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ET TU JUDGE BORK ?: WILL SOLIPSISM DESTROY CONSERVATIVE IDEOLOGY?

*Sol Wachtler and David S. Gould**

Given past rumblings, Bill Gates[1] probably was expecting the government to challenge the marketing techniques of Microsoft.[2] What he could not have expected - and what must have come to him as an incredible shock - was Judge Robert Bork's press conference announcement that he too was joining the regicides.[3]

When it comes to conservative judicial philosophy, there are few who would not recognize Judge Robert Bork as its leading exponent. He carved out this niche as far back as 1978 when he wrote *The Antitrust Paradox*[4] condemnatory exegesis on the evils of a government which would stifle free enterprise by using the

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[1] William (Bill) Gates III is the cofounder, chairman and chief executive officer of Microsoft Corp. *Microsoft Corporation* (visited Sept. 16, 1998) <http://www.microsoft.com/billgates/bio.htm>.

[2] *See generally* Karen Donovan, *Can U.S Beat Mircosoft*, NAT'L L. J., June 1, 1998 at A1.

[3] *See* John R. Wilke and David Bank, *Bork Calls for Sherman Antitrust Case Against Microsoft, Will Advise Netscape*, WALL ST. J., April 21, 1998 at B10.

[4] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

justice department's anti-trust hammer.[5] His argument was so persuasive that it formed the cornerstone of the "Chicago School"[6] of antitrust thinking known for its strong opposition to government intervention in the market place.[7]

In the spring of 1998 the Justice Department began its highly publicized case against the computer company Microsoft claiming its predatory practices as a source of software, news, and travel information had created a threat to open competition.[8] Among those who cheered the government on was one of Microsoft's major competitors, a company called Netscape.[9] Those members of the "Chicago School," and other followers of the Bork school of anti antitrust intervention in free markets decried the Justice

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[5] *Id.*

[6] *See* Janet Bernstein, Note & Comment, *Peace in the War Between Federal Antitrust Notification and Bankruptcy Asset Sales? A Survey of The Reformed Section 63(b)(2)(B)*, 11 BANKR. DEV. J. 755 (1995). "Followers of the Chicago School believe that the marketplace should be free from the restraints of government intervention and regulation until policymakers are absolutely certain that a business practice has anticompetitive effects and reduces efficiency." *Id.* at 775.

[7] *See* James May, *Redirecting the Future: Law and the Future and the Seeds of Change in Modern Antitrust Law*, 17 MISS. C. L. REV. 43, 73 (1996).

> Even though [Bork's Antitrust Paradox] is only one effort within a much larger body of scholarship and even though various other Chicago School scholars have not always agreed with all of its positions, the book, nevertheless, does reflect many of the most important tendencies in later Chicago School antitrust scholarship as a whole and has taken on unusually great independent prominence as a symbol of the Chicago School approach to antitrust law.

Id.

[8] Donovan, *supra* note 2. "The heart of the 53 page complaint filed May 18, [1998] . . . charges Microsoft with violating Section 2 of the Sherman Antitrust Act by illegally maintaining it's monopoly in windows . . . and attempting to monopolize the internet browser market through exclusive contracts and trying agreements." *Id.*

[9] *Bork Urges Action Against Microsoft Software: Conservative Jurist, Now a Lobbyist for Netscape, Asserts 'Clear Attempt to Monopolize'*, L. A. TIMES, April 27, 1998, at D2. "Netscape's Internet browser, used by an estimated 60% of people on the World Wide Web, is the biggest competitor of Microsoft's Internet Explorer. A browser is software that lets people view information on the Internet." *Id.*

Department's actions.[10] After all, Bill Gates of Microsoft epitomized the entrepreneurial spirit which created our dynamic economy and, as Robert Bork has often noted, a nation which has benefited from this spirit should be the last to discourage it.

But then on April 20, 1998, it was announced that Robert Bork had been retained as a lawyer for Netscape.[11] The author of *The Antitrust Paradox* and one of the nation's leading judicial critics of the antitrust division of the Justice Department had become its advocate and cheerleader. Was this a sell-out by Bork? Had he abandoned a part of his judicial conservatism? How could a man of such seeming righteousness - a man whose very name came to symbolize conservative wisdom - be on the side of the government in an anti-trust case? Was it because of his unique knowledge of computers and the computer industry? No. Indeed he told the press that he knew nothing of computers.[12]

Why would a man who many felt was unfairly treated by the United States Senate when he sought confirmation for the Supreme Court (giving rise to the term "Borked") want to "Bork" Microsoft which had helped establish this nation's preeminence in the computer industry?[13]

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[10] *See, e.g.*, Richard Epstein, *Monopoly is Bad, Trustbusting Can Be Worse*, WALL ST. J., July 17, 1998, at A14.

> [O]ne of the intellectual leaders of the Chicago School said laissez-faire economics meant that government action was evil unless shown to be good. The Governments antitrust case against Microsoft tests this presumption but does not over come it . . . . The risks of this lawsuit are greater than its possible returns despite Microsoft's commanding position in the network industry.

Id.

[11] Wilke and Bank, *supra* note 3.

[12] Holman W. Jenkins, *Business World: An Antiwar Horse Come in from Pasture,* WALL ST. J., July 16, 1998, at A6. (quoting Bork, "My wife gets on the Internet, but she'll have to teach me about it.").

