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# THE ROLE OF LEGAL SCHOLARS IN THE CONFIRMATION HEARINGS FOR SUPREME COURT NOMINEES—SOME REFLECTIONS

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## INTRODUCTION

Until recently legal scholars have traditionally not been much involved in the process of confirming Justices.<sup>1</sup> As the legal and political ideology of prospective Justices have come to play an important role in the process of nomination and confirmation, however, it is perhaps inevitable that legal scholars would also become more involved.<sup>2</sup> At least since the nomination of Judge Bork, legal scholars have contributed in unprecedented numbers both to the Senate's deliberation process and to the public debate over the fitness of the nominees to the Court. The Bork hearings themselves were, of course, the watershed, and they remain, for various reasons, the hearings in which legal scholars played the most prominent role.

Just as the Bork nomination raised strong emotions throughout the country, it also generated intense involvement within the legal academy. Legal scholars were thus involved at virtually all stages, from presenting the case for and against Judge Bork in the media and developing the strategies for defeating the nomination, to advising Bork's senatorial inquisitors and testifying on both sides of

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<sup>1</sup> LEONARD GROSS & NORMAN VIEIRA, BORK HEARINGS AND BEYOND (forthcoming book, chapter on "Law Professors") (manuscript on file with author).

<sup>2</sup> For one thing, constitutional law scholars are perhaps better equipped than any one else to advise and prepare Senators for the task of questioning nominees at the confirmation hearings, especially if that task is conceived to be for the purpose of probing the nominee's judicial and constitutional philosophy. Indeed, the evidence suggests that the Senators who opposed Judge Bork were significantly aided, especially by comparison to their conservative counterparts, because of the coaching they had received from legal experts. See Terence Sandalow, *The Supreme Court in Politics*, 88 MICH. L. REV. 1300, 1309 (1990).

the nomination struggle. In these nomination-related activities, legal scholars wore various hats: political activist, campaign strategist, political and legal advisor, advocate, informed observer, character witness, and "expert witness" before the Senate Judiciary Committee. It may be noticed that at least the last three hats might all be worn, perhaps by the same person, in the course of testifying at the hearings before the Senate Judiciary Committee.<sup>3</sup> An immediate problem concerns whether scholars in such circumstances remain clear about which hat they are wearing when they testify as legal experts before the Senate Judiciary Committee.

Apart from the potential for mixing roles, other factors complicate the task of testifying as legal experts before the Senate. Oral presentations are necessarily provided a limited amount of time, and scholars are aware that their written submissions cannot be much longer if they are to be read; such presentations do not lend themselves to subtlety and nuance. Moreover, points have to be simplified for the benefit of the nonspecialist, not to mention the nonlawyer Senators.

Yet these factors arguably call for more rather than less diligence on the part of the legal scholar to ensure that she does not mislead the Judiciary Committee. Legal scholars offer confirmation hearings unique credentials and unique claims. Constitutional law scholars are viewed by at least some Senators not only as a potentially useful source of information and opinion, but also as a kind of authority based on their scholarly efforts and presumed expertise.<sup>4</sup> Scholars are entitled to have and to share their opin-

<sup>3</sup> Sometimes legal scholars testify as little more than character witnesses; we expect them to tell the truth, but we would not necessarily expect them to set forth (or even to acknowledge) arguments or evidence on both sides of such a question. Moreover, many particular statements made by legal experts may be understood less as the sharing of legal expertise than as the broader reflections of an informed student of our constitutional system. Such statements may receive the least deference from Senators, who in most cases probably have some fairly well-developed views of their own, but may well have some value and are hardly objectionable on the grounds that they are one person's viewpoint.

<sup>4</sup> See Frederick Schauer, *The Authority of Legal Scholarship*, 139 U. PA. L. REV. 1003, 1012-17 (1991) (catalogue of reasons legal scholarship might be treated as type of legal authority and general assessment of likely impact). Whatever their actual impact, legal scholars frequently invoke their scholarly credentials, prior research, and areas of expertise as grounds for the Senate to give special weight to the conclusions they reach on questions that most people would assume might have answers. See, e.g., *infra* note 15 and accompanying text (conclusions and reasoning of Professor Tribe). And, in fact, the Senators on occasion pur-

ions, but when they invoke their expertise as legal scholars, they ought to speak and write by the canons of a *scholar* rather than as the functional equivalent of an appellate advocate.<sup>5</sup> But careful and objective scholarship may not square with the rhetorical strategies that dominate all political campaigns, including the kind Supreme Court confirmation proceedings have increasingly become. Scholars may have to choose between maximizing the political effectiveness of their testimony and providing a fair and candid appraisal of relevant legal or historical materials. Before addressing the broader implications of the sort of decision-making this may require of scholars, Part One will illustrate some of these problems by reference to the Bork hearings, including its impact on the nomination hearings that followed.<sup>6</sup>

### I. THE BORK HEARINGS

The prospect for helpful contributions by legal scholars testifying as expert witnesses is complicated both by the highly politicized setting of a confirmation campaign as well as by the tendency of contemporary legal scholars to bring with them their inclination toward engaging in heavy combat over esoteric constitutional theory. As to the influence of the "confirmation campaign" setting, there is no question that it is a difficult thing to win a battle opposing Supreme Court nominations. Beyond the simple political reality that even minority Presidents normally do not need a great number of swing votes to win confirmation battles, there is also the problem of the tradition, if not of constitu-

port to base their conclusions on the points asserted by scholars, which suggests that in such cases the scholar is being used as a type of authority (whether cited as such or not).

<sup>5</sup> Some of the complicating factors developed above in the text make the evaluation of confirmation hearing testimony an exercise in balance and objectivity. But it remains important that we ask hard questions of ourselves as a legal scholarly community.

<sup>6</sup> For reasons of time and space, this paper will necessarily focus on a few salient examples of the problems I have perceived. While these examples are not intended to exhaust the occasions in which, by my lights, scholars have engaged in distorting advocacy, I also want to underscore that it is not my intent to suggest that every scholarly presentation to the Senate in recent confirmation hearings displays these problems (indeed, it is not my claim that each presentation cited in this paper should be characterized primarily in these terms). I should also add that I am confident that these problems arise from scholars who are at all points on the political spectrum, and I have chosen to focus as I have based on my own view as to the discourse that has proven most unhelpful to the Senate Judiciary Committee's deliberative process.

tional command or inexorable logic, of giving Presidents some deference.

In the context of the Bork hearings, one of the battles to be fought concerned the role of the Senate in considering whether to give its consent; the question whether the ideological commitment of the nominee should be relevant or dispositive was itself an issue on the table. Any good lawyer knows that you move the evolution of most practices (just as you move the law) by arguing for bite-sized reform rather than for a wholesale revision in a single stroke. So it made sense to rely centrally on a relatively narrow basis for considering ideology rather than for more sweeping reconsideration of prior approaches.<sup>7</sup> With all these factors at work, it was nearly inevitable that the architects of the Bork defeat decided early on that their best chance for victory lay in portraying him as a "judicial extremist," a "conservative activist," and a "right-wing ideologue."<sup>8</sup> Bork had to be painted as an ideological stalking horse for President Reagan and Attorney General Edwin Meese with an essentially political agenda. The result, as we all remember, was a massive media blitz that has been fairly characterized as filled with distortion and misrepresentation.<sup>9</sup> That pattern of behavior also found its way into the behavior of Senators and advocates in the hearing room itself.<sup>10</sup>

<sup>7</sup> LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 93-105 (1985) (chapter on "Policing the Outer Limits: Testing Nominees One by One") (scholarly strategy for opposing Bork anticipated by author). In a subsequent chapter, Professor Tribe offered some further analysis on preserving ideological balance on the Court, but the gist of the opposition to Bork was that his views were beyond the outer limits as Tribe described them.

<sup>8</sup> Sandalow, *supra* note 2, at 1317.

<sup>9</sup> Sandalow, *supra* note 2, at 1311-18. The campaign as a whole was disturbing. As John Patrick Diggins wrote, "[a] victory won at the expense of truth . . . was not liberalism's finest hour." John Patrick Diggins, *The Judge Pleads His Case*, N.Y. TIMES, Nov. 19, 1989, § 7, at 15 (quoted in Sandalow, *supra* note 2, at 1319).

<sup>10</sup> Sandalow, *supra* note 2, at 1318-19. Fortunately, legal scholars by and large stayed clear of the worst examples of demagoguery engaged in by some advocacy groups and senators, though the balance of this article attempts to suggest that some do not receive high marks for objectivity and candor. *But see Hearings Before the Committee on the Judiciary, United States Senate, on the Nomination of Robert H. Bork to Be an Associate Justice of the Supreme Court of the United States*, S. 100-1011, 100th Cong., 1st Sess. 2207 (1987) [hereinafter *Bork Hearings*] (statement of John P. Frank) (noting that "Judge Bork held in the *American Cyanamid* case that an employer could require sterilization as a condition of employment," and finding "that indeed a remarkable conclusion"; no attempt to treat the case in its legal context or to confront its legal analysis); *cf.* Sandalow, *supra* note 2, at 1314-15, 1319 (treating similar misuses of *American Cyanamid* case by Senator Metzenbaum and others).

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Going in, then, politically committed legal scholars who opposed Bork had every incentive to portray him as an extremist whose thinking about constitutionalism lay "outside the mainstream" of legal and judicial thought.<sup>11</sup> Moreover, these strategic considerations served to supplement the pronounced tendency within the modern legal academy to engage in combative exchanges over the first principles of our constitutionalism, even in the context of traditional law review writing.<sup>12</sup> With these factors combined, it is perhaps unsurprising that the attack on Judge Bork's qualifications for appointment might be less than judicious. The sections which follow attempt to illustrate how factors such as these appear to have impacted significantly on the scholarly contributions to three important areas of focus during the hearings.

### A. *The Problem of Unenumerated Rights*

According to his scholarly and senatorial opponents, Judge Bork's steadfast opposition to the legitimacy of judicial elaboration of unenumerated constitutional rights was a sufficient ground to reject his nomination. This single issue became the linchpin in the argument that he was a constitutional extremist.<sup>13</sup> In fact, a number of scholars and Senators contended that Bork's rigid insistence that our constitutional rights are properly found only in the

The misuses of *American Cyanamid* in the anti-Bork campaign reached, in my view, the same level of politically calculated ugliness as President Bush's use of ads in his presidential campaign depicting Willie Horton.

