

# Bork's Jurisprudence

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*The Tempting of America: The Political Seduction of the Law.* Robert H. Bork. Macmillan, New York, 1990. Pp xiv, 432.

## I.

Although I have written about Robert Bork's constitutional theories before,<sup>1</sup> I agreed to review *The Tempting of America*<sup>2</sup> because he there sets out what he calls the "original understanding" thesis in a more complete and revealing form than he has attempted before. That thesis is unlikely to recover from his new defense of it, and his book may prove an important event for that reason. Bork also argues that law must be a matter of common sense, and that the flourishing of academic legal theory, far from a sign of law's health and liveliness, is rather a symptom of its decadence. That is a claim of independent importance, and I shall comment on it briefly.

I want first to make an overdue protest. Bork intends his book, among other things, to persuade the American public that the negative opinion many people formed of him during his unsuccessful nomination hearings was the result of deliberate lies and outrageous and crude simplifications, and that he is not, as some of those who campaigned against him claimed, a racist or a bigot or a madman. I hope that the book's popularity signals his success in that aim. No doubt Bork was the victim of outrageous distortions and fallacious, question-begging arguments. I do not think these misrepresentations played anything like as important a role in his defeat as he believes they did. Bork was defeated mainly because he challenged a style of interpreting the Constitution that has become part of the American political tradition, and that the public, much to his surprise, largely supports. But in any case he is surely justified in trying to redeem his public reputation.

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<sup>1</sup> Ronald Dworkin, *The Bork Nomination*, N Y Rev Books 3 (Aug 13, 1987).

<sup>2</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Macmillan, 1990). All parenthetical page references appearing in the text and notes are to this book.

Bork himself, however, has made a career of grossly unfair charges against those who disagree with his views, and in this book his charges become even more shrill and mendacious. He wants to persuade the public that he is not just an unsuccessful Supreme Court nominee, but a martyr in a patriotic war against scheming and powerful enemies of democracy. These well-disguised enemies are professors of law who, knowing that the Constitution does not support their egalitarian designs for America, produce insidious theories to trick judges into abandoning the real Constitution and replacing it with a different one the professors have invented.<sup>3</sup>

It is depressing that Bork is so anxious for martyrdom that he is willing to invent fantasies to achieve it. But it is simply intolerable that in his quest for redemption he should accuse a significant portion of the academic legal profession of being tricksters and cynics who care only for results at whatever cost. "Professions and academic disciplines that once possessed a life and structure of their own have steadily succumbed," he tells us, "in some cases almost entirely, to the belief that nothing matters beyond politically desirable results, however achieved . . . . It is coming to be denied that anything counts, not logic, not objectivity, not even intellectual honesty, that stands in the way of the 'correct' political outcome." (p 1)

He continues: "The clash over my nomination was simply one battle in this long-running war for control of our legal culture." (p 2) "The forces that would break law to a tame instrument of a particular political thrust are past midway in a long march through our institutions. They have overrun a number of law schools, including a large majority of America's most prestigious . . . ." (p 3) Decades of liberal political influence have imposed on constitutional law an "intellectual class moral relativism." (p 247) "The point of the academic exercise is to be free of democracy in order to impose the values of an elite upon the rest of us." (p 145)

"[Alexander Bickel, John Hart Ely, and Laurence Tribe] typify today's American professoriate," Bork reports, in "that they would depart, in varying degrees, from the actual Constitution of the United States. . . . What follows is a demonstration of that truth by sampling the views of other academic constitutional theorists." (p 207) These co-conspirators include, for example, Frank

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<sup>3</sup> It is worth noting, either in support or in explanation of Bork's conspiracy theory, that nearly forty percent of American law professors signed a petition opposing his confirmation. Kenneth B. Noble, *Bork Panel Ends Hearings*, N Y Times B9 (Oct 1, 1987).

Michelman, Thomas Grey, David Richards, and myself. (pp 207, 209, 210, and 213, respectively)

Those several scholars, whom Bork singles out to "demonstrate" his "truth," hold different views. But of *none* of them is it remotely true, nor does Bork offer any shred of evidence to support the claim, that he "would depart . . . from the actual Constitution." Or that he believes "nothing matters beyond politically desirable results, however achieved." Or that he urges judges to decline to "abid[e] by the American form of government." (p 1) Or that he thinks the Constitution and statutes "are malleable texts that judges may rewrite to see that particular groups or political causes win." (p 2) Or that he is a moral relativist, a philosophical position Bork seems hardly to understand.<sup>4</sup>

Bork deploys these wild charges almost randomly throughout his book. They are irresponsibly false. Nearly all the constitutional lawyers and legal philosophers who disagree with him disagree not about whether the Constitution should be obeyed but about the proper way to decide what its various provisions actually require. That conflict is part of a larger and older dispute among lawyers about what any statute is, that is, about the most accurate way of fixing the legal impact of any piece of legislation. (And that dispute is itself part of an even wider debate, which spans a variety of disciplines, about the character and proper standards of interpretation in general.) Bork subscribes to one answer to the question of what the Constitution is, which is also the answer conservative presidents and politicians have embraced in recent decades. Bork says that the Constitution should be interpreted in accordance with what he calls the "original understanding": it should be thought to have only the force it was assumed to have by those who enacted and ratified it. (pp 143-46)

It is true that this view, however popular among politicians, is not much in favor in law schools, where it is generally regarded as confused and unhelpful.<sup>5</sup> Some law professors believe that the Constitution is incomplete or open-ended, so that judges have no

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<sup>4</sup> Although Bork says he is against moral relativism (perhaps because the irresponsible view that liberals are moral relativists has become a shibboleth of the right), I know of no academic lawyer who is more firmly committed to relativism than Bork himself. See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind L J* 1 (1971).