[13] *See, e.g.*, Thomas E. Baker, *Bob Borks Amerika,* 44 UCLA L. REV. 1185, 1187 (1997) (book review).

> As a preliminary matter, I should reveal my take on Bork's failed nomination to the Supreme Court. I think what happened to him was a sin. Anyone who tells you that Bork was unqualified for the Supreme Court is either ignorant or lying. If I were president, I might not have nominated him, but if I were a senator, I would have

To begin to understand Judge Robert Bork's approach to this and other matters it is important to examine the Emperor's clothes.[14] A helpful start is Judge Bork's most recent book entitled *Slouching Towards Gomorrah.*[15] If you read the book expecting an analysis of contemporary society filtered through the prism of a conservative judicial philosophy you will be disappointed. Instead, you will become party to the wrath of a very grumpy man whose book would be more aptly entitled, *Grouching Towards Gomorrah.* Don't expect a consistent conservative philosophy based on a rigorous intellectual foundation. In its place you will find the World According to Bork. Judge Bork's philosophy of law, life and anything else that matters is that reasonable people can differ, but that anyone who differs from Judge Bork is not worthy of an audience.

Although his judicial philosophy is considered "conservative" and may come cloaked in such empirical clothes and lofty terms as "strict construction"[16] or "original intent,"[17] stripped of its

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voted to confirm him. I do respect the position of those who opposed him straightforwardly.

Id.

[14] *See, e.g.*, William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama,* 49 ALA. L. REV. 509, 548 (1998). Hans Christian Andersen, the well-known children's author wrote "The Emperor's New Clothes" in which he tells the story of how a kingdom is socially bullied into denying that the emperor's new clothes do not exist. *Id.*

[15] ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996).

[16] A strict constructionist advocates a strict adherence to the text of the Constitution and the Framers' intent. They do not eschew all judicial activity in applying the Constitution, but they do require that such an activity be limited to searching the historical record for the intent of the drafters of the constitutional provision in question. Caroline S. Earle, *The American Judicial Review Quagmire: A Canadian Proposal*, 68 IND. L.J. 1357, 1364 (1993). Robert Bork argues that "[t]he structure of government the founders of this nation intended most certainly did not give courts a political role." In this ideology strict constructionists believe that judicial policymaking is fundamentally inconsistent with the structure of American democracy and, hence, illegitimate. *See also* ROBERT BORK, THE TEMPTATIONS OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 154 (1990).

pretense, it really boils down to a philosophy best dubbed as an "Imrite" philosophy. That is, whatever else someone might think, "I'm right."

Now, if you are looking for a real champion of conservative judicial philosophy, you would best look to the writings of Justice Antonin Scalia.[18] His judicial philosophy, like it or not, is based on a rock solid integrity that often takes him down the road to a destination that turns his stomach.[19] Judge Bork never suffers such internal upset. The road of his judicial philosophy and the road of his personal predilection always lead him to the same place because they are the same road.

For instance, Justice Scalia voted to allow a multi-million dollar punitive damage award rendered by a state court to stand against a car company which performed a dishonest paint job.[20] Justice Scalia also provided the decisive vote in a case holding an anti-flag burning statute to be unconstitutional.[21]

There isn't a personal injury lawyer in the country who would want Justice Scalia on his jury. And, it is beyond cavil, that Justice Scalia would be elbowing Judge Bork for the honor of being the last man in the country who would stoop to burn our flag. Yet, Justice Scalia's judicial philosophy, with its strong

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[17] *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 895 (1985). Original intent has been interpreted to mean that the framers of the constitution expected future interpreters to seek the meaning of the document in the Framers' intent. *Id.*

[18] *See, e.g.*, Michael S. Paulsen, *The Many Faces of Judicial Restraint*, 1993 PUB. INT. L. REV. 3 (stating that Justice Scalia is the most developed, intellectually compelling, consistent, and forcefully applied judicial philosophy of any current justice).

[19] Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1 (1990); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

[20] *See* BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). In his dissenting opinion Justice Antonin Scalia rebuked the court for interfering with a state courts award of damages and for providing vague suggestions that amounted to "a road to nowhere." *Id.* at 598 (Scalia, J., dissenting).

[21] *See* Texas v. Johnson, 491 U.S. 397 (1989). *See also* United States v. Eichman, 496 U.S. 310 (1990).

emphasis on federalism,[22] and a belief in full enforcement of the word and spirit of the Bill of Rights, led him to reach two decisions which clashed violently with his personal beliefs. In short, his judicial philosophy has unshakable intellectual integrity.[23]

Judge Bork's judicial philosophy, on the other hand, never clashes with his personal philosophy because his judicial philosophy *is* his personal philosophy. In his book, Judge Bork does not approve of a single judicial determination which differs from his personal opinion or philosophy.

Most of us always thought that Judge Bork's articulation of a "strict construction" or "original intent" judicial philosophy reflected a reverence for the Constitution. Not so. In a paragraph dripping with the disdain Judge Bork has for anyone not of his "Imrite" philosophy, he states that "It is instructive that in the United Kingdom, the primary proponents of adopting a written constitution and the power of judicial review of legislation are the Labor Party and the intellectuals."[24] What they want, he snarls, is to achieve political and cultural victories that could not be achieved in Parliament.[25]

Though scholars can reasonably disagree about the original intent of the Framers of our Constitution as to the judicial review of legislative acts, it is clear that those who drafted our Constitution set up the unelected judicial branch as a check on the

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[22] *See generally* Gelfand and Werhan, *Federalism and Separation of Powers on a "Conservative" Court: and Cross-Currents From Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443 (1990).

