical style from third to first person; however, as I personally found the remainder of Clinton's book largely incomprehensible, this shift in style may be read as a signal to the more "philosophically

must admit that I do not hold a Ph.D. in political philosophy. And since this seems to be a prerequisite to complete comprehension of the final sections of *God and Man in the Law*, coverage of these sections is limited in this Review. Nevertheless, I proceed—at least to a point.

Clinton seems to argue that one of the most fundamental flaws in the philosophy of modern constitutional jurisprudence is its adoption of the view shared by Kant, Hume, Locke, and Berkeley that " 'ideas' are the things *which* the mind thinks, not the things *by which* it thinks."[79] Clinton views this "flaw" as a basic, epistemological and metaphysical misconception. He contends that viewing ideas in this manner implies "the notion that we can be directly aware only of the contents of our individual minds" and thus "there can be no direct experience of other individuals or of the contents of their minds."[80] This perception results in a denial of human nature, since "[t]here can be no common reason and no rational basis for assuming even the existence of a common humanity."[81] In addition, this view leads to a skeptical conception of humanity as selfish, atomistic, and material, and denies the existence of anything that is transcendent—i.e., nonmaterial.[82] In this manner, theorists such as John Austin "get rid of God . . . [by] simply defin[ing] him away"[83] and replace God with man as the giver of "positive law."

Rejection of the transcendent leads to either a denial of the idea of natural law or results in a "truncated"[84] version of natural law, based not on conventional morality which presupposes a transcendent order in the cosmos but on more "empirical," materialistic conceptions of morality, such as the Social Darwinism of the *Lochner* era or the "Lifestyle Liberalism"[85] which currently prevails. By contrast, Clinton urges the version of natural law developed by Thomas Aquinas, which divides law

sophisticated" reader that for the remainder of this Review, my remarks are only "objective" to the extent of my comprehension. Beyond that, they represent only the subjective reading experience of a reasonably intelligent, second-year law student.

79. *See* CLINTON, *supra* note 2, at 141.

80. *Id.* at 144.

81. *Id.*

82. *See id.* at 133-39.

83. *Id.* at 156.

84. *Id.* at 146.

85. *Id.* at 75. Clinton uses this term to represent the privacy rights protected by the modern Court.

into four fields: eternal law, natural law, divine law, and human law.[86] Eternal law is God's government of the universe, which is inherent in things created.[87] Natural law is the "imprint of eternal law on rational creatures directing natural inclination to its proper end."[88] The imprint of eternal law is imperfect and thus must be supplemented by divine law, which is the "ordinance of grace due to sin."[89] Finally, human law is the equivalent of modern positive law.[90]

Despite his affinity for Thomistic natural law, Clinton claims not only that the Supreme Court never has employed natural law, but that it *cannot, and, even if it could, it should not* apply natural law in deciding the constitutional issues which come before it.[91] He specifically rejects the argument that the current protection of "fundamental rights" is a result of natural law analysis.[92] Rather, Clinton claims that the fundamental rights analysis is based on a Millian-like "humanistic religion" which denies the natural law's emphasis on the truly religious character of the law, the central role of the state in guardianship of public morality, and the importance of social status.[93] This results in what Clinton labels "constitutional gnosticism," which distorts the purposes of the establishment, speech and press, and equal protection clauses, removing God from constitutional jurisprudence and putting man in His place.

2. Critical response

Though Clinton excoriates the warping of due process, equal protection, and establishment issues through modern constitutional analysis, he fails to make clear how his favored, Thomistic version of natural law would resolve the issues which have arisen in the constitutional adjudication of these clauses. More fundamentally, it is not even clear how Aquinas's four types of law interact to produce the theory of legal inter-

86. *See id.* at 152.

87. *See id.*

88. *Id.* (quoting THOMAS AQUINAS, TREATISE ON LAW (SUMMA THEOLOGICA, QUESTIONS 90-97) 14-16 (Stanley Parry ed., Regnery Gateway 1977).

89. *Id.*

90. *See id.*

91. *See id.* at 163.

92. *See id.* at 166-70.

93. *See id.* at 167.

pretation that Clinton seems to favor.

Assuming that Clinton does in fact espouse some form of natural law jurisprudence, one of the perennial problems with espousing a natural law approach to constitutional interpretation is that it creates a "loose, flexible, uncontrolled standard for holding laws unconstitutional."[94] In other words,

> [t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) has passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[95]

Despite Clinton's argument that "Naturalism, properly understood, . . . always counsels a healthy judicial *restraint*,"[96] Clinton fails to explain how the "counsel" of restraint is to be converted into "actual" restraint.

To confuse matters further, Clinton seems to conclude that natural law has not, and indeed should not, be applied by the Supreme Court in the area of constitutional adjudication.[97] This leaves readers in a quandary as to what theory of constitutional interpretation Clinton proposes. From his earlier discussions, he presumably leans toward a Thomistic natural law foundation, but from his explicit rejection of the application of natural law, the reader is left wondering what Clinton would have the Court do.

In short, while Clinton's ruminations regarding the natural law-positive law controversy certainly produce a great deal of gobbledygook, it is unclear in the final analysis what result Clinton espouses. I will admit that the answer may lie somewhere between pages 131 and 170, but if it does, it is well hidden by the recondite rhetoric Clinton employs to develop it. The only thing that can be said with clarity is that, in Clinton's view, God has been replaced by man in constitutional issues, and, in the same manner in which the wings of the Australian

94. Griswold v. Connecticut, 381 U.S. 479, 521 (1965) (Black, J., dissenting).

95. Calder v. Bull, 3 U.S. (1 Dall.) 386, 399 (1798) (Iredell, J.). Although Clinton claims that the Court was not actually employing a natural law analysis in either *Calder* or (presumably) *Griswold*, he provides no basis for not subjecting his version of natural law analysis to the same criticism.