<sup>5</sup> The parallel views have also been largely rejected in general jurisprudence and in other fields where the character of interpretation is debated. Few philosophers of law, in any legal culture, argue that a statute is only what its drafters intended and few literary critics insist that a novel means only what its author meant.

choice but to expand its provisions to meet new cases. Others believe that the Constitution, properly understood, is not so much open-ended as structural: that on the best interpretation it itself requires that judges serve something of the role Alexander Bickel described, as guardians of moral principles inherent in the national tradition. Others think the Constitution, on the best interpretation, is abstract: that it lays down general moral principles that contemporary lawyers, judges, and citizens must apply by finding the best answers to the moral questions these abstract principles pose. Some of those who take this last view think that the work of moral philosophers, even when philosophers disagree, provides a useful source, among others, of suggestions and argument.

These different positions all contemplate judges exercising a more judgmental and less mechanical role in interpreting the Constitution than Bork sometimes suggests his original understanding view allows them. Scholars insist on a more active judicial role, however, not because they want to subvert the Constitution, but because they believe a more active role is essential to *respecting* the Constitution, to *enforcing* the American form of government. It certainly does not follow—it seems a crude misunderstanding to say—that people who hold these views put politics before the Constitution, or would depart from the Constitution in the name of equality, or are guilty of the other sins Bork attributes to them.

If Bork's version of what the Constitution requires is in fact the right view, then the *effect* of judges following a different view would indeed be a departure from the actual Constitution. But that hardly means that scholars who disagree with Bork intend or advocate that result. For they have the same view about the effects of Bork's views: I myself think that the effect of following his version of original understanding would be—indeed, in recent years *has* been—a departure from the actual Constitution. But I do not accuse him of bad faith, or of wanting to subvert the American form of government.

Bork's caustic jurisprudence debases the quality of the debate. He coarsens the public argument by reducing it to a stock Western drama, heroes against horse thieves. He may find the real argument too complex for his polemical purposes. But he should not stoop to tactics he rightly deplores when they are aimed against him.

## II.

Bork was stung by the popular perception that he did not distinguish himself intellectually in the hearings. He grumbles, for ex-

ample, that the public mistook his extended exchange with Senator Arlen Specter about constitutional theory, in which Bork claims Specter failed to grasp his views on the Constitution, for a serious jurisprudential discussion. (pp 301-06) He hopes to repair the public misunderstanding in this book by offering an intellectual defense of the original understanding method in constitutional analysis, to show the public that it should now reject the constitutional style it has been seduced into approving. In fact his book, if carefully read, may achieve exactly the opposite of its intended effect. The arguments are so weak, and Bork's apparent concessions to his critics so comprehensive, that his book might mark the end of the original understanding thesis as a serious constitutional philosophy.

Bork claims that the prestigious law schools reject originalism because it produces a Constitution too conservative for most professors' liberal and egalitarian tastes. (pp 134-38) Law school professors differ too much in their own political views to make that a plausible explanation, however. They reject Bork's thesis primarily on conceptual rather than political grounds. These professors regard the idea of an original understanding as radically ambiguous and incomplete, almost empty, until the concept is supplemented by the contemporary political judgment that Bork says it rules out.

It is worth explaining this objection in some detail to see how thoroughly Bork now capitulates to it.<sup>6</sup>

I must begin by emphasizing a distinction rarely explicit in discussions of the original understanding thesis, but which is, I think, essential to understanding its vulnerability to the objection I shall describe. The thesis insists that judges should interpret the Constitution to mean only what the framers intended it to mean. But the framers had two very different kinds of intention that, in very different senses, constituted what they meant. They had *linguistic* intentions, that is, intentions that the Constitution contain particular statements. They also had *legal* intentions, that is, intentions about what the law would be in virtue of these statements.