[23] *See* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1310-20 (1990).

> While it is conceded that his judicial record is conservative, supporters argue that his adjudicative methodology surmounts political convictions and charge his critics with superficial analysis. One supporter traced Justice Scalia's interpretive methodology in constitutional cases to his religious roots and concluded that text and methodology control outcomes rather than political views or a desire to make policy.

Id.

[24] Bork, *supra* note 15, at 97.

[25] *Id.*

majoritarian excesses of the "Parliament."[26] It is indeed strange that Judge Bork who claims complete obeisance to the Constitution should ridicule those who would wish to install such a written constitution elsewhere.

We should not be misled into thinking that Judge Bork's antipathy to the anti-democratic nature of the unelected judiciary arises from some great sympathy for Jacksonian democracy, a democracy of the most leveling kind.[27] No one reading Judge Bork's book could ever envision him in the early 19th century agitating for the dropping of property restrictions on the franchise or lobbying for the direct election of senators. Nor is Judge Bork's opposition to the anti-democratic powers of the judiciary to be interpreted as a support for Jeffersonian democracy.[28] Judge Bork does not believe that the government that governs least governs best. For example, he argues for a very large and intrusive role for government in censoring and suppressing anything that he finds offensive.[29] For that reason, and to the surprise of many, the libertarians become targets of the Bork's Imrite philosophy.

Along with many reasonable people from both the right and the left, Judge Bork feels that the federal government should not provide for federal funding for such provocative artistic works as

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[26] *See generally* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994).

[27] *See, e.g., Panel Discussion: Merger Enforcement and Practice*, 50 ANTITRUST L.J. 233, 238 (1982). Commentators such as Bork decry the uncertainty and, indeed, the unconstitutionality of delegating to judges the power to determine the propriety of mergers under the "loose, mock-Jeffersonian" standards suggested by those who emphasize non-efficiency goals. *Id.* at 239.

[28] *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 356 (1998).

[29] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 27, 29 (1971). Bork claims that the First Amendment covers only explicit political speech and that scientific communication and artistic expression enjoy no constitutional protection at all. *Id.*.

those rendered by Messrs. Serano and Mapplethorpe.[30] But he does not think government should butt out altogether. In fact, he feels the government should butt in.[31] He feels it is a governmental responsibility to prevent anyone from displaying works like those of Serano and Mapplethorpe. Why? Because Judge Bork finds these works offensive, that's why.[32]

We had better find a sculptor who can carve a marble jockstrap or there will be no statue of David in Judge Bork's America. Although he attacks people who shy away from government censorship as being too timid,[33] we are fortunate that most people who appreciate the freedoms of a democracy like ours believe that one *should* be timid about employing government censorship. Indeed, Judge Bork again reverses his field when he spoke recently on behalf of the tobacco industry and said that any legislation which curbed their advertising would be violative of the First Amendment.[34]

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[30] *See* JOHN W. ZEIGLER, ARTS IN CRISIS 67-122 (1994) (discussing debate over controversial art funded by Federal Government). Some of the most prominent controversies surrounding government-funded arts projects included exhibitions of homeoerotic photographs by the late Robert Mapplethorpe and of a photograph entitled "Piss Christ" by Andres Serano in which a crucifix is shown submerged in a jar of the artist's urine.

[31] Bork, *supra* note 15, at 140 (stating that "sooner or later censorship is going to have to be considered as popular culture continues plunging to ever more sickening lows. The alternative to censorship, legal and moral, will be brutalized and chaotic culture, with all that entails for our society, economy and physical safety.").

[32] *Id.* at 150.

[33] *Id.* at 140. Bork states, "Censorship is a subject that few people want to discuss, not because it has been tried and found or oppressive but because the ethics of modern liberalism has made any inference with the individual's self-gratification seem shamefully reactionary." *Id.*

[34] Judge Bork states:

> The recent proposal of the FDA to restrict severely the First Amendment rights of American companies and individuals who, . . . have any connection with tobacco products [is] . . . patently unconstitutional under the Supreme Court's current doctrine concerning commercial speech as well as under the original understanding of the First Amendment.

Robert H. Bork, *Activist FDA Threatens Constitutional Speech Rights*, WASH. LEGAL FOUND., Jan. 19, 1998.

Anyone who thinks that Judge Bork's attack on the unbridled power of the unelected judges reflects some benign view of humanity ought to read his book. He not only mocks those who wish to adopt our Constitution with its prospects for "intellectuals" gaining "cultural" and "political" victories in the courts, he also attacks another one of our founding documents that is dragging us towards Gomorrah[35]--the Declaration of Independence.[36]

Judge Bork states with great regret that the colonists actually believed what Thomas Jefferson wrote in the Declaration of Independence about all men being created equal.[37] This reality makes him very grouchy indeed. He states, relating to the colonists' belief in the truth of Mr. Jefferson's ringing declaration: "That is true, and though it verges on heresy to say so, it is also profoundly unfortunate."[38] Yes, it is as profoundly unfortunate as the Constitution's creation of an anti-democratic judiciary that can protect us all from those who share Judge Bork's views about the "unfortunate" belief that all men are created equal.

