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The Tempting of America: The Political Seduction of the Law

Robert H. Bork

BOOK REVIEW

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW.

By Robert H. Bork. New York, N.Y.: Free Press. 1990. Pp. 432.

*Reviewed by Randolph J. May**

While the fight over President Reagan's nomination of Robert Bork to the Supreme Court was ugly in many respects, such as the distortion of some of Judge Bork's past decisions and positions, it did provide a forum for a public debate on the appropriate role of the Supreme Court in our constitutional system of government.

The first thing to say about Judge Bork's new book, *The Tempting of America: The Political Seduction of the Law*,[1] is that he genuinely seems to relish the opportunity to participate in—and stimulate—this debate in his role as a defeated nominee. Bork's desire to contribute to the substantive debate is evidenced not only by the fact that the book generally eschews a tone of rancor, but by the structure of the book, in which Judge Bork devotes the first two-thirds of the text to a substantive presentation of his views concerning the appropriate role of judicial review in a democracy and only the last third to his own confirmation fight.

This is not to say that Judge Bork does not defend himself

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1. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

quite capably in responding to particular issues that arose during the nomination fight, such as the charge that he had voted to require the sterilization of women workers.[2] In any event, presumably historians will be able to sort out the record relating to the nomination fight itself.[3] Perhaps knowing that his own personal views concerning the motives and politics involved in the nomination fight will count for little in the end, Judge Bork does seem less interested in settling scores than in prevailing in the larger constitutional debate. This purpose makes *The Tempting of America* a much more important work than it would be if Judge Bork had preferred instead to dwell on the nomination fight from his personal perspective. It is a book that deserves to be read widely by those interested in our constitutional system of government.

The views expressed by Judge Bork concerning the necessity for adherence to a jurisprudence of "original understanding" are generally well-known. Succinctly put, he believes that: "The abandonment of original understanding in modern times means the transportation into the Constitution of the principles of a liberal culture that cannot achieve those results democratically."[4] Bork argues that the judiciary, when it creates new rights not found in the Constitution, substitutes the judges' own conception of morality for the moral judgments of society as embodied in laws enacted by the people's elected representatives.[5] He pleads that "[t]he interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people."[6]

While the scholarly debate between the so-called "interpretivists" and "noninterpretivists"[7] already fills volumes, Bork's

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2. *See* R. BORK, *supra* note 1, at 326-28 (discussing Oil, Chem. & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984)).

3. For a journalistic recounting of the nomination fight, Ethan Bronner's book presents the story in a balanced way. *See* E. BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989). For the formal record of the hearings, see *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 33 (1987). Also, an extensive collection of scholarly essays and reports on the Bork nomination may be found at 9 CARDOZO L. REV. (1987).

4. R. BORK, *supra* note 1, at 9.

5. *Id.* at 126.

6. *Id.* at 159.

7. According to Ronald Dworkin,

> Interpretive theories . . . argue that judicial review of legislative decisions

treatment of constitutional theory in Part II of his book constitutes a good primer for a newcomer to the debate, even if seen through the tint of Bork's own "originalist" or "interpretivist" glasses and presented with repetition to a fault. What does Judge Bork mean when he says that judges should interpret the Constitution according to the "original understanding?" Not that the judges know the *specific* or *exact* intention of the lawgiver, for presumably in that case there would be no disagreement among the judges that the lawgiver's intent should be honored. Rather, "all that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise."[8] According to Bork:

> That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows.[9]

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must be based on an interpretation of the Constitution itself. This might be a matter of construing the text, or determining the intention of the "Framers," or, more plausibly, some combination of both. Noninterpretive theories are said to suppose, on the contrary, that the Court is at least sometimes justified in holding legislative decisions to standards taken from some source other than the text, like popular morality, or sound theories of justice, or some conception of genuine democracy.

Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471 (1981). Dworkin's characterization of the difference between "interpretive" and "noninterpretive" theories is provided here only as a frame of reference for the debate. Almost every scholar writing in the field prefers to fashion his or her *own* definitions of "interpretivists" and "noninterpretivists" theories. Dworkin attempts to show that the asserted distinctions between the "interpretivists" and "noninterpretivists" models are not useful in formulating a theory of constitutional interpretation. Dworkin's article is part of a symposium entitled *Constitutional Adjudication and Democratic Theory* published at 56 N.Y.U. L. REV. 259-582 (1981). This symposium contains a broad range of views in the debate between the "interpretivists" and "noninterpretivists" and makes an excellent source for further reading on the subject. Another good source for reading on this debate is the collection of essays by Justice Antonin Scalia, Judge Louis Pollak, and Senator Orrin Hatch published in the University of Cincinnati Law Review. *See* Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Pollak, *"Original Intention" and the Crucible of Litigation*, 57 U. CIN. L. REV. 867 (1989); Hatch, *Modern Marbury Myths*, 57 U. CIN. L. REV. 891 (1989).

8. R. BORK, *supra* note 1, at 162.

9. *Id.* at 162-63. Bork quotes with approval John Hart Ely's statement that:

> What distinguishes interpretivism [original understanding] from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be

Judicial adherence to this view of judging will mean that entire categories of problems and issues are placed off-limits to the judiciary because no provision of the Constitution reaches the issues presented.[10] For Judge Bork, this restraint is what the framers intended to accomplish through the separation of powers as that concept relates to the judiciary—that the judicial branch not be the policymaking branch of government, but rather the branch that implements the policymaking choices of the two politically accountable branches.

Although Judge Bork criticizes many Supreme Court decisions as examples of judicial encroachment, from *Dred Scott*[11] through the recent flag burning[12] and dial-a-porn[13] cases, including those substantive due process cases like *Lochner*[14] rendered by "conservative" rather than "liberal" Justices, he reserves by far his greatest opprobrium for *Griswold v. Connecticut*,[15] which established the "right of privacy," and its offspring, *Roe v. Wade*.[16] Indeed, Bork characterizes *Roe* "as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century."[17]

Even though Bork professes to be as troubled by earlier "conservative" decisions that depart from original understanding jurisprudence as latter day "liberal" decisions like *Roe v. Wade*, his discussion of the modern "political seduction of the law" evidences a passion that exceeds the more tempered concern expressed regarding the earlier "conservative" decisions. Perhaps this is only natural, because most of us "feel" the pre-

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found there—because the situation is not likely to have been foreseen—is generally common ground.

Id. at 162 (quoting J. ELY, DEMOCRACY AND DISTRUST 1-2 (1980) (footnote omitted)).

10. *Id.* at 16.

11. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

12. Texas v. Johnson, 109 S. Ct. 2533 (1989) (first amendment protects a person who burns the American flag to protest government policies).

13. Sable Communications v. FCC, 109 S. Ct. 2829 (1989) (Congress may ban dial-a-porn services that are obscene, but a total ban on indecent messages violates the first amendment).

14. Lochner v. New York, 198 U.S. 45 (1905).

15. 381 U.S. 479 (1965).

16. 410 U.S. 113 (1973). For Judge Bork, the creation of a "right to privacy" in *Griswold* and the reliance upon this right in *Roe* constitute the best illustration of the illegitimate use of judicial power. It is in the constitutionalization of the right to privacy that Bork sees the greatest potential for judges to substitute their own personal moral preferences for the moral choices embodied in legislation enacted by elected representatives.

17. R. BORK, *supra* note 1, at 116.

sent more strongly than the past. Nevertheless, Bork's passion carries him to fragile ground when he posits that federal judges and their fellow "noninterpretivist" theorizers and sympathizers (collectively "the intellectual class") hold opinions that "differ markedly from those of most Americans."[18] According to Bork:

> The constitutional culture—those who are most intimately involved with constitutional adjudication and how it is perceived by the public at large: federal judges, law professors, members of the media, public interest groups--is not a cross-section of America politically, socially, or morally. The truth is that the judge who looks outside the historic Constitution always looks inside himself and nowhere else. And when he looks inside himself he sees an intellectual, with, as often as not, some measure of intellectual class attitudes.
>
> The wide disparity between the left-liberal values of the intellectual class and the dominant values of bourgeois culture has existed and been widely recognized for a long time.[19]

In other words, the prevalent "noninterpretivist" method of judging is not just of theoretical jurisprudential concern to Bork. Rather, the modern day assault by the Court is altering public policy in a definite left-liberal direction at odds with the majority's will.