We make constant assumptions about the framers' linguistic intentions, and we never contradict these in our views about what the Constitution says. We assume, for example, that the framers of

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<sup>6</sup> See generally Ronald Dworkin, *Taking Rights Seriously* (Harvard, 1977), and Ronald Dworkin, *Law's Empire* (Harvard, 1986), for previous discussions. See also Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L J 1063 (1981).

the Eighth Amendment meant by "cruel" roughly what we mean by "cruel," and that they followed roughly the same linguistic practices we do in forming statements out of words. We therefore assume that they intended the Constitution to say that cruel and unusual punishments are forbidden rather than, for example, that expensive and unusual punishments are forbidden. (We would give up that assumption, however, if incredibly, we learned that "cruel" was invariably used to mean expensive in the Eighteenth Century.) We also assume that they intended to say something as abstract as we would intend to say if we said, "Cruel and unusual punishments are forbidden." Suppose we discover that they expected that the bastinado would be forbidden by the Eighth Amendment, but not solitary confinement. We would not then think that they intended to say that the bastinado but not solitary confinement was forbidden. We would have no justification for attributing to them that degree of linguistic incompetence. We would instead classify their opinions about these punishments as part of their legal rather than linguistic intentions. We would say that they thought they were outlawing the bastinado but not solitary confinement, or that that is what they hoped they were doing.

The original understanding asks judges, not merely to make the framers' linguistic intentions decisive over what they said, which is innocuous, but to make their legal intentions decisive over what they did, that is, over what effect their statements had on constitutional law. The difference is evident. Suppose I say to my real estate agent, "Do whatever possible to sell my house at the highest price you can, but do nothing unfair." She would of course make assumptions about my linguistic intentions in deciding what I said. If my tone of voice suggested quotation marks around "unfair," she might decide that I had not, in fact, told her to avoid unfair means. Assume, however, there is no question of what I meant to say. She rightly thinks that I intended to say, and did say, that she should avoid unfair means. Nevertheless it may be problematic what responsibilities I had actually imposed on her. Suppose she thinks that a particular negotiating strategy—bluffing—is unfair, but she knows that I disagree. She might well think that I had ruled out bluffing even though I did not intend to do so.

So even though the framers' linguistic intentions fix what they said, it does not follow that their legal intentions fix what they did. We need an independent argument for the original understanding thesis. The agency example suggests what kind of argument might be proposed. Someone might say, about the agency case, that

agents have a responsibility to carry out their clients' wishes, and should therefore defer to their convictions. And someone might say, about the constitutional case, that since the framers were the people whose decision made the Constitution our fundamental law, their convictions should be respected.

We must recognize three points about that kind of argument, however. First, the argument necessarily draws on normative rather than semantic or logical assumptions. It draws, in the former case, on normative assumptions about the proper relations between clients and agents, and, in the latter, on normative assumptions about the proper balance of authority, in a democracy, between remote constitutional architects, contemporary legislators, and judges. Second, these normative assumptions cannot be justified, without the most blatant and absurd circularity, by appealing to the intentions or wishes or decisions of the people whose authority they propose to describe. It would be absurd to argue that agents should defer to the wishes of clients because that is what clients wish, or that judges should respect particular convictions or expectations of the framers because the framers expected that they would or believed or decided that they should.

The third point forms the objection before which, as I shall try to show, Bork capitulates. It is that these arguments, even if supported by independent normative claims, are radically incomplete if they purport to establish only that agents or judges should respect clients' or framers' wishes or intentions or convictions or expectations. In most pertinent cases the question at issue is not whether the convictions, expectations and beliefs of those in authority count, but which of these mental states count and how. In the agency example, for instance, on the assumption that my instruction was not cynical or manipulative or only for effect, I had at least two relevant convictions. The first is that nothing that is unfair should be done on my behalf. The second is that bluffing is not unfair. My agent believes that these convictions are in conflict, and so she cannot decide what her instructions require just be resolving to follow my convictions. She must decide *which* of my convictions—the more abstract or the more concrete—to enforce.

This is not, of course, a problem of discovering what my "true" intentions or convictions or beliefs are. Both the convictions I described are genuine. Nor is it a problem of discovering which is more important to me, which, as someone might put it, I would abandon first. For I do not hold them as even potentially conflicting convictions—I hold the more concrete as part of the more abstract—and any idea of my choosing between them is incoherent.

Since it is the agent, not I, who sees the convictions as inconsistent, it is she who must make the selection. She must elaborate whatever normative argument she had for deferring to my convictions in the first place so that these now provide a reason for selecting one type or level of my convictions as the appropriate type or level.

Suppose she tries to avoid that responsibility by, in effect, passing it on to me. Suppose she tries to discover, not merely my opinions about fair play in negotiating, but also my second-order opinions about how my opinions about fair play should figure in determining the responsibilities of agents I instruct. Her problem will remain, even if she does discover that I have such second-order opinions, because she needs a reason why she should treat *those* opinions as decisive. Suppose I myself think that, on the best theory of agency, an agent should apply her own convictions in applying a client's abstract instructions. If she thinks the contrary, why should she not follow her own convictions on that matter rather than my (as she thinks mistaken) views? There may be a good answer. But it will take the form of an even more complex normative theory of agency than the one she first used, and, unless she has a taste for infinite regress, she must decide on her own about the merits of *that* theory.