Let us not forget that the Declaration of Independence was a political document not a biological or sociological thesis. It was not talking about all men and women being born with equal potential as carpenters or lawyers or baseball players.[39] It was

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[35] Gomorrah is an ancient city destroyed with Sodom because of its wickedness." *Genesis* 19:24, 25. *See also* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 821 (2d ed. 1983).

[36] Bork, *supra* note 15, at 56.

[37] The Declaration of Independence states in pertinent part:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[38] Bork, *supra* note 15, at 66.

[39] *See* Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1218 (1998). When the authors of the Declaration of Independence announced that 'all men are created equal,' they did not

talking about people being born equal before God and the law.[40] Nobody is inherently a better person than any other person. It is this political concept that seems to frighten Judge Bork.

The key divide between the conservative judicial philosophy of a Justice Scalia and the "Imrite" personal philosophy of Judge Bork is best displayed in Judge Bork's discussion of the flag burning case of *Texas v. Johnson*.[41] One can reasonably differ from Justice Scalia on many of his decisions, but one cannot deny his brilliance. Oops, take that back. There is *one* who can deny him his brilliance. If you read Judge Bork's arrogant dismissal of the majority in the *Johnson* case, you would conclude that the only honorable thing for Justice Scalia to do is turn in his robes immediately. In Judge Bork's world there are no reasonable differences.[42] There are only those who agree with him on one side, and dangerous fools on the other.

Judge Bork's first problem with the *Johnson* case is that the First Amendment prohibits the abridgement of speech, and, as anyone with half a brain should know, burning a flag is not speech.[43] Judge Bork is a man who supposedly believes passionately in strict construction, and therefore, the Constitution should be read as written, not as interpreted by a court.[44]

Let us follow Judge Bork's logic. Reading the First Amendment even he would concede that it says: " Congress shall make no law . . . abridging the freedom of speech."[45] He would

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suppose that even the people of whom they spoke (a subset of all people, and a subset of all men) were in fact equal in all respects, or even in all relevant respects. Their claim of equality was not a descriptive one, but one that was in part aspirational, and in even larger part normative. As with claims of identity, likeness, exactness, and sameness, claims of equality are not ordinarily claims of literal equality in all respects, or even in all potentially relevant respects, but rather they are claims that people should be treated the same in some number of respects because they are the same in some, but clearly not in all, respects. *Id.*

[40] *Id.*

[41] 491 U.S. 397 (1989).

[42] Bork, *supra* note 15, at 99-101.

[43] *Id.* at 100.

[44] *See supra* notes 16-17 and accompanying text.

[45] U.S. CONST. amend. I.

also concede that "no" means none, zilch, not one, nada, zero. You cannot get more strictly construed than by saying "no" means none. So, when Congress passes a law which prohibits any expression or dissemination of obscene material, it is making *a* law abridging freedom of speech which contradicts a ukase to make *no* law abridging freedom of speech.

Ah, but Judge Bork would point out that the courts have gotten around this impediment by holding that obscenity is not speech.[45] Oh really? My dictionary defines speech as the "expression or communication of thoughts and feelings by spoken words, vocal sounds and gestures."[47] Obscenity fits perfectly into that definition, particularly the part about the gestures. Where did Judge Bork find a definition of speech that excludes obscenity? Yet, Judge Bork would go even further and ban offensive expressions such as the Mapplethorpe exhibit.[48]

If we agree that the word "speech" can be given a judicially interpreted meaning reflecting the spirit and purpose of the First Amendment, then it could both prohibit obscenity and protect flag burning. On the other hand, a literal reading of the text would prohibit either interpretation.

Judge Bork attacks with even more vehemence, the *Johnson* majority's slippery slope argument. That is, if we elevate the flag to untouchable icon, what will be next, the Constitution, the presidential seal or even state flags? Judge Bork's dismissive answer is, in effect, that any idiot would know that the United States flag is special and deserving of unique and complete protection.[49]

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[46] *See generally* Roth v. United States, 354 U.S. 476 (1957).

[47] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1133 (1989).

[48] *See* Contemporary Arts Center v. Ney, 735 F. Supp. 743, 744 (S.D. Ohio 1990). The Contemporary Arts Center (CAC) is an Ohio Corporation which presents displays of contemporary artists. *Id.* at 743. The CAC publicly exhibited The Robert Mapplethorpe Exhibit containing 175 photographic images and other artwork. *Id.* CAC was indicted by the Grand Jury of Hamilton County, Ohio and charged with pandering obscenity and the illegal use of minors in nudity oriented material. *Id.* at 744.

[49] Bork, *supra* note 15, at 100.

But why is the flag to be treated differently from other symbols of our country? There is nothing in the Constitution that would lead us to this conclusion. To the contrary the Constitution reflects the desire of our forbears that the new country not worship symbols or people. (See, for instance, Article I section 9 prohibiting the Government from granting titles of nobility).[50] The answer is that the flag is deserving of special treatment because Judge Bork thinks it is.

Judge Bork is not saying that the flag should be protected because the legislature has determined that it should be. He would not allow the legislature to provide the same protection for the presidential seal or a copy of the Constitution.[51] Judge Bork wants the flag protected because whatever Judge Bork wants Judge Bork feels he is entitled to get. When Judge Bork is upset he feels the whole country must be outraged.

It may come as a shock to Judge Bork, but some patriotic non-brain damaged people revere the Constitution even more than the flag.[52] And those people would be more upset by someone burning a copy of the Constitution than by someone burning the flag. Judge Bork will not acknowledge that, to some very fine Americans, that piece of parchment is even more worthy of reverence than that piece of cloth.

