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### Preface

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## PREFACE

*Monroe E. Price\**

In the fall of 1987, the debate over the nomination of Judge Robert H. Bork to the Supreme Court resulted in the most extraordinary national seminar on the Constitution and the role of the Court since, perhaps, the debate over secession. To say that it was *the* event of the bicentennial of the Constitution would be to understate dramatically the way in which the discussion seeped into the consciousness of the country and made individuals ponder basic questions about their society.

The debate was a battle of ideas. The period of discussion, testimony, brief-writing, and conversation was replete with the kind of excitement that must have motivated the framers of the Constitution 200 years ago. There was a sense that the same issues that confronted them were still open for renewed review and adjustment. So much seemed to be at stake for so many. All of a sudden the American people were dealing—in ways that have escaped them in the great political campaigns, including those for the Presidency—with something far more than images and polish. It was as if packaging and thirty-second commercials did not make so much difference as an understanding of the complexities of racial covenants and religion in the schools. And yet, by the time the debate had taken its course, it was a national campaign in which many millions of dollars had been expended. It was a preview of 1988, an early call to arms, an odd fusing of the appointment process and electoral politics.

It was in that spirit that we determined, at the Benjamin N. Cardozo School of Law, to collect an important cross-sample of the debate, including Essays by outstanding legal scholars and Reports prepared by the White House, the Public Citizen Litigation Group, the Department of Justice and for Senator Biden as Chair of the Judiciary Committee. How this debate was framed, how it was used to galvanize constituencies, how it was used to change perceptions of the Supreme Court and its jurisprudence—these things and more could be gleaned from the Essays and Reports.

The debate over the nomination of Robert H. Bork to be Associate Justice of the United States Supreme Court has demonstrated one point, and perhaps one point only: at bottom, the words of the Constitution have meaning only when coupled with individual and

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strongly held visions of the shape and nature of the idealized American society. This is the driving force of Supreme Court jurisprudence.

I saw this as a young man clerking for Potter Stewart. I saw the way personality and philosophy interact with doctrine. Later, I thought it would be appealing to write about the "radical" Potter Stewart, fearful of the power of government, forceful about protecting individuals—particularly in the fourth and fifth amendment areas—from government incursion. He was not timid in his commitment to the protected sphere of the individual, even though he dissented in the now-hallowed *Griswold*<sup>1</sup> case on what seemed to him to be quite correct constitutional reasoning.

This sense of vision, masked, in Justice Stewart's case by his calm lawyerliness, now strongly reemerged as an important theme in the Bork nomination. What emerged for me was how different their visions were, how extraordinarily important it has been to contrast the libertarian view, celebrating the individual, with the parliamentary view that celebrates the representative body as the shaper of our nation.

The Supreme Court has been marked by the presence over the last generation of several almost curmudgeonish Justices, men who personally and institutionally vaunted individual eccentricity, as, perhaps, the legacy of colonial insubordination and frontier independence. Theirs was often a scorn of the legislature when it sought to impose its view of the style of the society. Black and Douglas belonged, to be sure, to this bank, and Stewart was often enough among them.

For them, the Court was the way of enforcing this vision, holding the majority at bay during its most aggressive moments. Here was the way of fostering the genius of America, encouraging its talents, sustaining the strength that comes from its diversity and creativity. Indeed, it is odd that the radical aspect of the left and the libertarian aspect of the right have not sufficiently recognized the overlap of their views and the sometime convergence of their needs for a Supreme Court jurisprudence that is centered on the individual.

Where they are not hopelessly parochial or narrowly confined in legal byways, the debates reflected in this special volume are about the fundamental questions of society: the way in which the Constitution encases the individual with an envelope that protects him or her from the incursion of the state, represented by the majoritarian impulse of the legislature. They are about human impulses and sincerity, and the

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<sup>1</sup> *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

coherence of views. Ultimately, the debates are also about the power and weakness of the mind, about the extent to which the intellectual power of a single individual, in this case Robert H. Bork, can be perceived as throwing a considerable shadow, or beam of light (depending on one's metaphorical and political preference) across the political and social landscape of the nation.

The editors and staff of the *Cardozo Law Review* have been tireless in assembling, editing and producing this issue in time for it to be useful in the public debate over the confirmation of Robert H. Bork. Our gratitude as an institution is owed to them, to Professor David Rudenstine for acting as faculty editor of this issue and to many in and out of government who helped in its preparation.