Exactly the same is true of constitutional interpretation. We must assume that the legal intentions of the framers were honorable rather than cynical. They intended to commit the nation to abstract principles of political morality about speech and punishment and equality, for example. They also had a variety of more concrete convictions about the correct application of these abstract principles to particular issues. If contemporary judges think that their concrete convictions were in conflict with their abstract ones, because they did not reach the correct conclusions about the effect of their own principles, then the judges have a choice to make. It is unhelpful to tell them to follow the framers' legal intentions. They need to know which legal intentions—at how general a level of abstraction—and why. So Bork and others who support the original understanding thesis must supply an independent normative theory—a particular political conception of constitutional democracy—to answer that need. That normative theory must justify not only a general attitude of deference, but also what I shall call an interpretive schema: a particular account of how different levels of the framers' convictions and expectations contribute to concrete judicial decisions.



An example Bork himself discusses—the Equal Protection Clause of the Fourteenth Amendment—reveals the character of the political theory that is needed. Suppose we provisionally accept the original understanding thesis, as a guide to deciding equal protection cases, and therefore set out to collect all the historical information we can about the mental states of the framers of that clause. Suppose we discover the following. All the framers of the Equal Protection Clause believed, as a matter of political conviction, that people should all be equal in the eye of the law and the state. They were convinced that certain specific forms of official discrimination against blacks were morally wrong for that reason, and they adopted the amendment mainly to prevent states from discriminating against blacks in those ways. They agreed, for example, that it would be morally wrong for a state to create certain special remedies for breach of contract and make these remedies available to white plaintiffs but not black ones. The framers assumed that the clause they were adopting would prohibit that form of discrimination.

They also shared certain opinions about which forms of official discrimination were *not* wrong and would not be prohibited by the clause. They shared the view, for example, that racial segregation of public schools did not violate the clause. (Many of them, in fact, themselves voted to segregate schools.) None of them even considered the possibility that state institutions would one day adopt affirmative action racial quotas designed to repair the damages of past segregation; therefore none of them had any opinion about whether such quotas would violate the clause. Some of them thought that women were unjustly treated by laws that discriminated in favor of men. Most did not, and assumed that the gender-based distinctions then common were not outlawed by the clause. Most thought that homosexual acts were grossly immoral, and would have been mystified by the suggestion that laws prohibiting such acts constituted an unjustified form of discrimination.

Bork himself distinguishes four different statements of the legal effect of the Equal Protection Clause, each of which treats the catalogue of information I just listed differently.

(1) The Clause has the effect of condemning all but only the cases of discrimination that the framers collectively expected it to condemn. So understood, the Clause forbids discrimination against blacks in legal remedies for breach of contract, but it does not forbid racially segregated schools, or affirmative action quotas that disadvantage whites, or discrimination against women or homosexuals.

(2) The Clause has the effect of establishing what Bork calls the principle of “black equality,” which holds that blacks must be treated in whatever way the ideal of equal citizenship, correctly understood, actually requires. Judges must therefore decide for themselves whether school desegregation violates black equality. Since the Clause establishes *black* equality, however, judges may not use it to strike down affirmative action quotas or discrimination against women or homosexuals.

(3) The Clause has the effect of establishing a principle of racial rather than just black equality. So, even though the framers of the Equal Protection Clause did not contemplate affirmative action, the Clause they adopted might, on the right understanding of racial equality, nevertheless condemn affirmative action, and judges have the responsibility to decide for themselves whether it does, but judges could not properly maintain that the Clause protects women or homosexuals, because that is a matter of gender or sexual orientation, not racial equality.

(4) The Clause has the effect of establishing a general principle of equality, which requires for all Americans what equal citizenship, properly understood, demands. So, if we assume that the best conception of equality is in fact denied by school segregation, quota systems, and laws that disadvantage people on the basis of sex or sexual orientation, the Clause condemns these discriminations, in spite of what the framers themselves thought or would have approved.

These four accounts are all consistent with the full set of convictions, beliefs, and expectations I assumed the ratifiers had. The four accounts represent not different hypotheses about the framers’ mental states, but different ways of structuring the *same* assumptions about what their mental states were. Each account states a genuine original understanding, but of a different kind or at a different level, and with very different consequences. It is, of course, possible that some of the framers had second-order opinions about the right way to take their own convictions and expectations into account in deciding what the clause they enacted does. It is unlikely that many of them had opinions about that jurisprudential question, however, and vanishingly unlikely that a majority of them had the same opinion about it. But even if they *were* all united in the same opinion, that would simply add one more piece of mental furniture to the inventory we had to consult. We should still have to decide whether and how to take *that* convic-

tion into account in deciding on the legal consequences of their enacting the propositions they did.<sup>7</sup>

In the last analysis it is we—people who in different roles must now decide what the Constitution does—who must decide how the various convictions and expectations of the framers figure in an account of that document's legal effect. We need a normative political theory—a particular conception of constitutional democracy—to justify our choice, and that theory must justify a particular interpretive schema for deciding which of the various mental states I described count and how. It is easy enough to formulate a *reductive* schema that would pick out the first of the four accounts I just listed as a correct account of the force of the Equal Protection Clause. This reductive schema holds that the impact of a constitutional provision is fixed, in an exhaustive way, by the widely shared concrete expectations of the framers, so that the Equal Protection Clause has only the specific consequences they expected it would. If we adopt that scheme, then on the assumptions I described school segregation is not unconstitutional, and the Supreme Court's decision in *Brown* was a flat mistake.