Judge Bork, as usual, has a dismissive argument for those who would support a rival to his beloved flag for the title of untouchable (or unburnable) icon.[53] Utilizing his trademark rigorous intellectual argument, he states, "Marines did not fight their way up Mount Suribachi to raise a copy of the Constitution on a length of pipe."[54] Yes, Judge Bork, and the President does not put his hand on the Bible and swear to defend the flag.[55]

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[50] U.S CONST. art. I § 9 cl. 2.

[51] Bork, *supra* note 15, at 100.

[52] *Id.* at 101.

[53] *Id.*

[54] *Id.* at 100-01. Judge Bork was referring to the forty marines who during World War II raised the American flag on Mount Suribachi, to illustrate the ferocity of their fighting; only four survived.

[55] U.S. CONST. art. II, §1. This section provides in pertinent part that the President of the United States must swear or affirm "I do solemnly swear (or

Article II section 1 of the Constitution specifically spells out word for word the oath or affirmation the President is to take.[56] ("Or affirmation?" We can hear Judge Bork choking on his burning copy of the Constitution already). The President must swear or affirm to preserve, protect and defend the Constitution of the United States.[57] There is no mention of the flag. But, of course that's only the Constitution, a silly obsession of those strict constructionists.

It was probably a disillusioning shock to Judge Bork that the heroic demonstrators in Tieneman Square did not share his belief that the flag was the only legitimate sacred symbol of our democracy.[58] Those courageous crusaders felt the Statute of Liberty best represented the American democracy they so revered. It was a paper mache copy of the Statue of Liberty that those crusaders for liberty risked their lives to protect.

Now, one can understand why someone with Judge Bork's views does not revere the Statue of Liberty as he does the flag. After all, Lady Liberty has been foully defiled with all of that graffiti about "huddle masses" and "wretched refuse."[59] That's the same type of parlous egalitarian clap trap that caused Judge Bork such anguish when our founding fathers put that nonsense about all men being created equal in the Declaration of

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affirm) that I will faithfully execute the office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." *Id.*

[56] *Id.*

[57] *Id.*

[58] *See* Nicholas Kristof, *Crackdown in Beijing, Troops Attack and Crush Beijing Protest*, N.Y. TIMES, June 4, 1989, at A1. Chinese troops retook the center of Beijing surrounding central Tiananmen Square, while peaceful demonstrators showed support for a democracy movement. *Id.* Thousands were injured and some killed in the crackdown. *Id.*

[59] The Emma Lazarus poem inscribed on the Statue of Liberty has, since 1886, served as a message of hope, attraction, and invitation to the downtrodden throughout the world. The inscription reads as follows: "Give me your tired, your poor, your huddled masses, yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me: I lift my lamp beside the golden door." *See* JOHN BARTLETT, FAMILIAR QUOTATIONS 664 (1988) (citing Emma Lazarus).

Independence.[60] But, one would suspect that those Tieneman Square demonstrators felt the same stab through the heart when their miniature Statue of Liberty was destroyed as when Judge Bork saw a flag burned.

Of course, the Statue of Liberty can never receive legislative protection because it does not pass Judge Bork's Mount Suribachi test, a constitutional standard that might have surprised many of our founders. In the World According to Bork, if the Marines didn't run it up the pipe stem on Mount Suribachi, you can burn it, stomp it, fold it, bend, and, God forbid, even spindle it. We wonder if Joe Rosenthal knew when he took that immortal picture atop Mount Suribachi that he was making Constitutional as well as military history.[61] We guess we're just lucky those Marines didn't stick one of Mapplethorpe's pictures on that piece of pipe.

The issue is not, as Judge Bork would have it, what symbol should be where on the patriotic pecking order. All of the symbols mentioned in the *Johnson* case should be respected, perhaps even revered, but they should not be worshiped. The scenario of a democracy which reveres freedom of expression prohibiting a person from non violently expressing his or her views, no matter how abhorrent, is an oxymoron that not even Judge Bork can reconcile.

One of the greatest ironies of the original intent doctrine is that it was never the original intent of the founders that the Constitution be an immutable fundamentalist document.[62] The

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[60] President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), reprinted in 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS (1859-1865) 536 (D. Fehrenbacher ed. 1989).

[61] On February 23, 1945, Joe Rosenthal of the Associated Press took the Pulitzer prize winning photograph of the four soldiers atop Mount Suribachi. VINCENT ALABISO ET AL., FLASH! THE ASSOCIATED PRESS COVERS THE WORLD (1998).

[62] The author alludes to the theory that the framers did not intend for the Constitution to be fixed literally to its text for future generations. *See* Hunter R. Clark, *The Pulse of life in Justice Brennan's Jurisprudence,* 46 DRAKE L. REV. 1 (1997). Justice William Brennan Jr. is quoted as saying that the United States Constitution should be read as a living document and interpreted in light of modern sensibilities and circumstances. *Id.* at v. Professed adherence, Justice Brennan wrote to the original intention of the framers, was 'little more

very words they used cried out for interpretation consistent with the spirit rather than a literal reading of the document.[63] We doubt that any of the Framers would be shocked that their phrase "due process" of law might carry a different interpretation in the 20th century than it did in the 18th century. The only thing that would probably shock the framers is that we are still using that same Constitution today. Thomas Jefferson thought we would and should have had a few more bloody revolutions by now.

