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THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW. By *Robert H. Bork.* New York: The Free Press/Macmillan. 1990. Pp. xiv, 432. $22.50.

Robert H. Bork's restless spirit has agitated the American legal community for more than a generation, and this book seems certain to assure that that will continue. *The Tempting of America* is a testament to what has been apparent for years to those who have followed Bork's interesting, ambitious career — that is, that he is in love with the law, and that he hates the law: he loves its nearly limitless creative possibilities, but he hates what others — especially academics — do with those possibilities. He always has looked to the law as an engine of advancement for his own career, and for his own ideas about what society's ordering arrangements should be and should do. But he has come, especially in more recent times, to a rude, even coarse intolerance of what the law has done for the careers of others, those who are of different instincts, imagination, and morality, and to a similar intolerance of what the law so often has been declared authoritatively to be.

In the arenas of intellectual and professional combat over the law that have been most important to Bork — the academy and the courts — he has been an energetic battler, but he has not often been able to declare himself the winner in the simplistic way that he apparently would like: he has not been able to control the outcomes, and, as a result, he has seen the law go off in directions that have made him deeply uncomfortable (and, seemingly, sorely afraid that things might never be different). This book was intended to be a treatment of that struggle, in what Bork surely must have hoped would be scholarly and convincing terms. But this book bespeaks such a seething anger, such a scalding fit of temper, and such a soaring arrogance that it is — finally — very hard to take seriously as scholarship, and it is even somewhat difficult to take with complete seriousness as public discourse.[1]

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1. The excesses of the book, understandably, have cheered his dedicated followers, who for some time have believed in the fundamental political necessity of raising their voices about the course of American consitutional history. Declares cheerleader Patrick B. McGuigan: "This book will change the course of history." McGuigan, *Book Review Essay: Bob Bork's America,*

The law can be, and very often is, discussed with passion and with intensity, and the debate is enriched, not diminished, by that. This book most assuredly is passionate. It is fully capable of exciting and arousing what Bork sees very plainly as the other side in the struggle; it cajoles, it taunts, it even goads. And if it were confined to that, one could read it with delight and discovery. But Robert Bork is not content to stop at provocative stimulation. He is so enamored of his own rectitude that he seems to be saying that it would make no difference whether there were another side willing to engage him. Bork seems prepared only to declare, not to persuade. If the debate about what American law is, and what it ought to become, is to continue in any meaningful way, there simply must be some underlying, even if unstated, understanding that all of the right does not necessarily lie on one side, and that the other side, however wrongheaded its assertions may seem, is animated by good will and sincere purpose. Such an understanding clearly is foreign to this book. One hopes that it is not entirely foreign to Robert Bork.

It would be easy, perhaps even tempting, to subject this book and its author to a dose of pop psychoanalysis and find in them only the residue of deep anger and resentment produced by Bork's ignominious defeat in 1987 as a nominee for the U.S. Supreme Court — a defeat, painful enough in itself, made more acutely hurtful by coming in a year of what was supposed to have been nationwide constitutional celebration, combined with the final triumph of what might be called "Reagan jurisprudence" at the Court. Knowing how long Bork had been imagining himself to be an Associate Justice, and how inevitable an entire generation of Court-watching journalists had made that seem to be, Bork could be forgiven for his thoroughly genuine wonderment at the final fall, and he could even be forgiven for believing (as he does) that it was done to him solely by a huge conspiracy of the Left. In short, he was angry enough then to write a book such as this one. (Indeed, audiences that have heard him on the speaker's circuit lately know well that the anger has not diminished one whit in the more than two years since.)