A significant problem with this part of Bork's argument is that, aside from some very anecdotal evidence, he makes no attempt to support his assertion of a "wide disparity" between the values of the intellectual class and the general culture with any empirical studies or data. In this regard, Bork's argument suffers from the same defect as the approach espoused by Professor Nagel in his new book, *Constitutional Cultures: The Mentality and Consequences of Judicial Review*.[20] Like Judge Bork, Professor Nagel argues that during the past three decades we have witnessed an excessive encroachment by the Supreme Court on public policy decisionmaking. As a result, he believes a wide gap has developed in this country between what he refers to as the "legal culture" and the "general political culture."[21] Indeed, so

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18. *Id.* at 241.

19. *Id.* at 242. At another point, Bork refers to "the sharp, long-standing difference between intellectual class attitudes and the values of most Americans." *Id.* at 338.

20. R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989).

21. *Id.* at 1. Although the distinction between the "legal culture" and "political culture" is crucial to Nagel's thesis, he never attempts to define these terms, except to say in the first two sentences of the book: "The meaning of the Constitution of the United

much so that "the courts' basic function has become that of critic and reformer of the general culture."[22] Like Bork, Nagel argues that:

> Courts, then, should attempt less. They should seldom hold the acts of other branches and levels of government to be unconstitutional. The judiciary's power to invalidate the decisions of other institutions should be reserved for those special occasions when some aberrant governmental action is emphatically inconsistent with constitutional theory, text, and public understanding as expressed in prolonged practice.[23]

While Professor Nagel attributes the gap between the two "cultures" to a somewhat different set of causes than Judge Bork,[24] he too makes virtually no attempt to support in any empirical way his assertion that such a culture gap in fact exists.

This failure has important consequences beyond merely leaving the reader unsatisfied. This is because Bork and others, like Professor Nagel, assume that once the Supreme Court overturns a statute the majority's will is effectively forever stymied on that issue. For example, Bork says that "[w]hen the Supreme Court invokes the Constitution, whether legitimately or not, as to that issue the democratic process is at an end."[25] This view of judicial finality minimizes the significance of the article V amendment process. Granted, the amendment process is not completed without difficulty, but any serious theory of constitutional interpretation should at least take the process into account.[26] Bork's failure to address the role of the amendment

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States, of course, emerges from the adversarial arguments and judicial opinions that make up the legal culture. It is less commonly appreciated that the Constitution is also expressed in the institutions, behaviors, and understandings that form the general political culture." *Id.*

While Judge Bork nowhere refers to Professor Nagel's work, his statement that his nomination fight constitutes a revealing case study "in the struggle for dominance in the legal culture and in the general culture," R. BORK, *supra* note 1, at 323, resonates with a Nagelian ring.

22. R. NAGEL, *supra* note 20, at 155.

23. *Id.* at 3.

24. Bork attributes the culture gap to the dominance of what he terms the "left-liberal" values among the intellectual class, including the federal judiciary (see R. BORK, *supra* note 1, at chapter 17), while Professor Nagel attributes the culture gap to a much less overtly political root cause—a system of legal training that emphasizes constant "interpretation" and "reinterpretation" grounded in nuances that necessarily accentuates differences in established understandings (see R. NAGEL, *supra* note 20, at chapter 2).

25. R. BORK, *supra* note 1, at 3. Elsewhere, Bork states that "the Court's invocation of the Constitution is final." *Id.* at 153.