We doubt any Framer intended that our country should be held in place by an anchor dropped at a time when people were treated as property and people without property were not considered worthy of the franchise.[64] We do no disservice to our nonpareil Founding Fathers by saying how much we appreciate the unmatched foundation that they built for our house but understanding that, from time to time, we have to do some home improvements.

The Framers of our Constitution were a collection of great minds doing the greatest good in the history of the world. Their lofty ideals and courageous actions cut a swath through a jungle of worldwide autocracy and cruelty that has provided a road to freedom for millions of people around the world.[65] However, we should not forget that though they may have had great vision, they did not have great eyesight.

The man who penned the revolutionary, unprecedented notion that all men are created equal, could read those ringing words by

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than arrogance cloaked in humility." *Id.* It is arrogant to pretend that today we can argue accurately the intent of the framers on application of principle to specific, contemporary questions. *Id.* Current Justices read the Constitution in the only way they can: as twentieth-century Americans. *Id.* The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in its adaptability to cope with current problems and current needs. *Id.*

[63] *Id.*

[64] *See generally* Aaron Schwabach, *Jefferson and Slavery*, 19 THOMAS JEFFERSON L. REV. 63 (1997). Although Thomas Jefferson wrote in the Declaration of Independence that "all men are created equal," he nevertheless had slaves and spoke of slaves in the same manner as he discussed other forms of property. *Id.* at 90.

[65] *Id.*

the light of a lamp held by one of his slaves. Like the great crusader for human rights who has been found to have treated his family as if they had no rights, our founders were better at expressing visions than in fulfilling them. For their times, they made remarkable advancements in human civilization, but it is for future generations to rise beyond their limitations.

Should "original intent" lead us to repeat the sins of and mistakes of our forefathers? Or should we take the approach, not much appreciated, taken by Lincoln in his Gettysburg Address? That is, should we use the soaring ideals and aspirations reflected in the bedrock documents of our nation's founding to attempt to rise above the foibles of our forefathers and complete the mission they so splendidly had begun? It is the goal of moving towards what Lincoln called "a new birth of freedom"[66] that we should have as a goal. And the Constitution should be our guidepost not our anchor.[67]

Judge Bork in his book states over and over again how shocked the Framers would be to see how courts were interpreting various parts of the Constitution.[68] He is probably right. The framers would be shocked that, for instance, the First Amendment was being interpreted to keep prayer out of our schools.[69] But what

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[66] Abraham Lincoln, *Address at the Dedication of the Gettysburg National Cemetery* (Nov. 19, 1863), *in* THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 788 (Philip Van Doren Stern ed., 1940) (stating "we here highly resolve . . . that this nation, under God, shall have a new birth of freedom"). *Id.*

[67] *See generally* Micheal L. Yoder, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173 (1990). Justice Kennedy suggests that the Court should first use the text of the Constitution as a guide. "By using the words of the constitution as a guide, the courts should be able to minimize the initial problem of characterizing an issue as textual or non-textual." *Id.* at 186.

[68] Bork, *supra* note 15, at 99.

[69] Lee v. Weisman, 505 U.S. 577 (1992). Deborah Weisman attended a public school system in Providence, Rhode Island where there had been a policy for many years to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. *Id.* at 581. On a regular basis, the principals elected to include the prayers as part of the graduation ceremonies. *Id.* Although Deborah Weisman's father, acting on behalf of himself and his daughter, objected to any prayers at her graduation,

Judge Bork does not say is that those same Framers would *not* be shocked by the *Dred Scott*[70] decision holding that black people were property.[71] That decision clearly reflected their "original intent." Not even Judge Bork would allege that decision was properly decided. By the literal wording of the Constitution it was correctly decided (Recall, that one of the only two matters not subject to Amendment in the Constitution was the prohibition against the abolition of the slave trade before 1808).[72] But if we look to the vision rather than the myopia of the framers, *Dred Scott* was wrongly decided.[73] Saying that the framers would be shocked at a court's decision is not so frightening when one conjures up the horrible court decisions that would not shock them.

One of the great aspects of our Constitution is the flex the Framers left in its joints.[74] That is not to say that judges should

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nothing transpired. *Id.* Petitioner Robert E. Lee, principal, invited Rabbi Leslie Gutterman to make the speech. *Id.* The question before the Court was whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment. *Id.* The Court held that not every state action implicating religion is invalid if one or a few citizens find it offensive. *Id.* at 597. However, the prayer exercises in this case were especially improper because the State had in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid. *Id.* No holding by the Supreme Court suggests that a school can persuade or compel a student to participate in a religious exercise, this is what occurred in this case and it violated the Establishment Clause of the First Amendment. *Id.* at 599. *See also* Bork, *supra* note 15, at 102.

[70] Dred Scott v. Sandford, 60 U.S. 393 (1856).

[71] *Id.* at 475. *See also* Bork, *supra* note 15, at 318.

[72] U.S. CONST., art. I, § 9, cl. 1 provides in part that:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each person.

Id.

[73] Clark, *supra* note 62.