We might compose a political argument, of sorts, for adopting the reductive schema. We might say, for example, that it is crucially important that Supreme Court decisions not depend on the political opinions of particular judges, and that judges should be guided by the framers' concrete convictions, not because judges have any other or better reason for doing so, but just to prevent them from relying on their own beliefs. That is a possible justification, though it is hardly compelling and is certainly controversial. Suppose we reject the reductive schema, however. Then we would need some other interpretive schema to decide which of the four accounts of the meaning of the Equal Protection Clause is the best or most sound one, and we should need to deploy a political theory purporting to justify that other schema as the best one available.<sup>8</sup>

What choice does Bork make? His explicit remarks are wholly unhelpful. He says, for example, that we learn the correct way to choose among different accounts of a constitutional provision's

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<sup>7</sup> See Dworkin, *Taking Rights Seriously* at 133, 226-29 (cited in note 6). The draftsmen deliberately chose a general formulation—"equal protection" shall not be denied to "any person"—rather than limiting the Clause's application to black equality or racial equality. The language itself, read alone, does not suggest the various limitations that Bork places on it; rather, it leaves room for evolving conceptions of what equal protections means.

<sup>8</sup> See generally Dworkin, *Law's Empire* (cited in note 6).

force by discovering what that document, properly interpreted, means.<sup>9</sup>

He adds that we find out what the Constitution means by studying its “text, structure, and history,” (p 162) or by divining the principles its framers wanted it to embody. Presumably he has in mind, when he says we must discover what a clause means, discovering its legal impact, rather than just what it says. But then he begs the question by saying we must consult text, history and structure. We need to know which of the numberless facts about text, history and structure contribute to fixing a clause’s impact and how. Sometimes Bork’s question-begging is spectacular. Here is his reply, for example, to the suggestion I just made, that we must reply on a theory of democracy, or some other controversial political theory, in justifying any particular interpretive schema.

It has been argued . . . that the claim of proponents of original understanding to political neutrality is a pretense since the choice of that philosophy is itself a political decision. It certainly is, but the political content of that choice is not made by the judge; it was made long ago by those who designed and enacted the Constitution. (pp 176-77)

That statement shows the confusion I warned against earlier. We cannot justify appealing to a particular set of convictions on the ground that those convictions support that appeal. We must decide to give effect to the framers’ intention *before* we can be guided by “the political content” of the choice they “made long ago.” And we must decide how to disentangle the principle they enacted from their convictions about its proper application in order to discover the political content of their decision. We cannot coherently assign *these* decisions back to the framers; we must make them, on grounds of political morality, for ourselves.

So we need to turn to Bork’s more detailed discussions of particular cases and problems to discover the interpretive schema he himself uses. On occasion he seems to adopt what I called the reductive schema. He asserts, for example, that the Cruel and Un-

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<sup>9</sup> “The role of a judge committed to the philosophy of original understanding,” he says, “is not to ‘choose a level of abstraction.’ Rather, it is to find the meaning of a text—a process which includes finding its degree of generality, which is part of its meaning . . . .” (p 145) This is opaque advice. The problem a judge “committed” to original understanding has is not deciding what an abstract provision says—it says something as abstract as the words it uses—but deciding what impact it has in concrete cases. He is trying to *establish* the Constitution’s meaning in that sense, and it is no help to tell him that he must *first* discover its meaning.

usual Punishment Clause of the Eighth Amendment cannot be understood as outlawing capital punishment because other parts of the Constitution make no sense except on the assumption that the framers thought that capital punishment was permitted. (p 9) (I return to this issue later.) But he implicitly rejects the reductive schema when he explains that the original understanding method would not condemn the Supreme Court's decision in *Brown*. (pp 81-83) According to Bork, the framers intended to establish a principle of equality, and they simply erred in thinking that equality would not condemn racial segregation. They had inconsistent views, and judges must follow the more abstract of these—the principle they enacted—rather than their own specific views about what that principle required.

Bork rejects the reductive schema explicitly in another discussion intended to show that it is no objection to the original understanding view that the specific opinions of the framers are often unknown. (pp 161-62) He writes that in many cases their collective opinions are not only unknown but non-existent—that often the framers, as a group, had no concrete opinions at all. “Indeed,” he states, “the various ratifying conventions would surely have split within themselves and with one another in the application of the principles they adopted to particular fact situations. That tells us nothing other than that the ratifiers were like other legislators.” (p 163) He does not say that therefore judges have a duty to try, as best they can, to discover the concrete views of the majority of ratifiers. That would be silly, and in any case insufficient, because Bork qualifies his original understanding thesis in another pertinent way. “Though I have written of the understanding of the ratifiers of the Constitution,” he says, “since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean.” (p 144) Presumably “the public of that time” would have been at least as divided about the specific consequences of constitutional principles as were the framers, and it would be preposterous to think that the meaning of the Constitution depends on which concrete view about application, if only we knew it, was the most popular then.

