What is Jaffa's point in his dispute with Bork, Rehnquist, *et al.*—as distinct from what seem to me to be his often confusing, if not confused (or contradictory!), attempts to make it? His point, I believe, is twofold, his argument for it consisting in an "in principle" part and an "in fact" part.

In principle, he argues, the whole process of framing and ratifying a constitution, and therefore the constituent law that is its product, necessarily presupposes some theory of its moral authority. Therefore, if one is to correctly understand and rightly interpret the "original intent" of any such process, including its product, one must understand and interpret it from the standpoint, or under the guidance, of the same theory of its moral authority that it itself in fact presupposes. So much for the first, "in principle" part of Jaffa's argument.

As for its other, "in fact" part, he argues that there can be no reasonable doubt in any informed mind that the theory of its moral authority that the whole proccess and product of framing and ratifying that the Constitution of the United States in fact presupposes was the theory set forth—not only but preeminently —in the Declaration of Independence, as in a "condensed summary," or even "a perfection," of a long tradition of natural law reaching back at least to Aristotle and incorporating the ethical core of the Judæo-Christian tradition. There can be no reasonable doubt about this, Jaffa argues, because this same theory was so widely presupposed and expressed throughout the whole period of the nation's founding—in state constitutions, resolutions, and bills of rights, in other public statements such as newspapers and the sermons preached in churches, in the writings of individual founders, and so on—that Jefferson could plausibly claim that the Declaration "was intentend to be an expression of the American mind"—including, not least, the mind of the framers and ratifiers of the Constitution.

Applying, then, the principles argued for in the "in principle" part of his point to the facts argued for in its "in fact" part, Jaffa concludes that the "original intent" of the whole process of framing and ratifying the Constitution and so also its product can be correctly understood and rightly interpreted only from the standpoint, or under the guidance, of the Declaration—or (to put it more

carefully than he often puts it!) the theory of the moral authority of the whole process as well as its product that the Declaration—not only but preeminently —expresses.

The crux of his issue with Bork, Rehnquist, *et al.*, then, is that they cannot correctly understand and rightly interpret the "original intent" of the whole constitutional process and its product because or insofar as they understand and interpret it from the standpoint, or under the guidance, of another very different, in fact, contradictory, theory of its moral authority—namely, their own positivist theory of moral authority in general as well as of the authority of positive law, constituent and governmental, in particular. In their view, moral concepts and principles are not capable of being rationally justified because they are grounded in emotive value judgments, often determined by class interests, and so valid only within some particular historical community, as distinct from being grounded in rational principles capable of universal validation by common human experience and reason.

My own judgment is that Jaffa's point is essentially valid and can be convincingly made over against the counterview of his fellow disputants, provided one develops arguments that manage to avoid the confusions or contradictions that I find in his own formulations. No doubt the most serious of these is his confusion of understanding, and so also interpreting, with believing. Contrary to claims he makes or implies not only in this dispute but also elsewhere in his writings, understanding and interpreting are one thing, believing, or holding to be true, something else. So also with critical *interpretation*, including the critical interpretation of the law without which a judge cannot perform her or his office as such, and critical *validation*, including the critical validation of constituent, as distinct from governmental, laws, which is no part of a judge's strictly judicial office. Moreover, the notion that a judge can interpret the constituent laws of the Constitution of the United States rightly—which is to say, in accordance with the "original intent" of its framers and ratifiers—only if the judge believes in the existence of a moral order such as is formulated in the Declaration of Independence's appeal to "the laws of nature and of nature's

God" is so hopelessly confused that anyone having profound misgivings about the view to which it is represented as integral can be pardoned for resisting that view—even by one, such as myself, who has the deepest doubts about the philosophical soundness of the counterview from which Bork, Rehnquist, *et al.* resist it.

But, to repeat: Jaffa's point, in my judgment, is essentially valid, because its validity, so far as I can see, in no way depends upon this or any of the other confusions or contradictions of his own attempts to argue for it.

One final comment: the more I have tried to understand Jaffa's point as the necessary first step in critically appropriating it, the more I have become convinced that it is closely analogous to the point Victor Furnish makes much more successfully in the methodological parts of *The Moral Teaching of Paul.* Furnish there argues that Paul's specifically moral teaching in general, and his moral teachings in the concrete cases he addresses in particular, cannot be understood correctly or rightly interpreted in their "original intent" in abstraction from their actual twofold context: the social, cultural, and political situation in and for which they were intended; and the comprehensive theological understanding in which they are grounded and of which they are a necessary part. Were I to attempt to make what I understand to be Jaffa's point, I would argue analogously that the whole process of framing and ratifying the Constitution, and therefore also the constituent law that is its product, cannot be correctly understood or rightly interpreted in its "original intent" in abstraction from its corresponding twofold context: the social, cultural, and, especially, political situation in and for which it was intended (including, not least, the legal existence of slavery in several of the states whose ratification was crucial); and the theory of the moral authority of both process and product that the framers and ratifiers themselves in fact presupposed, viz., the theory set forth—not only but preeminently—in the Declaration of Independence.

In other words, this theory of moral authority is to the Constitution and thus also to correctly understanding and rightly interpreting its "original intent"

as Paul's comprehensive theological understanding is to his specifically moral teaching, and thus also to correctly understanding its "original intent" and rightly interpreting it.

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