[74] *See generally* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989). Gary Wills argued that James

be free to overreach their mandate. The Constitution should not be interpreted as an inerrant fundamentalist would read the Bible, but it is evident that Judge Bork's argument with "activist" judges is, at its heart, not doctrinal but personal.[75] He is distressed that many judges are reaching decisions with which he disagrees.[76] Many of the things that cause Judge Bork to melt down are

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Madison assumed the Constitution should be a flexibly interpreted "living document." *Id.* at 247. *See also* G. WILLS, EXPLAINING AMERICA 54 (1981). Wills gives several reasons for this argument among them that the Constitutional Convention was called to propose alterations to the Articles of Confederation but produced a new document instead. *Id.* According to Wills, in order to justify the Convention's proposal, Madison in Federalist Number 40 broadly interpreted the Convention's initial authorization. Wills viewed this as a "grant of freedom to interpret." *Id.* at 51. *See also* Arlin M. Adams, *Justice Brennan and The Religion Clauses: The Concept of a "Living Constitution"*, 139 U. PA. L. REV. 1319 (1991). In a speech addressing the use of the history in constitutional interpretation, Justice William J. Brennan Jr. emphasized "that the Constitution is a living document subject to 'contemporary ratification' and that the judiciary must interpret the text to promote human dignity in light of society's changing values and needs." *Id.*

[75] A strict constructionist advocates a strict adherence to the text of the Constitution and the framers' intent. They do not eschew all judicial activity in applying the Constitution, but they do require that such an activity be limited to searching the historical record for the intent of the drafters of the constitutional provision in question. *See* Caroline S. Earle, *The American Judicial Review Quagmire: A Canadian Proposal*, 68 IND. L.J. 1357, 1364 (1993). Robert Bork argues that "[t]he structure of government the founders of this nation intended most certainly did not give courts a political role." In this ideology strict constructionists believe that judicial policymaking is fundamentally inconsistent with the structure of American democracy and, hence, illegitimate. *See* ROBERT BORK, THE TEMPTATIONS OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 154 (1990).

[76] Bork, *supra* note 15, at 96-119 (discussing cases such as Roe v. Wade, 410 U.S. 113 (1973)). Bork argues that *Roe*, which established the right to abortion, has no constitutional foundation and that the Court offered no constitutional reasoning for its' decision. *Id.* at 103. Bork wrote that this was "extra-constitutional individualism" which was promulgated in Planned Parenthood v. Casey when the Court invented an unheard-of constitutional right to personal dignity and autonomy. *Id. See also* Planned Parenthood v. Casey, 505 U.S. 833 (1992). *See generally* ROBERT BORK, THE TEMPTATIONS OF AMERICA THE POLITICAL SEDUCTION OF LAW (1990).

indeed outrageous, and in need of correction. But the medicine recommended by Judge Bork would certainly kill the patient.[77]

Anybody who has been made to feel uneasy by the jeremiad Judge Bork delivers against our modern society, will be even more distressed to learn of his remedy. You sense that you are heading for real trouble when Judge Bork dismisses stripping the federal courts of much of their jurisdiction as an inadequate cure. Instead he recommends curbing the power of the judiciary by transferring many of their prerogatives to the Congress.[78] That's like removing your money from someone you suspect of embezzlement and giving it to a bank robber for safekeeping.

Judge Bork's idea is to pass a constitutional amendment which would allow a majority of the House of Representatives to override any federal *or* state court opinion.[79] In other words he would nullify the power of the judiciary, which he mistrusts, by giving the ultimate judicial authority to the Congress.[80] We sincerely doubt that a small store owner in rural Alabama will sleep better at night knowing that his state courts' decisions can be overridden by the United States Congress. We rather think that, at best, he would consider it as going from the frying pan into the belching volcano.

Judge Bork does not say if the anti-democratic aspects of the legislature such as the Presidential veto, the Senate filibuster, or the Congressional death by committee will be available as a check on the Congress. More importantly, he puts no limitation on this power he would vest in the Congress. It would apply to any judicial decision, not just those involving so-called constitutional

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[77] *Id.* at 154.

[78] *Id.* at 117.

[79] *Id.* at 115-18.

[80] *Id.* at 117, 119 (stating that this is only one means by which the courts, federal and state, can be brought back to constitutional legitimacy). *See also* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts To Intimidate and Remove Judges From Office For Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 309 (1997) (commenting that in SLOUCHING TOWARDS GOMORRAH, Bork advocates giving Congress the power to override Supreme Court decisions).

issues.[81] Let us say that Mr. A sues Mr. B for breach of contract in Montana. Mr. A wins a substantial judgment in the Montana courts based on the determination that a clear breach of contract was committed by Mr. B. Now Mr. B, a loyal Democrat, turns to his party leaders at a time when the Democrats happen to control Congress. The party leaders see to it that the Congress, without any regard to the merits of the case, overrides the Montana court decisions and, voila', Mr. B has won his law suit. Lobbying will be the biggest growth industry in the country.

We should also remember that unlike courts, Congress makes no pretense about being guided by legal arguments, precedents, and appeals to intellectual arguments and logic.[82] The Congressional decisions will be guided by lobbyists, contributors and political pressures.[83] That is the way it is today, but at least

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[81] *Id.* at 96-119.