Uncertainty about what the framers thought, or the fact that they likely disagreed, does not matter, Bork says, because a judge is concerned with principles and not with specific intentions:

In short, all that a judge committed to original understanding requires is that the text, structure, and history of the Consti-

tution provide him not with a conclusion but with a major premise. 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. It does not follow without difficulty, and two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing. (pp 162-63)

We should pause to notice what an amazing passage this is. It could have been written by almost any of the people Bork takes to be members of the academic conspiracy against him and the nation. For Bork's analysis is entirely consistent with the view—indeed it seems to *be* the view—I described above, which holds that the Constitution enacts abstract principles that judges must interpret, as best they can, according to their own lights. Bork does say that the principle the judge applies must be one that the framers “wanted.” But once he abandons the reductive interpretation of what they wanted—that they wanted their own specific views realized—once he accepts that the principle they wanted might have *condemned* their own specific views, as in the case of segregation, then he has nothing left to which he can tether an opinion of what they wanted, except the exceedingly abstract language they used.

In any case this passage plainly rejects the reductive schema, and Bork emphatically rejects the first account of the meaning of the Equal Protection Clause does under the historical assumptions I described. In another discussion he insists that under those assumptions the second account would be the correct one, and that the third or fourth would be inappropriate. If there is no evidence that the framers intended to protect whites or women from discrimination, Bork asserts, then although the Constitution contains a principle requiring “black equality,” it does not contain one requiring “the next higher level of generality above black equality, which is racial equality.” (p 149) We therefore could not say that quotas were unconstitutional.<sup>10</sup>

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<sup>10</sup> Perhaps Bork senses that this discussion in effect confesses the emptiness of the original understanding doctrine. For there is much whistling in the dark in the discussion's

Bork never identifies the interpretive schema he relies on in choosing the second and rejecting the third account in this discussion. If it does not matter that the framers and their public thought segregation was constitutional, then why should it matter whether they also thought affirmative action quotas were constitutional? And if that wouldn't matter, then how could it possibly matter that we have no evidence of what they thought about quotas or even that they thought about them at all? Why should we not say that the principle the framers "wanted" was a principle of racial equality and that therefore (if this is what *we* think follows from a principle of racial equality) quotas are unconstitutional? What in the history, except for concerns that Bork has now declared irrelevant, prevents us from taking that line?

Apparently nothing, because in yet a different part of the book Bork adopts exactly this line, without noticing, or at any rate without identifying, the contradiction with his earlier remarks. He endorses the recent affirmative action decision in *Richmond v J. A. Croson Co.*<sup>11</sup> on the ground that the Equal Protection Clause does protect whites as well as blacks; he assumes, then, that the third rather than the second account of what the Equal Protection Clause means is correct despite the absence of evidence that the framers had any opinions about quotas. (pp 107-09) Even on that assumption, he thinks it correct to interpret what they did as enacting a principle of racial and not merely black equality.

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neighborhood. "The precise congruence of individual decisions with what the ratifiers intended can never be known," he writes, "but it can be estimated whether, across a body of decisions, judges have in general vindicated the principle given into their hands." (p 163) Of course that can be estimated. But different judges with different "minor premises" will estimate it differently because the premise will determine what each counts as vindication. "Of at least equal importance," Bork continues, "the attempt to adhere to the principles actually laid down in the historic Constitution will mean that entire ranges of problems and issues are placed off-limits for judges. . . . That abstinence has the inestimable value of preserving democracy in those areas of life that the Founders intended to leave to the people's self-government." (p 163) But the set of issues any judge regards as placed off-limits is fixed by: (1) the judge's view about how best to capture the distinction between principle and application in determining what "the founders intended," which will depend on that judge's interpretive schema; and (2) what the judge considers the appropriate "minor premises" in applying the principle to concrete cases. For example, it is difficult to think of any political controversy that someone armed with the appropriate interpretive schema and set of minor premises would not regard as a matter of equality, and therefore brought within the Constitution by the Fourteenth Amendment. Of course, the Constitution, properly interpreted, did designate many controversies as political rather than constitutional. But this conclusion results from choosing the appropriate interpretive schema, justified by the most attractive foundational interpretation of our constitutional democracy, not by virtue of any consequence of the concept of original understanding itself.

<sup>11</sup> 109 S Ct 706 (1989).

Bork never adopts the fourth summary. That is hardly surprising, for he thinks that the Equal Protection Clause does not apply to gender discrimination (p 329), or to discrimination against homosexuals. (pp 117-26, 250) But once he abandons the reductive interpretive strategy, which limits the force of the Clause to the framers' own specific convictions about what forms of discrimination are incompatible with equal citizenship, then he has no *other* means of checking the abstract language solely by reference to those convictions. He is in a kind of free fall in which the original understanding can be anything, and the only check on his judgement is his own political instincts. That fact explains why he adopts the third account of the original understanding when he explains that the Constitution outlaws racial quotas, the first when he explains that it does not outlaw capital punishment, the second when he tries to show that *Brown* is compatible with this approach (a test any constitutional theory must now pass), and the fourth never—in spite of the fact that he has no independent way to distinguish the fourth from the others. Bork's abandonment of the reductive schema also explains the often circular and opaque nature of his theoretical discussion; where he rejects the reductive schema, Bork has nothing to say.