<sup>11</sup> Indeed, reaching those whose votes were most needed probably depended to some degree on reinforcing the idea that a negative vote would not be merely a vote based on differences of political and constitutional philosophy, but an act to preserve the most time-honored traditions of Supreme Court decision-making under the Constitution.

<sup>12</sup> At least one leading constitutional commentator has presented a persuasive case for the view that the disturbing thing about Bork's tendentious writing is precisely the extent to which its worst features are so characteristic of modern constitutional law debate. See Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633, 642-48 (1990) (book review); see also Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981) (most writings advocate scholarship, not political theory based on academic tradition).

<sup>13</sup> Indeed, Sandy Levinson has concluded that that "Judge Bork was deprived of a seat on the Supreme Court largely because of his refusal to acknowledge the 'unenumerated' right to privacy as being part of the set of constitutional rights legitimately enjoyed by Americans." Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 135 (1988); see also *Bork Hearings*, *supra* note 10, at 34 (Senator Edward M. Kennedy).

text was sufficient in itself to place him outside the mainstream of judicial and constitutional thought.<sup>14</sup>

The scholarly strategy thus became to argue that Bork's opposition to the fundamental rights doctrine (1) stood in opposition to a uniform judicial tradition that stemmed from the early republic to the present Supreme Court; (2) violated his commitment to a jurisprudence based on constitutional text; and (3) undercut his interpretive commitment to being bound by original intent. Each of these arguments will be analyzed in turn.

### 1. The Judicial Tradition

On the second day of witnesses supporting and opposing Judge Bork, Professor Laurence Tribe testified in opposition. In his submitted statement, Professor Tribe began by setting forth his credentials to speak as an expert witness.<sup>15</sup> He purported to speak from his scholarly expertise, and not as an advocate of a political cause or merely as an informed observer with strong opinions.<sup>16</sup> He further indicated that work on the second edition of his well-known treatise had required him "to conduct a comprehensive study of the constitutional views and judicial philosophy of virtually all who have served as Supreme Court Justices throughout our history."<sup>17</sup> Against this backdrop, Professor Tribe testified to the Committee that "a careful review of the Supreme Court's precedents reveals that *not one of the 105 past and present Justices of the Supreme Court* has ever taken a view as consistently radical as Judge Bork's on the concept of 'liberty'—or the lack of it—underlying the Constitution."<sup>18</sup>

<sup>14</sup> See, e.g., *supra* note 7 (taking position that not recognizing unwritten constitutional right of privacy places nominee outside mainstream); *Bork Hearings*, *supra* note 10, at 101, 862 (Senator Joseph R. Biden).

<sup>15</sup> Specifically, Tribe noted his scholarly credentials, frequent role as an "expert witness" before Congress, the awards given his treatise on constitutional law, and his recent work on a second edition of his one-volume treatise, *American Constitutional Law*. *Bork Hearings*, *supra* note 10, at 1272 (statement of Laurence H. Tribe).

<sup>16</sup> Tribe specifically disclaimed that his own politics "have a lot to do with what I have testified here." *Id.* at 1314.

<sup>17</sup> *Id.* at 1272. It is difficult to avoid the sense that this sort of claim is basically the device of a rhetorician who is seeking to establish credibility with his audience.

<sup>18</sup> *Id.* at 1281. It is clear in the context of Tribe's prepared statement that he is here referring specifically to Bork's assertion that the rights of the people are "limited to those

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It is difficult to know where to begin with an assertion as breathtaking as this one. Judge Bork stands completely alone, or so the Senate was told. As a matter of historical research, it is difficult to fathom how Tribe might have gone about validating such a claim, or how such a research project could have contributed to the writing of his treatise.<sup>19</sup> Nor did Tribe explain why we should infer that Bork is an extremist because the Supreme Court has not been as “consistently radical” as Judge Bork in rejecting nontextual rights. In general, modern scholars have agreed with Thomas C. Grey, a leading exponent of the view that the Supreme Court properly recognizes fundamental rights beyond the text, that the textualism defended by Bork is “deeply rooted” in our history, our shared principles of political legitimacy, and our formal constitutional law.<sup>20</sup> According to Grey, it “must at once be conceded” that the more difficult role to justify for the Court is the one that makes it “the expounder of basic national ideals of

specifically mentioned in the Constitution or directly inferable from those expressly listed.” *Id.* So that the reader does not think I am taking an isolated statement out of an entire presentation, the following statements illustrate the centrality of this general theme and the strong language with which it is addressed. *Id.* at 1326 (Bork’s view against unenumerated rights “is a fairly outlandish view;” it was “not a view shared by any Justice” and is “inimical to liberty”); *id.* at 1300 (for 200 years, Justices have said that our rights were “not a fixed, frozen set”); *id.* at 1267 (Bork “seriously threatens constitutional values that have proven fundamental in our history”); *id.* at 1283 (Bork rejects Court’s “historic role in articulating an evolving concept of liberty protected by the Constitution”); *id.* at 1296 (Bork’s views are “hostile to individual rights”); *id.* at 1333 (calling argument that rights are limited to those found in the text as “very unusual—to put it mildly”); *id.* (claiming that “it is only Judge Bork who says that that whole [200-year] tradition is unconstitutional, is illegitimate,” and claiming that he “cannot find anyone who thinks that the whole development of these fundamental rights should just be wiped away”).

<sup>19</sup> Some questions that come immediately to mind include: Has every Justice on the Court been involved with cases based on claims of unenumerated liberty interests? Has Tribe compiled them? Do the early cases invoking the doctrine of vested *property* rights, whether based in the Due Process Clause or nontextual analysis, count as decisions establishing fundamental unenumerated liberties? Is Tribe counting dictum as well as holding? When, prior to the *Lochner* era, did the Supreme Court *ever* strike down a law as invading a sphere of constitutionally protected “liberty” or “autonomy” beyond the freedoms enumerated in the text of the Constitution? See GERALD GUNTHER, *CONSTITUTIONAL LAW* (12th ed. 1991) (citing unpublished work by Thomas C. Grey indicating that substantive due process was largely confined to “property” prior to the Civil War; that substantive liberty cases do not become significant until late nineteenth century).

<sup>20</sup> Thomas C. Grey, *Do We Have an Unwritten Constitution?*, in *MODERN CONSTITUTIONAL THEORY: A READER* 28, 28 (John H. Garvey & T. Alexander Aleinikoff eds., 2d ed. 1991). Grey acknowledged that this sort of textualism “is, after all, the theory upon which judicial review was founded in *Marbury v. Madison*.” *Id.*



individual liberty and fair treatment."<sup>21</sup> Tribe turns this consensus on its head.<sup>22</sup>

Professor Corwin long ago taught us that the so-called vested rights doctrine of early American constitutionalism was "domesticated" in the Due Process Clause precisely because of the power of the textualist vision of our constitutional scheme.<sup>23</sup> Indeed, logically it might be just as important that Bork's textualism has been given voice by Supreme Court Justices during every period in the nation's history, as it is that the textualist vision has also been regularly honored in the breach.<sup>24</sup> Virtually no one claims that the

<sup>21</sup> *Id.* Indeed, Grey acknowledges that the Court has frequently strained text and abused legislative history so as to bring court-created rights within the ambit of the text. *See infra* notes 55-56 and accompanying text (questioning validity of inferring one single intent attributable to entire collective body such as Congress or Constitutional Convention). Given this history, it is thus rather odd to characterize the textualist view as "radical," let alone to dismiss it because Supreme Court practice has not "consistently" conformed to it.

<sup>22</sup> This is a consensus, incidentally, which the Supreme Court acknowledges even as it decides cases rooted in the tradition which Tribe invokes. *See, e.g.,* *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986).

<sup>23</sup> EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* 105, 114 (1948). More recently, Professor Grey has contended that Corwin actually understates the degree of acceptance of substantive due process prior to the Civil War, but he concurs that, at least by the turn of the twentieth century, "invocation of constitutional principles that claimed no anchor in the text had become rare." Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 *CHI-KENT L. REV.* 211, 217 (1988). While Grey and other modern commentators see the historical moves by which judges went from relying on extratextual principles to focusing on general constitutional provisions as unwritten constitutionalism by another name, these developments nonetheless attest to the power of the textualist vision of constitutionalism.

<sup>24</sup> It might also be doubted whether Supreme Court precedent is the only logical place to look for a constitutional vision that is within the mainstream, if only because the Supreme Court may not have operated from an consistent premise throughout its history. If our constitutional heritage is not defined exclusively by the text of the Constitution, it seems absurd to imply that even the views of the Justices are to be extracted only from Supreme Court precedents. Does it not count that during the struggle over ratification of the Constitution Justices Wilson and Iredell both contended that the people in general grant to their governments all rights not expressly reserved by their written constitutions? *See infra* notes 62 & 67 and accompanying text (debating question whether *federal* Constitution was distinguishable as based on a grant of limited powers to national government with limited purposes). What about Justice Iredell's assertion of precisely this view during his famous colloquy with Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798)?

Is it irrelevant that the *Lochner*-era Court was criticized by commentators for its infidelity to the written Constitution, or that "[a]fter 1937 many commentators began to assert that the due process clauses governed only matters of procedure"? Grey, *supra* note 23, at 219; *see id.* at 219 & nn.30-31. Or that immediately prior to the modern resurrection of the Court's fundamental liberties jurisprudence the Court itself purported to completely repudiate its own prior attachment to substantive due process? *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963). Or, for that matter, that there has been a raging debate about the appropriate sources for constitutional decision-making, engaging many of the nation's best legal minds on both sides, at least since the Court's decision in *Roe v. Wade*?

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Court has shown perfect fidelity to the text of the Constitution, but a great deal of constitutional debate continues to revolve around whether it *should*.