26. The very existence of the amendment process may cut both ways, of course, in

process as one of the checks in our constitutional system is a weakness in his argument.[27] The possibility of constitutional amendment, however arduous the process, is certainly available as an outlet for expression of the majority's will if a decision of the Court deviates so far from the general culture that popular support for our constitutional system is threatened.[28]

Short of the amendment process, there is another, if less formal, check in our constitutional system that vitiates Judge Bork's view that the democratic process is at an end when the Supreme Court rules on an issue. The Presidential appointment

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formulating a theory of constitutional interpretation. A "noninterpretivist" might argue that if the result of a decision like *Roe v. Wade* is really at odds with the majority's will, then the people can amend the Constitution to prohibit or more severely restrict abortion. An "interpretivist," on the other hand, might argue that rather than having the Court create new constitutional rights, such as the right to privacy, by reliance on natural law theories, the people, if they wish, can amend the Constitution to specify such rights. In his dissent in *Griswold*, Justice Black stated:

> The [noninterpretivists'] idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification.

Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting). *See also*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 678 (1966) (Black, J., dissenting) ("[W]hen a 'political theory' embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of the country proceeding in the manner provided by Article V.").

27. Elsewhere Bork has written that: "Amending the Constitution is not a general solution to judicial expansionism; there are too many serious judicial excesses to make amendment a feasible tool of correction." Bork, *"Inside" Felix Frankfurter*, 65 THE PUBLIC INTEREST, 108, 109 (1981).

28. The failure to enact constitutional amendments in response to decisions that Bork criticizes most harshly may indicate, of course, that the claimed disparity between the values of the Justices and the so-called general popular culture may not be as great as Bork supposes. For example, after the Supreme Court's decision in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), a decision criticized by Bork, many politicians immediately called for a constitutional amendment that would give the federal and state governments the authority to prohibit the physical desecration of the flag. A proposed amendment was introduced but did not receive the necessary two-thirds majority in a Senate vote. S.J. Res. 180, 101st Cong., 1st Sess., 135 CONG. REC. S13733 (daily ed. Oct. 19, 1989). Again after the latest "flag burning" decision, *United States v. Eichman*, 497 U.S. 497 U.S. ___, 110 S. Ct. 2404 (1990), a proposed constitutional amendment to prohibit physical desecration of the flag was defeated in both the House and Senate by failure to achieve the required two-thirds majority. H.R.J. Res. 350, 101st Cong., 2d Sess., 136 CONG. REC. H4006 (daily ed. June 21, 1990); S.J. Res. 332, 101st Cong., 2d Sess., 136 CONG. REC. S8693 (daily ed. June 26, 1990). Of course, many resolutions have been introduced since 1973 proposing to amend the Constitution to overturn *Roe v. Wade*. *See, e.g.*, S.J. Res. 27, 100th Cong., 1st Sess., 133 CONG. REC. S1152-53 (daily ed. Jan. 22, 1987).

power does, over time, influence the philosophy of the Court to the extent that the Court's decisions become an issue of significant public debate.[29] While Judge Bork is right to be concerned lest the judiciary become too "politicized," ultimately this too is a question of degree and balance. Surely there is an appropriate place in our political discourse, including political campaigns, for serious debate regarding differing views of constitutional interpretation.

It is easy to envision a written Constitution much different than the one the founders gave us—a considerably longer document with much greater detail and explicit direction. But that is not the constitution the Founders in fact bequeathed. That being so, there is much to be said for Ronald Dworkin's view that "[i]f we want judicial review at all—if we do not want to repeal *Marbury v. Madison*—then we must accept that the Supreme Court must make important political decisions."[30] Perhaps the most we can hope for—or the most that the Founders in their own wisdom wished us to expect—is that judicial review will help focus public debate on the important issues of the day in a principled and constructive way.[31]

Like the Supreme Court decisions of which he is so critical, which contribute to resolution of the important issues of the day by engendering public debate, Bork himself makes an important contribution with his new book to the ongoing debate about the proper role of the judiciary in our constitutional system.

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29. *See, e.g.*, Friedman, *Balance Favoring Restraint*, 9 CARDOZO L. REV. 15, 18 (1987) ("[H]istory shows that a president's nominees never constitute a phalanx for very long. Even Franklin Roosevelt, who got to fill eight seats, was able to shape the Court for only a few years. Too many forces inevitably intervene—Justices die, resign, retire, or drift in unexpected directions.").

30. Dworkin, *supra* note 7, at 516.

31. Dworkin says that:

> Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself. That is important beyond the importance of the actual decisions reached in courts so charged.

Id. at 517.