Consider, in more detail, his argument about capital punishment. Bork claims that we *know* that the Eighth Amendment does not forbid capital punishment because the Fifth Amendment contemplates the death penalty when it forbids that anyone should be "twice put in jeopardy of life" for the same offense, or be deprived of life without due process of law. (pp 213-14) That language does suggest that most of the framers thought it at least an open question whether capital punishment is outlawed by the Eighth Amendment. But we do not need that evidence: it seems incredible, quite apart from the language of the Fifth Amendment, that any substantial number of the framers of the Eighth Amendment thought it outlawed capital punishment, which was then a familiar part of criminal process almost everywhere. If we adopted the reductive schema, therefore, Bork would be right that capital punishment is unquestionably constitutional. But once we abandon that schema, as Bork has elsewhere, his argument collapses. For only that schema makes the framers' concrete opinions decisive in the way the argument assumes.

When we abandon the reductive schema, we may develop the following kind of argument, which I shall state in Bork's own vocabulary. The Eighth Amendment enacts the following major premise: punishments inherently cruel and unusual in the practices of



civilized nations must not be inflicted. The framers did not think the death penalty failed those two tests; in fact, it plainly did not fail the second when the Amendment was adopted, though it probably does now. Whether it also fails the first test now becomes a matter of minor premise that judges applying the Clause must inescapably decide for themselves. On that interpretation, the Fifth Amendment language, which merely confirms what the framers themselves thought, cannot assist judges any more than the fact that the framers of the Fourteenth Amendment accepted segregated schools assists in understanding the Equal Protection Clause.

Holding that the Eighth Amendment forbids capital punishment does not produce any contradiction with the Constitution as a whole. The argument I just described is not that the Eighth Amendment expressly or automatically forbids capital punishment, but rather that the Amendment establishes a principle that under certain circumstances, or connected to certain "minor premises," would have that result. It is perfectly consistent both to adopt such a principle, in its abstract form, and also to insist that if (or so long as) the principle *is* understood to permit capital punishment, the process through which the penalty is inflicted must meet the independent requirements of the Fifth Amendment.

I should now take note of Bork's surprising announcement that he can prove that any method of constitutional interpretation other than the original understanding thesis is "impossible" in the same way that a perpetual motion machine is impossible. (pp 251-53) His "proof" has these steps. First, any method not based on original understanding requires judges to make "major moral choices." Second, judges cannot show that they have legitimate authority to make major moral choices for the rest of the community. Third, in the absence of such authority, judges must only make decisions based on a moral theory the public would accept. Fourth, since people disagree deeply on matters of morality, no such moral theory exists, and judges therefore must not make moral choices. (pp 251-53)

The key step is the second. Bork rejects the position that judges have legitimate authority under our system of government to make controversial and important moral judgments in the course of a good faith interpretation of the Constitution. (pp 176-78, 252-53) But that view—that under the best understanding of our constitutional democracy judges *do* have such authority, legitimately—is very widely accepted. Bork says his view is correct and that the contrary view is therefore wrong. But his "impossibility"

claim suggests he can *prove* that his view is the right one, which of course, since his view *itself* depends on a moral theory many people would reject, he cannot. The only impossibility in this story, in other words, is the impossibility of Bork's rescuing his argument from self-contradiction.

Bork seems to forget, moreover, that on his own account the method of original understanding also requires judges to make controversial moral choices in applying abstract constitutional principles. Bork says these are matters of "minor premise," perhaps intending to distinguish them from the "major" choice he insists other theories require. (pp 162-63) But the examples he offers—the question whether school segregation denies equal protection, for example—show that these choices are sufficiently "major" to cause great concern if judges really have no legitimate authority to make them.

I conclude that Bork's defense of the original understanding thesis is a complete failure. The right-wing lawyers and politicians who have embraced the thesis with such passion and delight have always assumed—indeed they *must* assume—that it includes what I have called the reductive schema, according to which the Constitution imposes no limit on majority will beyond what the framers themselves would have expected. But Bork's confirmation hearings made plain that he had to abandon that reductive schema, because it would condemn *Brown* (despite Bork's assertions to the contrary) and other constitutional principles America would not now give up. He can offer nothing in its place except unelaborated, dead-end claims about the "meaning" of the "text, structure, and history" of the Constitution. He has transformed the original understanding thesis into a platitude anyone can accept and use to justify almost any result. Some other conservative legal scholar might succeed further with the idea of an original understanding than Bork has. But until someone does we are entitled, on the evidence of this book, to store the theory away with phlogistonism and the bogeyman.