Even if we thought it valuable to compare Bork with the Justices who have sat on the Court, we must at least take account of the distinct setting in which Justices make decisions. As it is, Tribe compared apples and oranges and thus advanced an argument that simply missed its mark. Since Judge Bork has never been a Supreme Court Justice, we are not in a position to compare his voting record with the voting records of other Justices on the Court.<sup>25</sup> As a matter of fact, it is clear that Judge Bork would have quickly joined Tribe's distinguished list of Justices who draw fundamental rights from nontextual sources, based on his acquiescence in settled doctrine, as a matter of *stare decisis*.<sup>26</sup>

If reliance on following established precedent seems unfair, it should be recalled that a number of the Justices on Tribe's list are there because of their commitment to precedent or by virtue of rank inconsistency between their articulated constitutional philosophy and their actual decisions.<sup>27</sup>

<sup>25</sup> This is not a mere quibble. However seriously intended Judge Bork's scholarship might have been, it cannot be argued that it attempted to provide an exhaustive prescription about how Justices should deal with bodies of precedent that appear to conflict with his own first principles. Yet that is what we would have to discover to know whether Judge Bork would be as radical a Justice as Tribe is inferring from the comparison he makes.

<sup>26</sup> Thus Bork made it emphatically clear at the hearings that, despite his criticism of *Bolling v. Sharpe*, 347 U.S. 497 (1954), to use one of Professor Tribe's prominent examples, he considered it to be binding precedent and would not be willing to reconsider it. *E.g.*, *Bork Hearings*, *supra* note 10, at 287-88, 351, 405 (statement of Judge Robert H. Bork) (though Tribe and others questioned whether Bork's reliance on *stare decisis* represented confirmation conversion, it is difficult to believe that any had reason to doubt Bork's assurance that he would not reopen *Bolling*). Testimony at the hearing, moreover, made it clear that Bork had long since acquiesced as well in the selective incorporation of the Bill of Rights in the Fourteenth Amendment despite the doubts scholarship had raised about the original intent. *Bork Hearings*, *supra* note 10, at 446-47 (statement of Judge Robert H. Bork) (acknowledging historical evidence on both sides, but mainly finding that "it is a thoroughly established doctrine"); *see also id.* at 2454-55 (statement of Ronald Rotunda). Considering that this line of cases is based on due process "liberty" (the source of the modern privacy cases which Bork rejects as unacceptable unenumerated rights), the implication is that he, in fact, does join in accepting the legal and constitutional validity of at least some unenumerated rights.

<sup>27</sup> At least two present members of the present Supreme Court, Chief Justice Rehnquist and Justice Scalia, are included by Tribe himself within this broad judicial consensus despite the fact that each has embraced in extra-judicial writings the originalist and textualist foundational theories of constitutional interpretation long defended by Judge Bork. William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976);

In fact, the Court's fundamental rights doctrine is of fairly recent vintage, and Tribe's real concern was that Bork had rejected the "long line of decisions from the 1920's to the present upholding the right of individuals and families to decide for themselves basic matters of marriage, childbearing and childrearing."<sup>28</sup> It was, in short, the modern Court's right of privacy that Tribe was concerned about, not the preservation of a 200-year tradition.<sup>29</sup>

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Justice Stewart articulated Bork's view in his dissenting opinion in *Griswold v. Connecticut*, and only subsequently acquiesced in the modern right of privacy in *Roe*. Similarly, Justice Brandeis questioned the textual and historical underpinnings of substantive due process even while reluctantly embracing it. See *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.") I am not aware that he ever embraced any general vision of an unfolding panoply of unwritten rights.

Strangely, the strongest modern spokesperson on the Court for Judge Bork's view, Justice Black, appears on Tribe's list only because of his intellectual inconsistency, as reflected in decisions like *Bolling v. Sharpe*, 347 U.S. 497 (1954). Yet Justice Black's lack of consistency was heralded as a virtue by the opponents of Judge Bork. Indeed, Justice Black is quite possibly the chief explanation for Tribe's peculiar language that looked for a Justice whose views were "as consistently radical as Judge Bork's on the concept of 'liberty.'" *Bork Hearings*, *supra* note 10, at 1281 (statement of Laurence H. Tribe). You can be radical, one presumes, provided you are not consistent.

<sup>28</sup> *Bork Hearings*, *supra* note 10, at 1268 (statement of Laurence H. Tribe). Tribe does not underscore that this "long line of decisions" was a very short line as of the decision in *Griswold v. Connecticut* in 1965, and of course he does not acknowledge that a long line of thoughtful scholars and judges have questioned whether these cases represent a legitimate pedigree for the modern fundamental right of privacy. *Id.*

Considering that Judge Bork has long embraced rationality review under the Equal Protection Clause, it seems rather clear that Professor Tribe was not especially concerned that Judge Bork rejected the notion of even the limited sort of review that the Supreme Court has exercised in the name of due process through most of this century.

<sup>29</sup> Professor Grey's approach to the extremism argument is thus much more plausible than Tribe's. Grey focused on a broader range of decisional implications he draws from Judge Bork's scholarly expositions of his originalist constitutional philosophy and concluded that Bork was a "constitutional extremist" because "[t]his is the most radical departure from existing and accepted constitutional doctrine ever proposed by any Supreme Court nominee." *Bork Hearings*, *supra* note 10, at 2518 (statement of Thomas C. Grey) (emphasis added). Of course, Judge Bork had not in fact "proposed" that the then-present Court render all the decisions which Grey infers from his theory (which goes in part to the issue of stare decisis, see *infra* notes 70-85 and accompanying text), and the statement is accurate at least in part because we never received a very clear picture of the views of most nominees until after they were on the Court. Had Hugo Black been appointed to the Court in 1936, it seems likely that Grey's claim would not hold up, but of course Black's "extremism" as a senator became the orthodoxy on the Court.

By Grey's criteria, of course, even though each one would differ from Bork, among the modern Justices it would be difficult not to see Justice Frankfurter, the second Justice Harlan, and at least Chief Justice Rehnquist and Justice Scalia (and perhaps others now on the Court) as anything other than "constitutional extremists" were they nominated in

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There has never been the sort of consensus among thoughtful constitutional thinkers about the modern Court's fundamental rights jurisprudence as Tribe's testimony suggested. If Judge Bork's criticism of the method of deriving fundamental Constitutional rights from outside of the text were sufficient in itself to place him outside the mainstream of constitutional thought,<sup>30</sup> it would mean that a number of our most thoughtful (and indeed, some moderate or even liberal) scholars would also not be fit candidates for appointment to the Supreme Court.<sup>31</sup> Even the AFL-CIO acknowledged, in an otherwise hard-hitting critique of Judge Bork's constitutional thought, that "the substantive due process line of cases is highly controversial—and Judge Bork's views on

1987, given their voting records and the extent to which each stated objections to a great many modern constitutional decisions. Presumably each of these Justices would, moreover, have joined Judge Bork in viewing Professor Grey's invocation of the model of an open-ended living Constitution and the picture of the Court as the special guardian of egalitarian values as the views of a "constitutional extremist." See *Bork Hearings*, *supra* note 10, at 2515-17 (Thomas C. Grey) (articulating such general vision of Court's role).

<sup>30</sup> And Tribe was clear that this commitment was sufficient. Even prior to the Bork Hearings (though no doubt in anticipation of similar candidates), Tribe asserted that senators should vote against confirmation of any nominee solely because he or she rejected *Roe v. Wade* on the ground that the fundamental right of privacy is not found explicitly in the Constitution. TRIBE, *supra* note 7, at 98-99. If moderates like Hugo Black and Gerald Gunther are thus beyond the pale of acceptability, it seems odd that Tribe and others attempted to suggest a different status for Justices Frankfurter and Harlan as constitutional extremists simply because their tradition-oriented jurisprudence opened the door of substantive due process a crack. One might also suppose that a Court that might well overturn *Roe*, at least in part based on doubts as to its constitutional legitimacy, ought to at least be brought in for questioning on suspicion of constitutional heresy.

<sup>31</sup> Those who have criticized the Court's derivation of nontextual fundamental rights include (among others) Gerald Gunther, Gerhard Casper, Hans Linde, Henry Monaghan, Richard S. Kay, Michael W. McConnell, and John Hart Ely. See, e.g., GUNTHER, *supra* note 19, at 449; *Bork Hearings*, *supra* note 10, at 3241, 3243 (Gerhard Casper); *id.* at 1361 (Michael W. McConnell); John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 931-33 (1973) (criticizing derivation of right to abortion from privacy right, and questioning elevation of both to level of constitutional inquiry); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 244 (1972) (criticizing Warren Court's "proliferation of substantive fields" covered by Constitution); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 228 (1988); Henry P. Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977). Ely subsequently recanted his initial criticisms of the Court on the precise issue of going beyond the text, but he remains skeptical as to whether the Court should pursue the role in elaborating fundamental rights that is contemplated by, among others, Professor Tribe. And, of course, if nominated in 1965, Justices Black and Stewart should have been questioned and determined to hold unacceptably extreme views about the nature of the Constitution.

these are within the spectrum of mainstream legal thought.”<sup>32</sup> This statement provides a more balanced assessment than Tribe’s. It may well be possible to justify the judicial revolution that has occurred in this century; it is not possible to deny it.

## 2. Constitutional Text

In any rhetorical struggle, it is always attractive to meet your opponent on her own ground. The argument that an individual contradicts herself or fails to live up to her own standards of judgment has an appeal all its own. In the Bork hearings, it was possible to make the self-contradiction argument while also lending support to the extremism charge that was central to anti-Bork strategy. One key was the Ninth Amendment, which reads: “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>33</sup> Thus, Professor Kurland claimed that in limiting the Constitution to the rights specified in the text, Judge Bork was “rejecting his claim to be a textualist by ignoring the ninth amendment.”<sup>34</sup> The Ninth Amendment became the centerpiece in the case against Judge Bork largely because it permitted the claim that he was fundamentally wrong on the basis of the very sources which he accepted as authoritative—the text of the Constitution (as we will see, it also became the centerpiece in the argument that Bork violated his own canon requiring us to follow the intentions of the

<sup>32</sup> *Bork Hearings*, *supra* note 10, at 1891 (AFL-CIO, Memorandum on Judge Robert H. Bork’s Academic Writings and Judicial Opinions (Aug. 17, 1991)).

<sup>33</sup> U.S. CONST. amend. IX.