96. CLINTON, *supra* note 2, at 149.

97. *See supra* Part II.C.1.

butterfly cause the rainstorm in North America, this is somehow a result of the conception of ideas as objects of thought rather than tools of thought. Go figure.

D. Constitutional Gnosticism and Constitutional Theism

The final portion of *God and Man in the Law* (like the previous portions) is prefaced by a short introduction in which Clinton raises the reader's hopes of comprehending the text by stating, "[B]efore going any further, [it might be advantageous] to catch a breath by way of summarizing some of the ideas that have already been introduced."[98] I must admit that I was elated at the prospect of a concise, comprehensible summary of the erudite, metaphysical quagmire through which I had, somewhat unsuccessfully, trudged. My reprieve was short-lived, however, as Clinton's summary proved equally unintelligible. I quote the beginning of Clinton's summary at length, not only to express my personal awe at how much can be said and so little understood, but to allow the reader to whom this makes sense—and you know who you are—to disregard my commentary and give this portion of the book his or her own fair shake:

> [M]odern thought holds fast to a restrictive view of reason that effectively eliminates the idea of the mind as an organ providing direct access to an intelligible reality. This perspective has led to a conception of the mind as an organ whose task is merely to process sense data by the application of logical or mathematical functions. Commensurate with the empiricist assumption that ideas are the very things we think and not merely the vehicles of our thoughts, modern reason is denied access to things in themselves ("things as such," or "things as they are") through its denial of any necessary connection between thought and its objects. We are led to the position described by Bertrand Russell in *The Principles of Pure Mathematics*:
>
> > When actual objects are counted, or when geometry or dynamics are applied to actual space or actual matter, or when, in any other way, mathematical reasoning is applied to what exists, the reasoning employed has a form not dependent upon the objects that they are, but only upon their having certain general properties. . . . Thus when space or motion is spoken of in pure mathematics, it

98. CLINTON, *supra* note 2, at 171.

> is not actual space or actual motion, as we know them in experience, that are spoken of, but any entity possessing those abstract general properties of space or motion that are employed in the reasonings of geometry or dynamics. The question whether these properties belong, as a matter of fact, to actual space or actual motion, is irrelevant to pure mathematics, and therefore to the present work, being, in my opinion, a purely empirical question, to be investigated in the laboratory of the observatory. [citation omitted].

> The divorce of objects "just as they are" (and just as they are experienced) from their "abstract general properties" leads straightforwardly to an epistemological skepticism that denies the possibility of discovering objective truth in the cosmos and ultimately to a metaphysical nihilism that denies the very existence of any external reality apart from that which is accessible through sense perception.[99]

Well, there you have it. Multiply this by ten; repeat the words "constitution" and "judicial supremacy" three times; throw in a few phrases that include the expressions "noumenal," "immanentize," "*metaxy*," and "antinomy"; mix well with the first dozen five-syllable words ending in "-ism" that come to mind; and "voilà," the politico-philosophical, metaphysical, epistemological, teleological, ontological, and theological foundations of Clinton's theory emerge.

With that kind of introduction, I presume that the reader of this Review will come to one of two conclusions: (1) she will agree that Clinton's editors should have returned his manuscript to him and demanded that he rewrite it in the English language, or (2) she will dismiss my criticism as the unlearned ejaculations of an ignorant student. And while the true answer probably lies somewhere in between these two extremes, both sides would likely agree that it is best at this point to proceed quickly to the conclusions which relate to the practical implications of Clinton's theory and leave the niceties of Clinton's metaphysics to those who have more time and patience, and who have breakfasted on enough metaphysical Wheaties to send in for the magical philosophical secret decoder ring.

99. *Id.* at 171-72.

III. CONCLUSION

Whatever the metaphysical, epistemological, etc.-ical basis for Clinton's proposal to constrain judicial decisionmaking in the constitutional arena by limiting judicial freedom, Clinton's approach fails for the more fundamental reason that, as a practical matter, it will not work. While reliance on common law traditions may provide sufficient interpretive tools for constitutional provisions which clearly may be shown to have traditional common law antecedents, such an analysis may be inappropriate (or impossible) for constitutional provisions that cannot clearly be shown to emanate from the common law. Furthermore, there is no guarantee that, even if implemented, the traditional rules of interpretation (i.e., the plain-meaning, mischief, and golden rules, and the principle of stare decisis) would act as an effective restraint against judicial supremacy. Finally, even if such traditional rules were to be consistently applied as a constraining force, the constraint would necessarily be self-imposed. Thus, adopting Clinton's traditional jurisprudence would not deprive the Court of judicial freedom, but rather would be an affirmative act of judicial freedom, and thus, paradoxically, would actually result in a perpetuation of judicial supremacy.

As Clinton admits,[100] *God and Man in the Law* is the "alternative" argument to his earlier theory for dethroning the judicial monarchy in *Marbury v. Madison and Judicial Review*, which in my view, presents a much more compelling solution to the problem of judicial supremacy. In the spirit of alternative pleading, *God and Man in the Law* effectively illustrates what any competent lawyer knows: There is a good reason why alternative arguments find their way to the *back* of judicial briefs.[101]

David D. Garner

100. *See id.* at 54-55.

101. For the concluding statement, the reviewer wishes to acknowledge Cory Talbot, whose quick wit was the genesis of the thought expressed.