### III.

Bork wants his public to regard constitutional law as a simple matter, to accept that a good lawyer needs only plain common sense, innocent of any complicated theorizing, to know what the Constitution requires. Here is a sample: "Of course the judge is bound to apply the law as those who made the law wanted him to. That is the common, everyday view of what law is. I stress the point only because that commonsense view is hotly, extensively,

and eruditely denied by constitutional sophisticates, particularly those who teach the subject in the law schools." (p 5)

"Sophistication" and "philosophy" are often mentioned in *The Tempting of America*, but never with approval. Law professors who appeal to philosophy, literary theory, or other complicated disciplines are treated as charlatans. They write in pretentious and mystifying jargon, and they often refer to foreign, and sometimes Marxist, writers. Gullible judges pretend to understand. But Bork knows that the academic emperors have no clothes; he assures his audience that their theories are nonsense and can safely be ignored. He regards with hilarity the suggestion various professors make, that the work of Foucault or Rawls or Habermas or some other philosopher has a bearing on constitutional law. He argues, as I noted earlier, that the complexity of contemporary constitutional theory, and its attempt to find connections with areas of knowledge outside law, is a sign that constitutional law is sick.

One is tempted to dismiss these statements as mere crowd-pleasing anti-intellectualism with perhaps a tinge of personal ludite smugness. Even Bork's own discussion of constitutional issues betrays much more "sophistication" than his imitation of Dr. Johnson kicking a stone to refute Berkeley's idealism suggests. But from Bork's tone of voice as well as his explicit claims, we can construct a further, unstated but implicit argument for his constitutional views. In a decent society (one might say) the public as a whole understands and accepts the basic principles of government. So the standards judges apply to decide what the Constitution means should be those the public as a whole can easily grasp. The original understanding thesis, Bork claims, is a simple matter of common sense. More complicated ideas—that the Constitution enacts concepts not conceptions, for example, or that understanding it requires constructive interpretation in which moral argument figures—draws on ideas, distinctions, and experiences that are not common stock in the Republic. This observation explains why constitutional law really is in a healthier state—better suited to ideals of participation and shared understanding—when it is simpler, less dependent on febrile academic argument. On this account, the death of complex constitutional theory would be a tribute to rule of the people. (pp 134-38)

But this argument misunderstands the academic critique of the original understanding doctrine. The law professors Bork distrusts do not argue that the original understanding thesis, though simple, easily grasped, and widely appealing, should defer to some exotic metaphysics. They point out, as I did in the last section,

that the idea of an original understanding is much more complex than it first appears, that no single understanding exists, and that the idea, when treated as simple, serves only to allow judges to treat their personal political convictions as neutral constitutional law. If an attractive and coherent political morality is also simple and easily understood by a wide public, that accessibility is a strong, though not necessarily decisive, argument in its favor. It does not follow that a bogus theory should survive just because it seems simple.

Nor can we put limits in advance on the depth and complexity of philosophical discussion in legal writing. Of course, academic lawyers should not set out (as I fear some do) to parade their knowledge as if it were part of law's business to provide theaters for interdisciplinary performances. But legal doctrine is inevitably philosophically *exposed*. Its proper business forces it to use the concepts of will, intention, meaning, responsibility, justice, and other ideas that are frequent sources of philosophical complexity and confusion. Academic lawyers cannot avoid philosophy—it goes with the territory—though of course they can do it badly and ignorantly. It is irresponsible for a lawyer to insist that the concepts of meaning and original intention should occupy the center of constitutional practice and then ignore the revolution in our understanding of those concepts in this century. He cannot pretend that Wittgenstein or Donald Davidson, for instance, had never written about mental events.

I know that these remarks raise many problems for and about both legal practice and academic law. It seems irresponsible, as I just said, for lawyers to ignore philosophical discussion of the concepts they treat as central to their work. But it is also true that most lawyers and judges, and indeed most legal scholars, have no time for serious study of technical philosophy. I hope to take up that dilemma on another occasion. I want now, however, to contest the assumption on which Bork's view, reconstructed above, rests: that the general public cannot understand a basic structure of government within which lawyers argue and judges decide issues of philosophical depth. There is nothing abstruse or even unfamiliar in the notion that the Constitution lays down abstract principles whose dimensions and application are inherently controversial, that judges have the responsibility to interpret those abstract principles in a way that fits, dignifies, and improves our political history, and that judges with that arduous responsibility should be encouraged to take account of and reflect on the work of others who have thought and written about those difficult matters.

It is of course a further, difficult and complex question what counts as the correct way for judges to exercise their great responsibility. That further, difficult question is what the real academic debate is now about. The debate is not, contrary to Bork's suggestion, mainly conducted in arcane jargon, and it only occasionally draws explicitly on technical philosophical argument. It is true that not as many people can follow this debate as can understand the more general view of judicial responsibility that sponsors it. But that fact is hardly surprising or disturbing. Not as many people can follow intricate discussions of tax economics as can understand that Congress has the responsibility to set tax policy and to consult and listen to experts when it does.

The constitutional debate in the law schools and in the political community as a whole would cease, or become much less lively, if people came no longer to think of the Constitution as an abstract commitment to political ideals, if they did settle into some deadening illusion of an original understanding in which the major questions were all answered. That would certainly make constitutional law less democratic, in the sense of less participatory. Bork's odd thesis that controversy reflects the decay of constitutional theory is another product of his rigid, parochial, and depressing account of the proper nature of law.