<sup>34</sup> *Bork Hearings*, *supra* note 10, at 2833 (statement of Philip B. Kurland); *accord id.* at 3054 (David A.J. Richards) (Ninth Amendment “expressly rebuts the negative inference [against unenumerated rights] so feared by many Founders”); *id.* at 1279 (statement of Laurence H. Tribe). Strangely enough, Kurland confirmed that he had criticized the Court’s decisions in the substantive due process cases from *Lochner* through *Roe*, including *Griswold v. Connecticut*, on similar grounds to Bork’s, and initially appeared to affirm that disagreement, and then subsequently fell back on the Ninth Amendment to justify a change of position on the privacy cases. *Id.* at 2858-60.

It might be observed that Kurland is literally correct about Bork, inasmuch as Bork in fact had not paid much attention to the text and history of the Ninth Amendment. But if Bork the practitioner was not as rigorous a textualist and originalist as Bork the theoretician, he clearly would join a distinguished group of Supreme Court Justices whose decision-making embodied similar gaps, including at least the second Justice Harlan and Justice Black. Moreover, Judge Bork’s views on the Ninth Amendment, though ill-defended, more closely conform to its original meaning than do the views of his scholarly critics.

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Framers).<sup>35</sup>

What went unnoticed and unmentioned at the Bork hearings is that there is a time-honored understanding of the Ninth Amendment—indeed, what John Hart Ely called the “received account” of the amendment<sup>36</sup>—which does not read it as a command to courts to look for fundamental rights with which to limit the powers granted to government. The traditional reading is perfectly consistent with the text itself. It is based on the understanding that the sovereign people who established the federal Constitution retained as rights all that they reserved in granting limited powers to the national government. On this view, the Ninth Amendment enjoins interpreters from reading the Constitution’s provision for *specific rights*, as found in the Bill of Rights, as warranting any inference affecting the *general reservation of rights* that Madison called the “great residuum” of rights secured by the original Constitution (in its limited powers scheme).<sup>37</sup>

The scholars who opposed Bork did not offer the Senate any sort of analysis of why this traditional reading was an implausible way of construing the Ninth Amendment as a text. Considering that it was accepted by nineteenth-century commentators,<sup>38</sup> adopted by the United States Supreme Court prior to 1965,<sup>39</sup> and defended by a number of constitutional scholars,<sup>40</sup> one might expect some explication of why a textualist could only embrace the more modern reading of the amendment. Instead, the Senators heard only the bare assertion that all real textualists would accept

<sup>35</sup> See Levinson, *supra* note 13, at 138 (indicating that “one of the architects of the strategy that led to Judge Bork’s defeat” confirmed that decision to emphasize Ninth Amendment was made in part in order to use Bork’s own methodology against him). Kurland’s insistence that a true “textualist” would adopt a particular reading of the Ninth Amendment is echoed by a number of modern commentators in the literature on the Ninth Amendment. Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1238-40 & nn.94-99 (1990) (collecting authorities). For a thorough critique, see *id.* at 1238-48.

<sup>36</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 34 (1980).

<sup>37</sup> 1 ANNALS OF CONG. 438 (Joseph Gales ed., 1789) (James Madison, June 8, 1789).

<sup>38</sup> See McAfee, *supra* note 35, at 1311-14 (discussing nineteenth-century commentators who adopted traditional reading of Ninth Amendment).

<sup>39</sup> United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947).

<sup>40</sup> The traditional view had been set forth and explicated as early as the 1950’s. See McAfee, *supra* note 35, at 1224 n.33 (citing early treatments of traditional view). For more recent articles defending this view, see *id.* at 1217 n.14.

the amendment as a reference to nontextual limitations on government power rather than as a device for securing the rights retained by the limited powers design of the Constitution.<sup>41</sup>

Though the witnesses against Bork remained silent, it has been suggested by others that the traditional reading turns the Ninth Amendment into a federalism provision that secures states' rights, rather than the individual rights provision suggested by its words. Indeed, at one point Justice Black argued that the provision was "enacted to protect state powers against federal invasion,"<sup>42</sup> which prompted several scholars to suggest that he had confused the Ninth Amendment with the Tenth Amendment. Even so, an intellectually honest presentation of the Ninth Amendment issue should have at least informed the Senators of the traditional view as well as the "federalism" objection to it; such a presentation legitimately should have also at least acknowledged that the Tenth Amendment itself was conceived of historically as a device for securing the retained rights of the people, and not alone as a *states' rights* provision.<sup>43</sup>

Professor Kurland assured the Committee that his new convic-

<sup>41</sup> It might plausibly be argued that the scholars felt no need to address other conceivable readings of Ninth Amendment in light of Judge Bork's willingness to relegate it to the status of an inkblot because of his uncertainty as to what it means. *Bork Hearings, supra* note 10, at 249 (statement of Judge Robert H. Bork). See Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?* 64 CHI-KENT L. REV. 67, 71 (1988). But that washes only if the scholars were there as partisan advocates against Bork rather than as expert witnesses about the meaning of the Ninth Amendment and its implications for a textualist jurisprudence like Bork's. Besides, even attorneys in an adversary setting are expected to address relevant conflicting authority; the Senators at least should have been informed that there is a serious debate about the meaning of the Ninth Amendment text.

<sup>42</sup> *Griswold v. Connecticut*, 381 U.S. 479, 520 (1965).

<sup>43</sup> See McAfee, *supra* note 35, at 1244-47. Indeed, the proponents of a bill of rights did not draw a sharp line between individual and states rights. See, e.g., 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 210, 211 (M. Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION] (An Officer of the Late Continental Army, Nov. 6, 1787) (complaining that under proposed Constitution "the liberties of the states and the people are not secured by a bill or DECLARATION of RIGHTS").

Despite the objection that the traditional reading makes the Ninth Amendment redundant of the Tenth, the text and history of the Tenth Amendment testify that was *not* written to address the special concern that led to the Ninth Amendment—namely, the concern that the act of reserving specific rights by stating limitations on government might be construed as reflective of an intent to give up to government all the rights thought to be reserved the limited powers scheme. The Tenth Amendment simply does not speak to the implications of the enumeration of rights in the Constitution. For a complete critique of the redundancy claim, see McAfee, *supra* note 35, at 1302-04, 1306-07.

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tions about the meaning of the Ninth Amendment grew out of his work on *The Founders' Constitution* (another invocation of the authority of the expert).<sup>44</sup> But if the text is so clear in its historical setting, one would expect people at that time to so understand it. So let us turn to two examples of how contemporaries understood its language.

In November of 1789, while the Virginia Assembly was considering the amendments proposed by Congress, a member of the assembly, Hardin Burnley, wrote to James Madison (the principal draftsman of the Ninth Amendment) as to concerns expressed by Edmund Randolph about the language Congress had adopted for the Ninth Amendment.<sup>45</sup> Randolph had objected because Congress had changed the language from the language proposed by the Virginia ratifying convention that prohibited an inference of enlarged national powers from provisions stating "exceptions" to powers (another description of rights provisions), to a provision prohibiting an inference against "retained" rights from the enumeration of rights.<sup>46</sup>

Responding to the charge that the new language was an inadequate way to state Virginia's intended "reservation against constructive power,"<sup>47</sup> Burnley agreed with Randolph's characterization of the purpose of the amendment and defended the language proposed by Congress:

<sup>44</sup> *Bork Hearings*, *supra* note 10, at 2860 (statement of Philip B. Kurland). Kurland did not provide interested parties with any insight into his own thoughts about having spent so many years decrying the Court's creative jurisprudence as to individual rights only to discover at the end of his scholarly career that his own starting point was completely wrong textually and historically. Given this dramatic conversion, one might have hoped for more than a bare assertion about plain text and invocation of himself as an authority on the history that was already a subject of controversy at the time that Kurland was leading the chorus of criticism of the Warren Court. My own interest in more explanation was reinforced when, in writing an extensive article on the Ninth Amendment, I consulted, *The Founders' Constitution* and failed to find anything that appeared to me to have any direct bearing on the modern controversy as to its original meaning. See generally THE FOUNDERS' CONSTITUTION (P. Kurland & R. Lerner eds., 1987).

<sup>45</sup> See 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY 1188 HISTORY (1971) (letter dated Nov. 28, 1789).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* Randolph contended that it was "more consistent with the spirit of [the Virginia proposals anticipating the Ninth and Tenth Amendments], that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible [sic] to no definitive certainty." *Id.*



But others among who I am one see not the force of the distinction, for by preventing an extension of power in that body from which danger is apprehended safety will be insured *if its powers are not too extensive already, & so by protecting the rights of the people & of the States*, an improper extension of power will be prevented & safety made equally certain.<sup>48</sup>

In viewing the amendment as a way of “preventing an extension of power” in Congress, Assemblyman Burnley construed the provision as protecting both the people and the states.<sup>49</sup> Indeed, his words read surprisingly like Justice Black’s dissenting opinion in *Griswold*.

It would be natural to understand a provision securing the rights retained by the Constitution’s limited powers scheme as securing the rights of the people and contributing to the protection of state powers as well. In August of 1789, William L. Smith, wrote the following in a letter to Edward Rutledge:<sup>50</sup>

I shall support the Amendmts. proposed to the Constitution that any exception to the powers of Congress shall not be so construed as to give it [Congress] any powers not *expressly* given, & the enumeration of certain rights shall not be so construed as to deny others retained by the people—and the powers not delegated by this Constn. nor prohibited by it to the States, are reserved to the States respectively; if these amendmts. are adopted, they will go a great way in preventing Congress from interfering with our negroes after 20

<sup>48</sup> *Id.* (emphasis added). Notice Burnley’s suggestion that the efficacy of the amendment to secure retained rights would depend on whether Congress’ “powers are not too extensive already,” a clear allusion to the enumerated powers scheme that Federalists had claimed secured rights but would be endangered by a bill of rights.

<sup>49</sup> It should be noted that Madison responded to Randolph’s concern in a letter to President Washington a week after receiving Burnley’s letter. *Id.* at 1189, 1190 (letter dated Dec. 5, 1789). Madison’s argument tracks Burnley’s response, which has prompted some modern commentators to intimate that Madison was either being disingenuous or was confused about the way in which Congress’ proposed amendment had altered the meaning of the Virginia proposal. Madison and Burnley were almost as confused as Justice Black. For a more complete treatment of this whole episode, see McAfee, *supra* note 35, at 1287-93 (discussing response of several modern commentators).