[82] *See* Molly L. Dillon, *Legislative Expansion of the 5th Amendment "Takings"? A Discussion of the Regulatory Takings Law and Proposed Compensation Legislation*, 15 UCLA J. ENVTL. L. & POL'Y 243, 255 (1996-97). As there is no requirement that legislation follow case law, various Congressional legislation has been enacted to reject specific decisions made by the courts. *Id.*

[83] *See* Felice Bernstein, *Conflict of Interest Rules for Lobbyists*, 4 GEO. J. LEGAL ETHICS 671 (1991). Lobbyists promote efficient functioning of the legislative process, but in the same breath they pose a threat to the integrity of the legislative process in several ways. *Id.* at 672. First, Congressmen may replace their own neutral investigation with the lobbyist's information. *Id.* The lobbyist's information is usually the product of detailed study, however, it serves primarily as advocacy for a certain position or policy. *Id.* If the Congressman relied only on the information given to him from the lobbyist then he only would consider one side of the issue, "making the lobbyist's recommendation dispositive." *Id.* at 672-73. This is essence puts the decision making power in the hands of the person being paid, who is also a biased advocate, instead of the elected official. *Id.* at 673. Second, the Congressman can be influenced by the force of the lobbyist's effort rather the merits of the argument. *Id.* The fear is that a Congressman will cast his vote on grounds other than meritorious arguments. *Id.* This will thwart well reasoned discussion on the floor of the Congress and laws will be enacted that do not effectuate the public's good. *Id.* Third, lobbyists pose another threat by seeking to manipulate Congressman through expertise, inside information, secret contacts and personal pressure. *Id.* The article explains that lobbyists do play a major role in the legislative process and it is important to keep them

we have the "check" of the court system available to curb any unconstitutional or illegal excesses by the Congress.[84] Now, if Judge Bork's plan became a constitutional mandate, your civil rights might well be in the hands of that lobbyist or contributor who stopped off to visit a few Congressmen on his way to his overnight stay in the Lincoln bedroom.

One also will have to live with the fact that when the ultimate decision becomes political rather than judicial, there will be no repose - no end to the litigation. Mr. B will enjoy his breach of contract victory until the Republicans take over Congress and reverse the decision of the Democratic Congress. Of course, Mr. B could claim the protection of a statute of limitation or rule of finality argument, but even if a court accepts his argument and rules in his favor, the Congress can just override it.[85]

It is doubtful that the Congress has or ever could have the expertise or staff sufficient to oversee the thousands of cases that would be potentially available for Congressional override monthly. Either the debates on the floor would be endless or the overrides would occur without ever really seeing the light of day. The entire Congressional override plan is just further proof that Judge Bork has abandoned all use of his very considerable

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within ethical boundaries in order for the process to function properly. *Id.* *See also* Stacie L. Fatka ET AL, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559 (1998). The article states that the problem is not that there are too many lobbyists; it is that the lobbyists are tied to large powerful corporations or social groups who can afford them, thus the ordinary citizen's voice's are shut out of political discourse. *Id* at 568. The lobbyists have formed relationships with government officials and their staff. *Id.* Many lobbyists are former legislative branch employees who have expertise regarding the legislative process and knowledge of the subject matter that congressional committees address. *Id.* It is noted that members of Congress have relied on lobbyists to draft legislation. *Id.*

[84] *See* James T. Barry III, *The Council of Revision and The Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 260 (1989) (discussing the intention of the framers in creating the power of judicial review).

[85] Bork, *supra* note 15, at 117 (arguing that a constitutional amendment could make *any* federal or state decision subject to being overruled by a majority vote in each House of Congress).

intellectual skills in favor of an emotional reaction to a situation that he has made into a chimera which has overwhelmed him.

Judge Bork is correct about there being many severe cultural dislocations today, but they are not as bad as he thinks they are.[86] Nor are we some decadent society plunging from the spiritual heights of some Edenic past. Despite our loss of values today, and the many commendable values possessed by those of yesteryear, this tendency to over glamorize the past is misplaced. On the whole, our society is far more civilized today than it was at any other time since Columbus "discovered" "America." We sincerely doubt that those "witches" tortured and executed in Salem went to their terrifying end singing "Give Me That Old Time Religion."

Because Judge Bork is a man of considerable intellectual skills, one assumes that much of the outrageousness in his book is merely an attempt to provoke those who have so provoked him. It is some bit of theater that could have come right out of the playbook of the student radicals of the '60s whom he so greatly despises. Much of what he rails against are indeed condign targets. But Judge Bork's blunderbuss attack on anything and anyone that disagrees with him is like watching a great mind coming unglued before your eyes. And his suggested remedies for his perceived problems are chilling.[87] It is ironic that, in the end, the best argument for a congressional override Constitutional Amendment would be a Supreme Court full of Judge Borks.

So if you're trying to find some conservative heresy in Microsoft's activity because of Judge Bork's opposition, don't waste your time. Judge Bork opposes Microsoft's practices, not because it has done something inconsistent with a conservative ideology. Judge Bork sides with the government against Microsoft because Microsoft has done something inconsistent with what Judge Bork had determined to be proper conduct.

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[86] *See id.* at 123. Bork discusses the collapse of popular culture, noting that culture has changed, is changing and will continue to change for the worse. *Id.* at 126. Bork further states that "American popular culture is in a free fall, with the bottom not yet in sight." *Id.* at 139.

[87] *See* Bork, *supra* note 15, at 117.

The only people who should have been shocked by Judge Bork's position on the Microsoft issue are those who presumed they could always divine Judge Bork's landing place by tracing a conservative trajectory. In fact, Judge Bork marches to the beat of no ideology - he marches to the beat of a drum played only by himself. Conservatives would do well to eschew personal rage and stick to consistent ideology.