<sup>50</sup> William L. Smith was a Representative from South Carolina who had deliberated over the Bill of Rights in the first Congress. Edward Rutledge had supported the Constitution in the South Carolina ratifying convention. Both men were Federalists, the group that had favored adoption of the proposed Constitution.

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years or prohibiting the importation of them. Otherwise, they may even within the 20 years by a strained construction of some power embarrass us very much.<sup>51</sup>

Smith completely runs together not only the Ninth and Tenth Amendments, but even paraphrases the language prohibiting an inference of constructive power from specific “exceptions” which had appeared in Madison’s original draft of the Ninth Amendment (tracking Virginia’s proposal),<sup>52</sup> but which had already been omitted by the committee that finalized the language. Smith thus sees the Ninth Amendment as contributing to the security of Southern states’ autonomy on the issue of slavery; one suspects that he would have been surprised to be told that actually it was to be read as an open-ended natural rights provision that perhaps even limited the powers of the states.<sup>53</sup>

<sup>51</sup> See *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 273 (Helen E. Veit, Kenneth R. Bowling, & Charlene Bangs Bickford eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*] (letter from William L. Smith to Edward Rutledge, Aug. 10, 1789). If Smith’s language seems to confusingly run the Ninth and Tenth Amendments together, compare a draft for these two amendments, with the respective provisions denominated, prepared by Representative Roger Sherman while the House deliberated over the proposed bill of rights in the summer of 1789:

[Tenth Amendment] And the powers not delegated to the government of the united States by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively. [Ninth Amendment] nor Shall any [exceptions to] the exercise of power by the government of the united States [in] the particular instances here in enumerated by way of caution be construed to imply the contrary.

*Id.* at 267 (bracketed language inserted to fill gaps in handwritten draft). Here the Ninth Amendment is drafted as an express guard against a construction that would undercut the effect of the Tenth Amendment; *cf.* SCHWARTZ, *supra* note 45, at 911-12; (setting forth proposal of New York ratifying convention that similarly combines current Ninth and Tenth Amendments into single provision consisting of two clauses separated by a semicolon).

<sup>52</sup> *Id.* Madison’s original draft read:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for the greater caution.

I *ANNALS OF CONG.*, *supra* note 37, at 435.

<sup>53</sup> At least two prominent modern commentators have contended that the plain language of the Ninth Amendment expresses implied limitations on both the state and national governments. Charles L. Black, Jr., “*One Nation Indivisible*”: *Unnamed Human Rights in the States*, 65 *ST. JOHN’S L. REV.* 17, 26 (1991) (since Ninth Amendment text “uses ‘certain rights’ enumerated ‘in the Constitution’ as its base of reference, and ‘certain rights’ against the states *are* enumerated ‘in the Constitution,’” for constitutional textualists “the application of [the Ninth Amendment] to the states ought to be clear”); II *WILLIAM W.*

### 3. The Intentions of the Framers

The other main table-turning move employed against Judge Bork concerned the claim that his four corners approach to construing the Constitution violated his commitment to a jurisprudence of original intent, inasmuch as the founding generation intended courts to enforce unenumerated rights. Professor Tribe claimed that “no understanding of the Constitution would be further from the clear purpose of those who wrote and ratified the Constitution and its first ten amendments.”<sup>54</sup> He asserted, in turn, that this “clear purpose” is demonstrated by the Ninth Amendment and the word “liberty” in the Due Process Clause of the Fifth Amendment. Tribe did not inform the Committee, however, that two years earlier he had written that “no collective body—be it the Congress or the Constitutional Convention or the aggregate of state legislatures—can really be said to have a *single*, ascertainable ‘purpose’ or ‘intent.’”<sup>55</sup>

If the text of the Due Process Clause provided a clear grant of authority to the Supreme Court to develop a fundamental rights doctrine that only right-wing ideologues could miss, it would be passing strange that defenders of fundamental rights constitutionalism have expended so much energy attempting to build the historical case for an unwritten Constitution and the broad, modern reading of the Ninth Amendment. To use but one example, Professor Thomas C. Grey, no right-wing ideologue and a scholar who testified against Bork, has argued that under a purely interpretive model in which scholars look for the value judgment embodied in texts by the Framers, the due process fundamental

CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1078 (1953) (arguing from generality of text and view that rights could not be “retained” by people unless “they were free of the authority, not only of the national government, but of the state governments as well”). Many modern commentators disagree and conclude that the bill of rights as a whole was directed at the national government, but this plain language argument seems as persuasive on its face as its narrower counterpart.

<sup>54</sup> *Bork Hearings*, *supra* note 10, at 1279 (statement of Laurence H. Tribe) (emphasis added).

<sup>55</sup> TRIBE, *supra* note 7, at 46; accord Philip B. Kurland, *History and the Constitution: All or Nothing at All?*, 75 ILL. B.J. 262, 265-66 (1987). Even if such bodies could be said to have a single collective intent, Tribe questioned whether that intent would be relevant to us today. TRIBE, *supra* note 7, at 46.

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rights doctrine could not be justified.<sup>56</sup> Indeed, Grey developed his unwritten Constitution model because he believed that courts should not “resort to bad legislative history and strained reading of constitutional language to support results that would be better justified by explication of contemporary moral and political ideals not drawn from constitutional text.”<sup>57</sup>

Going beyond the Due Process Clause and Ninth Amendment texts, Professor David A.J. Richards informed the Senate that “[o]n any plausible theory of Founders’ intent, such intent could not be clearer that such unenumerated rights are fully protected by the Constitution.”<sup>58</sup> Richards pointed to the concern expressed during the debate over ratification of the Constitution that the inclusion of a bill of rights might present a negative inference as to rights left out of the enumeration. Inferring that the rights referred to were natural rights limitations on government powers, which were conceived as inherent to republican government, he concluded that the Ninth Amendment was drafted to avoid an inference against limitations on government power based on natural and inalienable rights.<sup>59</sup> Richards’ submission to the Committee summarized, in short, the reading of the extrinsic evidence that has been argued to lend support to the view that the Ninth Amendment is a provision warranting a jurisprudence of unenumerated fundamental rights. Richards did not acknowledge, however, that there is an alternative reading of the “legislative

<sup>56</sup> Grey, *supra* note 20, at 33-34.

<sup>57</sup> Grey, *supra* note 20, at 29. While Grey has developed his thinking along somewhat different lines in the years since his initial treatment of these themes, he continues to believe that his extra-textual emphasis best describes the occasions “when the Court treats the words of the Constitution as essentially irrelevant to its decision, as, for example, in *Roe* and *Bolling*.” Grey, *supra* note 23, at 230. Grey now would also justify fundamental rights decision-making by reliance on the due process clause, but he is clear that this reflects the leeway granted modern interpreters by the bare text and does not embody a claim as to what the framers intended when they adopted its language.

<sup>58</sup> *Bork Hearings*, *supra* note 10, at 3055 (statement of David A.J. Richards). In his testimony Richards stated that opposition to unenumerated rights “is an idea foreign, I think, to the text, the history, the political theory, and the continuous judicial tradition of American public law.” *Id.* at 3048-49.

<sup>59</sup> *Bork Hearings*, *supra* note 10, at 3052-55. Richards thus contended that the Federalist argument against the necessity of a bill of rights rested on the view that republican government presumed the inherent constitutional status of “the wide range of inalienable human rights that could not, in principle, be surrendered to the state.” *Id.* at 3053.

history" of the Ninth Amendment.<sup>60</sup> Indeed, the Committee was never told that the understanding that the Ninth Amendment secures the rights retained by the limited grants of power to the federal government, summarized above, is based on a competing interpretation of the statements from the ratification debate pointed out by Richards.<sup>61</sup> Federalists defended the omission of a bill of rights by reference to the limited powers scheme to the national government, arguing the catch phrase that all not granted was retained;<sup>62</sup> in turn, they contended that the enumeration of specific rights in a bill of rights would reverse the original premise and create a national government that could exercise general powers subject only to the exceptions named in the bill of rights.<sup>63</sup> This is why they were concerned that any enumeration would inevitably contain a partial list of rights to the detriment of the great mass of rights the people were intending to reserve to themselves.

The debate as to the correct historical reading cannot be fully developed in this essay. But we can learn a great deal of importance in our purpose from Professor Richards's chief evidentiary exhibit, a speech by James Iredell before the North Carolina Rati-

<sup>60</sup> See McAfee, *supra* note 35, at 1224-1320 (for complete defense of alternative reading of history consistent with traditional reading of text); see also *id.* at 1217 n.12 (citing additional authorities defending traditional reading).

<sup>61</sup> In fairness, the Committee would have been aided had it been aware that none of the scholars who placed the greatest weight on the Ninth Amendment—David Richards, Laurence Tribe, and Philip Kurland—had ever published a serious, sustained treatment of the text and history of the Ninth Amendment. Indeed, so far as I know, none of them had ever directly engaged the arguments of text and history that had been offered by those presenting a different understanding of that text and history. It is not at all clear, with all their impressive credentials as legal and constitutional scholars, that any of them were in fact experts on the very issue upon which they purported to impeach Judge Bork's jurisprudence.

<sup>62</sup> McAfee, *supra* note 35, at 1230-31, 1243, 1246-47. Richards argues that this reference to the reservation of rights by limited powers "includ[ed] the wide range of inalienable human rights that could not in principle, be surrendered to the state." *Bork Hearings*, *supra* note 10, at 3053. In fact, however, all the disputants agreed that under the republican governments of the states the opposite principle was in effect—that all rights not expressly reserved in a bill of rights was granted to the government. See, e.g., McAfee, *supra* note 35, at 1267 (citing statements by James Wilson and Patrick Henry concurring on this point). The argument defending the omission of a bill of rights was an argument that distinguished the government created by the federal Constitution with the governments of general powers in the states.

<sup>63</sup> This understanding of the ratification debate is fully set forth and defended elsewhere. See McAfee, *supra* note 35, at 1248-77.

fying Convention. Richards claimed to the Senate that the speech presented an “extraordinarily prophetic expression of the fears of the Founders about a bill of rights” that directly anticipated the text-centered jurisprudence of Judge Bork.<sup>64</sup> In the speech, Iredell set forth the consequences if a subsequent generation construed a bill of rights as evidence that the sovereign people “did not think every power retained which was not given.”<sup>65</sup> The result would be the loss of important rights intended to be retained—perhaps the right of privacy, Richards intimates.

But Richards did not address the significance of the quoted language to understanding the portion of the speech he quoted, and he assumed, without argument, that Iredell referred to inherent legal limitations on government based on natural and inalienable rights. But the significance of the quoted language is readily understood if the language which completes Iredell’s speech is given to the reader. What follows is Iredell’s language as quoted by Richards, with the subsequent language which he omitted shown in italics:

A bill of rights, as I conceive, would not only be incongruous,<sup>[66]</sup> but dangerous. No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by the Constitution. Suppose, therefore, an enumeration of a great many, but an omission of some, and that long after all traces of our present disputes were at an end, any of the omitted rights should be invaded, and the invasion complained of; what would be the plausible answer of the govern-

<sup>64</sup> *Bork Hearings*, *supra* note 10, at 3055.

<sup>65</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 149 (J. Elliot 2d ed. 1866) [hereinafter ELLIOT’S DEBATES] (James Iredell, Virginia Ratifying Convention, June 14, 1788).

<sup>66</sup> Iredell’s argument that a bill of rights was “incongruous” was not a claim that it is absurd to list natural rights that are inherent; he had been deeply committed to the bill of rights in North Carolina. It was an argument about grants and reservations:

Of what use, therefore, can a bill of rights be *in this Constitution*, where the people expressly declare how much power they do give, and consequently retain all they do not? It is a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised but what is expressly given. Did any man ever hear, before, that at the end of a power of attorney it was said that the attorney should not exercise more power than was there given him?

4 ELLIOT’S DEBATES, *supra* note 65, at 148-49 (emphasis added).

ment to such a complaint? Would they not naturally say, "We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any idea of our own. *The bill of rights, passed at that time, showed that the people did not think every power retained which was not given, else this bill of rights was not only useless, but absurd.* But we are not at liberty to charge an absurdity upon our ancestors, who have given such strong proofs of their good sense, as well as their attachment to liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them." Thus a bill of rights might operate as a snare rather than a protection. *If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the Constitution before us, I think, for the reasons I have given, a bill of rights is not only unnecessary, but would be absurd and dangerous.*<sup>67</sup>

The least that can be said about the language from Iredell's speech omitted from Richards's submission is that it sharply cuts against Richards's interpretation of the thrust of the speech. If a bill of rights would be necessary as to the state governments of the early republic, despite their republican nature, it is because the rights must be expressly reserved by the sovereign people. In the federal Constitution, the rights were reserved by a grant of limited powers; in state constitutions, they were reserved by the limitations set forth in a bill of rights. A bill of rights was not dangerous under the *state* constitutions because its provisions are needed to give constitutional status to rights that limit governmental power that otherwise would be deemed to be within the general grant of power.

What is dangerous about a bill of rights in the *federal* Constitution for Iredell is precisely that the rights secured by virtue of

<sup>67</sup> 4 ELLIOT'S DEBATES, *supra* note 65, at 149.

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enumerated powers might be lost by inference: the inference, in Iredell's words, against the principle that "every power [was] retained which was not given."<sup>68</sup> Judge Bork, of course, had never confronted the historical evidence and was not equipped to supply the Senate with a refutation of Richards's use of Iredell's speech. Consequently, the Senate never received a clue that such a reading of Iredell was possible, let alone the language from the speech that raised questions concerning the reading offered by Richards. A scholarly exegesis would have presented all the evidence and articulated the basis for the conclusion reached, but this was an exercise in advocacy, not scholarship.<sup>69</sup>

### B. *The Problem of Stare Decisis*

One of the major issues of the Bork proceedings concerned the extent to which Judge Bork would be likely to "roll the clock back" by overturning decisions which he did not believe conformed to the originalist canon of construction which he espoused. In fact, in speeches Judge Bork had spoken as though stare decisis were not a significant barrier to setting things aright. An important part of the portrait of Bork as constitutional extremist turned on the claim that not only was he critical of much of modern Supreme Court decision-making, he would vote to overrule a great deal of it as well. In his testimony at the hearings,

<sup>68</sup> 4 ELLIOT'S DEBATES, *supra* note 65, at 149.

<sup>69</sup> Richards and others might have contended more broadly that, apart from the Ninth Amendment, the founding generation believed that natural rights limitations on government were an inherent part of the social contract that a written Constitution only partly embodies. This is a position for which there is some historical evidence and which has been defended by modern scholars. Any reasonably objective scholarly presentation, however, would at least have acknowledged that the debate is a difficult one to resolve. The debate as between constitutional positivism and the acceptance of extra-textual inherent rights engaged Justices Chase and Iredell in *Calder v. Bull* in 1798, and the leading proponent of Justice Chase's view among modern scholars acknowledges that "perhaps the deepest original understanding was that the question was debatable." Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *TO FORM A MORE PERFECT UNION* 168 (N. York ed. 1987); see McAfee, *supra* note 35, at 1318-20.

To suggest that this historical debate is so clear that anyone on either side of it is outside the mainstream of legal thought is not to deal honestly with the available materials. For treatments supporting and opposing these respective views, compare Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) with Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" By the People*, S. ILL. U. L.J. (forthcoming 1992).



however, Bork reassured the Committee that he would not vote to reconsider a number of important decisions with (in his view) doubtful originalist credentials. An important question for scholars who testified became whether Bork's testimony should be credited; if it were, those with a very different vision of the Court's role would still be dissatisfied with Bork as a nominee, but the argument that Bork represented a significant threat to the entire fabric of established constitutional law would be largely undercut.

Based on Bork's performance at the hearings alone, there were arguably reasonable grounds for some skepticism. Some of some of Bork's pre-nomination rhetoric hardly sounded like someone deeply committed to stare decisis. Moreover, some of the positions which Bork took on other issues at the hearings, particularly relating to the Equal Protection Clause, certainly smacked of confirmation conversion. He would have had a similar incentive with respect to precedent.<sup>70</sup>

At the same time, the political incentives seem clearly to have impacted on the scholarly analysis of the probabilities concerning Judge Bork's approach to precedent. Scholarly opponents placed heavy weight on statements in speeches emphasizing the possibilities for overthrowing "pernicious" precedent, some of which appeared to give little or no weight to stare decisis.<sup>71</sup> None of these speeches, however, presented anything like a full treatment of the doctrine of precedent or purported to present Bork's complete thinking on the subject.<sup>72</sup> Unlike some of Bork's thinking criti-

<sup>70</sup> It is also perhaps understandable that those who most strongly disagreed with Bork on constitutional philosophy would be extremely wary of accepting what might appear as late (possibly self-interested) concessions. To one predisposed to embrace, rather than merely tolerate, the decisions of the modern Court, there is also the quite reasonable argument that the Senate should not have taken the chance that Judge Bork would vote to overrule important decisions; any doubt in the record should be construed against the nominee. Finally, some who expressed concerns about Judge Bork's approach to stare decisis did not couch it as part of broader effort to paint him as an extremist who would overturn a generation of decisions.

<sup>71</sup> *Bork Hearings*, *supra* note 10, at 1293-94 (statement of Laurence H. Tribe).

<sup>72</sup> It is thus imprecise to discount Bork's testimony as to stare decisis based on "the impression that comes through from his speeches and scholarly writing over the last twenty-five years." *Bork Hearings*, *supra* note 10, at 2598 (statement of Dean Robert W. Bennett) (emphasis added); see also *infra* note 79 (dealing with claim that Bork's jurisprudence of original intent is itself in conflict with doctrine of precedent). Nor is it entirely irrelevant that

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cized at the hearings, none of these were works of serious scholarship. In this case, at least, the confirmation hearings may have provided the occasion to think through not only the possibilities for originalism as a check on perceived judicial excess, but also the limits on those possibilities properly suggested by a doctrine of precedent.

Moreover, the pre-confirmation record in fact provides some credible evidence suggesting that Bork's assurances were not eleventh-hour concessions. Thus, while Professor Tribe sought to rehabilitate the thesis that Bork's views on precedent were "disconcerting" and reflected "an eagerness to overrule" many of the decisions with which he disagreed,<sup>73</sup> he elsewhere acknowledged what others had testified to, namely, that Bork had concluded well before his nomination that the decisions incorporating the Bill of Rights were beyond judicial reconsideration.<sup>74</sup> This is significant not only because those cases are an important body of law that has been controversial historically, but also because it provides compelling evidence that Bork had relied upon more than a single criterion for determining when to follow precedent well before he came before the Senate Judiciary Committee.

Professor Tribe asked the Committee to discount Bork's explanation at the hearings of a particularly strong statement about originalism's power to trump *stare decisis* based on his simultaneous invocation of the doctrine of precedent with respect to modern Commerce Clause law.<sup>75</sup> Tribe observed that Bork's "reason for leaving [Commerce Clause] cases in place, like his reason for

Bork's purpose in these presentations would likely have been to emphasize that his jurisprudential views would have practical implications, and thus did not amount to mere exercises in theory. Without repudiating the essential thrust of that view, see *Bork Hearings*, *supra* note 10, at 1293 (statement of Laurence H. Tribe), his hearings provided an occasion for underscoring what his views did *not* mean.

<sup>73</sup> *Bork Hearings*, *supra* note 10, at 1295 (statement of Laurence H. Tribe). Tribe combined this rhetoric portraying Bork as a radical on *stare decisis* with the further suggestion that the source of most serious concern was Bork's strong disagreement with so much modern case law. This enabled Professor Tribe to reconcile his criticism of Bork with his own relatively liberal view of judicial power to reconsider precedent. Tribe, *supra* note 7, at 102 (recommending against confirmation of nominees who view precedents "as divine edicts inscribed on stone tablets").

<sup>74</sup> *Bork Hearings*, *supra* note 10, at 1328 (statement of Laurence H. Tribe); see also *id.* at 2454-55 (Ronald Rotunda).

<sup>75</sup> *Id.* at 1294.

leaving some of the free press cases untouched, is simply that entire industries have grown up in reliance on these decisions."<sup>76</sup> Relying on other statements, Tribe concluded that Bork had viewed basically all individual rights cases with which he differed as fair game for overruling.<sup>77</sup> But the selective incorporation cases cannot be explained in these terms. Bork's decision as to these must have been based on either the notion that the decisions were made in good faith and can be referred to a plausible theory of the text and history (even if a debatable one), or simply on the perception that they had become too much a part of our constitutional consciousness to be rethought.<sup>78</sup>

Finally, it was suggested that Bork's new emphasis on precedent was actually at odds with his originalist constitutional philosophy. The argument was that "[t]he theory of original intent, as Judge Bork understands it and repeatedly defines it, commits the judge to the values embodied in the Constitution or the values of the framers, not to the values embodied in earlier decisions of the Su-

<sup>76</sup> *Id.*; accord *id.* at 2519-20 (statement of Thomas C. Grey) (suggesting that "at least until very recently," presumably confirmation hearings, Judge Bork had not indicated that any individual rights decisions are "even presumptively immune from overruling"); *id.* at 2603 (statement of Dean Robert W. Bennett).

<sup>77</sup> *Id.* Judge Bork had indicated that decisions under the Bill of Rights would be easier to reconsider than decisions around which the political and economic institutions of modern American life and government had grown up, but few would disagree with that assessment. Dean Bennett quoted Bork as saying that "*some degree of reexamination* [of individual rights cases] is desirable," and that there was a need to end judicial imperialism, but nothing he said at the hearings contradicted that earlier view, which hardly sounded like a program for wholesale repudication of a generation's worth of precedent. *See id.* at 2603 (emphasis added).

<sup>78</sup> In his post-nomination book, Bork writes:

But if the judge concludes that a prior decision was wrong, he faces additional considerations. The previous decision on the subject may be clearly incorrect but nevertheless have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now.

ROBERT H. BORK, *THE TEMPTING OF AMERICA* 158 (1990). While a confirmation conversion could explain this statement, it harmonizes rather nicely with Judge Bork's pre-confirmation commitment to the Bill of Rights decisions.

Henry Monaghan testified, moreover, that months prior to his nomination Bork had contended with him that it was too late to reconsider *Brown v. Board of Education*, even if it had been incorrectly decided. *Bork Hearings*, *supra* note 10, at 2926-27, 2957. Such a defense of *Brown* represents another judgment that cannot be reconciled with construing Bork's emphasis on the clearest cases (such as the Commerce Clause) as reflecting an exclusive focus on seismic structural developments to justify upholding wrongly decided prior law.

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preme Court.”<sup>79</sup> To the extent that this argument was intended to suggest that Bork’s reliance on *stare decisis* at the hearings was necessarily disingenuous (or absurd), it seems overdrawn. As a matter of theory, Henry P. Monaghan, a thoughtful originalist, has been on record for many years as viewing the problem of reconciling commitment to original meaning with an appropriate commitment to precedent as one of the central issues of constitutional theory.<sup>80</sup> As a matter of practice, Supreme Court Justices have seldom purported to be anything other than originalists, and they have always struggled with the question of precedent. Without question, the Court has come to overrule more decisions than it once did, but any member of the Court would tell you instinctively that a great many debatable decisions are beyond reconsideration. It is no more surprising that Judge Bork would sustain *Shelley v. Kraemer*<sup>81</sup> than that Madison came to accept the national bank,<sup>82</sup> that Justice Stewart accepted *Griswold v. Connecticut*,<sup>83</sup> or that Justice Harlan would invoke the originalist canon in a number of contexts even while emphasizing tradition and precedent.<sup>84</sup>

<sup>79</sup> *Bork Hearings*, *supra* note 10, at 2511 (statement of Owen Fiss); *accord id.* at 2598 (statement of Dean Robert W. Bennett) (expressing concern whether Judge Bork “yet appreciates the extent to which his insistence on the original intention route to constitutional truth is inconsistent with his acceptance of a substantial role for precedent”). These comments suggest that at least one reason scholars presumed that Judge Bork’s acknowledgment of the weight of precedent presented a significant change of position is because of their own view of the incompatibility between the doctrine of *stare decisis* and the jurisprudence of original intent. Fiss was partly responding to Judge Bork’s own assertion that “[a] Justice committed to the theory of original intent needs a strong theory of precedent.” He may well be right that originalism probably does not square with an extremely strong view of precedent; but Judge Bork required only a somewhat more vigorous conception of *stare decisis* than the one he was charged with having to insulate a significant amount of the core of modern constitutional law from being overruled.

<sup>80</sup> See, e.g., Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723-24 (1988).

<sup>81</sup> 334 U.S. 1 (1948).

<sup>82</sup> See, e.g., Hans W. Baade, “Original Intent” in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1036-40 (1991) (reviewing Madison’s change of position in light of established practice).

<sup>83</sup> 381 U.S. 479 (1965). For comment as to Justice Stewart’s reluctant acceptance of *Griswold* in *Roe v. Wade*, see *Bork Hearings*, *supra* note 10, at 2180 (statement of Lloyd N. Cutler); *id.* at 1395 (statement of Michael W. McConnell).

<sup>84</sup> For Justice Harlan’s attachment to precedent, see *Bork Hearings*, *supra* note 10, at 2603 (statement of Dean Robert W. Bennett). As to his originalism, see *Reynolds v. Sims*, 377 U.S. 533, 593-608 (1964) (Harlan, J. dissenting). Dean Bennett, admittedly, observed that Judge Bork was not as committed to *stare decisis* as Justice Harlan and Justice Powell, and this concerned him; but he at least acknowledged that the same thing was true of

It would have been surprising had Judge Bork departed dramatically from these paths. Bork's scholarly critics probably would have been quicker to acknowledge this practical reality, and the improbability of the more calamitous results which had been projected under Bork, if it were not in their interests to portray him as an enormous threat to a stable past rather than a significant obstacle to a preferred future.<sup>85</sup>

### C. *Foundational Theory and the Practice of Judging*

Bork's scholarly critics could easily distinguish him from other conservative jurists and scholars on the basis of what appears to be a more radical and absolute approach to constitutional adjudication. Even twentieth-century advocates of a restrained judicial role, like Justices Holmes, Frankfurter, and Harlan, had acknowledged the legitimacy of due process decisions that in effect constitutionalized rights not enumerated in the text. Scholars with deep concerns about the role assumed by the modern Court, such as Alexander Bickel and Philip Kurland, have rejected the idea that the answers lie in the search for the intent of the founders and have seemed more interested in the values of restraint, stability and continuity. Few scholars, even of a conservative bent, have stated the grounds for skepticism about the Court's ability to perceive a fundamental morality outside of constitutional text as starkly as has Judge Bork.

At the same time, it seems fair to say that the academy has been engaged in more of a foundational debate about the nature of constitutionalism and the justifications of judicial review during the last twenty years or so than at least since the *Lochner*-era. Cer-

several members of the then-current Supreme Court. He was less clear as to why this should have been an important reason to reject Judge Bork when it represented the predominant approach then on the Court, but he also fell short of making extravagant claims about the nature and effect of Bork's views on precedent.

<sup>85</sup> The need to be especially skeptical of Bork's use of precedent reflected the advantage his opponents perceived in portraying Judge Bork as a serious threat to virtually all of an entire generation of constitutional decisions, rather than mainly to *Roe v. Wade* and progeny. Refreshingly, some acknowledged the real issue. Owen Fiss, for example, observed that "[t]he real test is *not* whether the nominee will, in 1987, follow *Brown v. Board of Education*, or even more to the point, whether he will follow *Bolling v. Sharpe*, but how he might resolve cases of that magnitude and that importance as an initial matter." See *Bork Hearings*, *supra* note 10, at 2511.

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tainly, until very recently our leading conservative jurists have hardly had occasion to fully engage foundational issues in the midst of deciding cases, and the task of judging does not lend itself well to that sort of enterprise. Constitutional law scholars seldom engaged the claims of at least a basic fidelity to text and history until a leading scholar at an elite school, John Hart Ely, raised questions about the constitutional legitimacy of the decision in *Roe v. Wade*. A number of leading constitutional law scholars, including such notable spokespersons for liberal constitutional values as Michael Perry and John Hart Ely, have commented that this sort of debate over fundamentals was long overdue.

While the debate over foundational questions has led to some fairly extreme formulations on both sides, from “noninterpretivism” to “strict intentionalism,” this sometimes heady debate over abstract theory is easily overrated as an instrument to be used by the Senate Judiciary Committee to determine whether Judge Bork would be a more extreme Justice than say, Judges (now Associate Justices) Kennedy, Souter, or Thomas. To listen to much of the scholarly discussion before the Committee in the Bork hearings, for example, one who was not intimate with the *actual* decisions of Justices Black and Harlan might have concluded that (with a few glitches) Black bordered on constitutional extremism while Justice Harlan embraced unenumerated rights and the living Constitution. Yet despite the admiration with which Harlan is often held by constitutional law scholars for his lawyering skill, his few contributions to our modern constitutional edifice cannot detract from the reality that he was often a lonely dissenter throughout the Warren Court revolution.<sup>86</sup>

Apart from the sheer incentive to portray Bork as an extremist, it is difficult to avoid the sense that some constitutional theorists who viewed Bork’s constitutional theorizing as anathema, may

<sup>86</sup> There is little question that a Court filled with nine Justice Harlans would never have given us a great deal of the modern legacy of the Court; if Bork showed anywhere near the deference to precedent as he represented he would to the Committee, he would in practice be a more liberal Justice than Harlan was simply because of where the Court has travelled since Justice Harlan was a member. In *The Tempting of America*, Bork suggested that he saw little point even now in overruling *Griswold v. Connecticut*. If this statement is to be believed, it in practice commits him to sustaining unenumerated rights as much as subsequent appointees were actually committed to during their respective confirmation hearings.

have been more attuned to pursuing the theoretical debate than in realistically assessing whether, in fact, the differences between Bork and other Justices or nominees, including Justice Scalia, were of great significance.<sup>87</sup> If the goal is to stop anyone of these you can, such differences hardly matter, yet Bork's critics made the difference between him and other potential conservative nominees a large issue. In the meantime, there are those of us who wonder whether the Court would have been better served by a conservative with the intellectual background of Judge Bork than by those who have succeeded where he failed, in part, by sounding more moderate on some foundational issues that may not be determinative of very much.

In any event, the strategy of putting so much weight on the apparent threat Judge Bork presented to contraceptive freedom and the right of privacy, and unenumerated rights in general, seems clearly to have suggested the strategy followed by subsequent nominees. Justices Kennedy, Souter and Thomas all laid claim to "mainstream" status by embracing the Ninth Amendment, or some equivalent, and by acknowledging the validity of the *Griswold* case and the general idea of a right to privacy. Even so, as their critics attempted to remind the Senate, it is possible that some of these Justices extended the idea of unenumerated rights about as far as they ever will in acknowledging the weight of prior cases while they were before the Judiciary Committee.<sup>88</sup> The

<sup>87</sup> The tendency of scholars outside the hearing room to proclaim the defeat of Bork as an important watershed event in which the doctrine of originalist jurisprudence crashed against the rocks is indicative of this attitude. The rumors of the death of originalism, however, seem somewhat exaggerated, considering that then-Judge Souter purported to adhere to a jurisprudence of "original meaning," which seems difficult to distinguish importantly from "original intent." In my mind, the Bork hearings became more a referendum on contraception (or perhaps even sterilization in the workplace) than on constitutional theory. So long as the Court wields power, we will fight over results; but the people of the nation are not, on the whole, well situated to confront the subtler (if more important) institutional debate as to appropriate reach of judicial power and popular authority under a Constitution such as ours.

<sup>88</sup> Perhaps in part because they lacked the heavy ammunition that Bork's writings had provided, the Senators seemed content to think that these judges' moderate credentials were established by these litmus tests. This is not to say that scholars did not at some points seek to characterize the records of subsequent nominees as revealing an individual equally outside the mainstream as Judge Bork. Indeed, a group of scholars sought to characterize Judge Thomas as even more extreme than Judge Bork on the issue of abortion, asserting in a letter to the Committee that "Judge Thomas endorses a natural law right to life from

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scholars who testified against Bork were hardly well-situated to be especially critical of these nominees even if this were true; after all, their testimony during the Bork Hearings implied that the other 105 Justices who had sat on the Court were all within the mainstream.

### II. COMMITMENT AND OBJECTIVITY

During the last several years legal scholars have turned to looking critically at legal scholarship itself.<sup>89</sup> Increasingly we are examining not only the presuppositions of our legal system, but also the foundations of the scholarly enterprise. While some question whether the very tasks which normative legal scholarship sets for itself are inherently flawed,<sup>90</sup> others wonder whether legal scholarship—especially the theoretical sort—“matters” in the real world of practice.<sup>91</sup> Less dramatically, but nevertheless with real

conception.” See *Hearings on the Supreme Court Nomination of Clarence Thomas, Committee on the Judiciary, United States Senate*, 102d Cong., 1st Sess. (1991) available in LEXIS, Legis library, Fednew file. When Senator Specter questioned Professor Thomas Grey as to the basis for this stark assertion, Grey stated that it had been inferred primarily from a speech by Judge Thomas in which he referred to an article stating such a view as a “splendid example of applying natural law theory.” *Id.* at 22. Grey found this “a very significant line” inasmuch as Judge Thomas might have praised the author without praising the work. *Id.* But he did not explain how this equivocal language of praise could be discerned as a clear endorsement of a complete substantive agenda of the right to life view (as Grey and other scholars had asserted) rather than as an endorsement of a particular sort of methodology (reliance on principles of natural law, that may or may not yield such particular conclusions).

Professor Grey did not offer any reason to reject Judge Thomas's explanation that this was a throwaway line designed to invoke a common ground of natural law methodology in the context of a speech on a quite different topic than abortion rights; even without that explanation, an objective scholarly inquiry would not have offered such a firm conclusion. Unsurprisingly, Senators of both views about Judge Thomas's nomination rejected this partisan conclusion of legal scholars. The question whether the Senate should have presumed that Judge Thomas opposed abortion rights unless he endorsed them at the hearings, based on Judge Thomas's overall background and the reasonable assumption that the administration must have believed that he held such views, is quite separable from whether this sort of strongly-stated conclusion can properly be drawn from such a flimsy evidentiary base.

<sup>89</sup> See, e.g., Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 1 (1991). Indeed, Professor Schauer suggests that this introspective bent may itself be a sign that all is not well. Schauer, *supra* note 4, at 1003.

<sup>90</sup> See Pierre J. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991).

<sup>91</sup> Schauer, *supra* note 4; Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767 (1987); Mark Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777 (1987).



angst, some wonder aloud whether it is impossible to reconcile Olympian visions of scholarly objectivity and pursuit of "truth" with the sort of concrete commitment to the realization of human values that first brought many legal academicians to a career in law and legal scholarship.<sup>92</sup> It is to the discussion of this last question in particular that our confirmation hearings experience calls us.

I am one of those naive and optimistic souls who not only believes that legal scholarship matters, but that it is most important that legal scholars strive diligently to realize an ideal which harmonizes the value of objectivity in scholarship, with the value of commitment, in an attempt to realize worthwhile social and political ends through our professional involvement. There is no reason, in my view, to see these two values as hopelessly irreconcilable, difficult though it may be for us as humans to reconcile these ideals in practice.<sup>93</sup> I believe that we can harmonize objectivity and commitment to a greater extent than we normally do, and, additionally, that our present difficulties in doing so ought to be a matter of serious reflection and discussion in our professional lives. What follows is a brief reflection on *why* this task is so important and on *how* we might approach it.

### A. *The Why*

In an important work on legal ethics, Thomas Shaffer has suggested that legal scholars are uniquely situated as members of a legal tradition and culture, who yet function outside the main corridors of power, to play a critical prophetic role in our legal order.<sup>94</sup> Legal scholars have the access to institutions and the vocab-

<sup>92</sup> Rodney A. Smolla, *Constitutional Scholarship: What Next?*, 1 CONST. COMMENT. 54, 55 (1988) (wondering "[h]ow, if at all, is the professional role of the constitutional scholar different from that of the litigator or judge?", and if it is quite different because not instrumental in orientation, "[w]ill I be yet another yuppie without a cause?"). If you have not read this short piece, it is worth the reading simply for the poem (which can be sung "blues style") "Bye, Bye, Bye Centennial Blues," which it contains.

<sup>93</sup> It strikes me that a great many ideals worth striving for are difficult to realize in practice, and that part of the difficulty frequently involves harmonizing the demands of competing values.

<sup>94</sup> THOMAS SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 177-83 (1991). A thoughtful and sophisticated presentation of a theology of legal ethics, Shaffer's book is filled with related themes.

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ulary to speak to the profession in ways that can count in improving the system we live in and with. Yet they are “outsiders” too, who enjoy the independence, critical distance, and opportunity for deep moral and practical reflection to play the role of constructive critic.<sup>95</sup>

This prophetic role hardly calls for a narrow conception of the scholar as merely a disinterested observer. In fact, it calls for commitment. Even so, the capacity to play that role is dependent upon our ability to speak “from a narrower part of the tradition and the culture” of law, which Shaffer describes with a metaphor of “belief,” but which “others might call scholarly objectivity or (a bit too pretentiously) a commitment to truth.”<sup>96</sup> If we forsake this tradition of commitment to objective canons of scholarship in order to influence the wielders of power—whether they be Supreme Court Justices who want to hear of “text” and “history,” not of moral theory, or members of Senate Committees exercising their constitutional responsibilities—we become merely friends of power and “false prophets.”<sup>97</sup> The commitment to avoid this path ultimately rests in our commitment to and belief in the power of truth itself, or at least our recognition that the absence of that commitment lessens our ability to win trust and, ultimately, our ability to influence.

### B. *The How*

An important first step is to increase our awareness that these important values—objectivity and commitment—are in tension, or at least that our commitments may easily become obstacles to our scholarly objectivity. Most legal scholars are the product of a system of legal education that is much better at teaching advocacy, and indeed at suggesting (quite implicitly) that perhaps there are only arguments (no answers), than at instilling the commitment to truth as the highest value.<sup>98</sup> We are all very good lawyers,

<sup>95</sup> *Id.* at 179.

<sup>96</sup> *Id.*: *see id.* at 180 (providing example of type of critique of profession that law professors seem uniquely situated to offer).

<sup>97</sup> *See id.* at 182; *see also id.* at 111-20 (on moral advocacy within institutions); *id.* at 113 (effective moral advocacy appeals to truth rather than to power).

<sup>98</sup> Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL ED.

which is to say something different than to say that we are all very good scholars. If any would quarrel with the idea of tension between the ideals of commitment and objectivity, it probably would be based upon a skeptical premise that questioned whether the very notion of objectivity, and the notion of an ideal of the pursuit of "truth," was in fact, chimerical. In my judgment, this sort of deep skepticism is, in fact, one more reason why we are likely to be persistently unreflective in practice about the task of reconciling the twin values of objectivity and commitment. If we can hardly avoid being committed (to something at some level), and if our commitment inevitably colors our perception, purporting to pursue truth objectively might appear as a delusional activity. It is unquestionably the case that one of our tasks is to be continually skeptical *of ourselves*, to ask ourselves at each turn whether we are adhering to rigorous standards of scholarship or slipping into a mode of pure advocacy that places the highest premium on the persuasive power of the writing rather than its fairness or accuracy. Even more subtly, we can inquire into the prisms through which we perceive the data we confront, and consider whether that data can be honestly accounted for by another paradigm.

Ultimately, any hope we have of reconciling our allegiance to the value of truth and objectivity in scholarship with our more concrete legal and political commitments, may be enhanced if we continually ask ourselves if it is possible to reconcile them. Beyond continually asking the question, we may be lifted to better effort by developing the courage to at least hope that it *is* possible, or at least that it is worth struggling for. This paper is written in the hope that discussion of the issue can itself make a difference.

247, 253-55 (1978) (on encouraging skepticism in law students); SHAFFER, *supra* note 94, at 166-67, 173; *cf.* McAfee, *supra* note 35, at 1318 (commenting on "overdrawn skepticism about language and history" and "the pervasive teaching that there are never answers, but only arguments"; suggesting that "[s]cholarship tinged by these doubts can slide into rhetoric that pretends to look for answers but instead justifies preordained conclusions").