But it will not do to try to explain this book that way. This is what Bork has been waiting to say (or has been saying piecemeal) for years and years. The ideas had been in gestation long before Bork's nomination to the Court, years before even the intelligentsia in Washington

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FAM., L. & DEMOCRACY REP. Jan. 1990, at 6, 8. Finding it to be a volume of "wit and perception," thus turning its emotional hyperbole into subtle virtues, McGuigan predicts that the book

> will convince increasing numbers of Americans that Robert Heron Bork is one of the giants of our era — in many ways the closest thing we have in this generation to James Madison. Bob Bork is a uniquely American character, the intellectual former Marine who stood for us in the pass at Thermopylae, buying time so we might prepare the legal defenses, and even make careful plans for constitutional restoration.

Id. at 8.

had bothered to pay any serious attention to "originalism" as constitutional theory, years before Bork would emerge from the groves of learning to make his claim to be taken seriously in the public domain as a constitutional scholar. After reading this book, one is inclined to think that this is what those who fought his nomination to the Court would have said they were really fighting against, had they become as familiar with Bork then as this one volume would have made them. Then, his challengers had relied upon fifteen years of prior (and not always relevant) writings. This book, in a way, tends to validate what happened in the Senate and in the political community outside the Senate, because it moves beyond all of the tactics of Media Age political hype and manipulation used against him[2] and puts the focus squarely where Bork had wanted it all along — on his manner, his ideas, and his agenda. This revelation of the real Bork, in his own words, would have served the opposition as nothing it had gathered before did or could have. This is a manifesto, a summons, an aching plea for America to see the law as Bork insists that it must be seen, but it ultimately becomes an unintended explanation of why he is not now on the Court. (Indeed, this book is vastly more revealing even than Bork's personal, televised testimony before the Senate Judiciary Committee, because the courtesies required there — and his own attempt at self-restraint to improve his confirmation chances — masked the full measure of his views and, even more importantly, largely obscured the nature of his difficult personality.)

It is simplistic to see *The Tempting of America* as no more than a tome about "originalism," and, if it were only that, it would be mindless (as well as quite out of date) to criticize it. In this era of the "Rehnquist Court" (or, to put it more accurately so as to pinpoint that institution's true present character, the "Scalia Court"), there is no sense pretending that "originalism" was at stake in the Bork nomination and went down with it, as some of Bork's detractors seem to believe (and as some of the anxious sentiments in this book might imply). "Originalism" will continue to be the emergent, and frequently the dominant, jurisprudential approach of the Court at least through the remaining days of its present membership and, very likely, well beyond. And, indeed, there is no reason to act as if "originalism" were bad stuff just because Bork espoused a version of it (or just because former Attorney General Edwin Meese said he, too, was for it). It is purely respectable constitutional theory, and it can be both interesting and compelling. The search for what the Framers had in mind — especially, what they ordained as the structure of American constitu-

2. For a revealing (if undramatic) look behind the scenes of the opposition to Bork, see M. PERTSCHUK & W. SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION (1989); *see also* Ethan Bronner's readable account, *Battle for Justice: How the Bork Nomination Shook America,* which is reviewed by Professor Terrance Sandalow in this issue.

tional government — and a keenness on being faithful to the mandates which that search reveals, ought to be some part of every judge's machinery of constitutional interpretation.

It is possible, moreover, to argue "originalism" without being ill-humored about it. Antonin Scalia does that much of the time; indeed, Scalia's use of that theory as the ground for a constitutional decision is often an intellectual delight to behold. In this regard, one recalls, readily, his opinion in *Michael H. v. Gerald D.*,[3] a declaration well worth studying for its articulation of theory, no matter how one may feel about the specific result. (Scalia, of course, has been known to lose his temper when confronted by a stubborn refusal by a colleague to embrace a particular "originalist" result,[4] but that is quite uncommon; his usual tactic with those who remain unconvinced by his argument is to resort to quite agreeable sarcasm.)

Bork's treatment of "originalism" in this book is, in some ways, cleverly disarming. As he summarizes that theory in Chapter Seven, he is logical and even quite convincing about it (pp. 143-53). Of course, one must look past the unpleasantly argumentative tone, but that is fairly easy to do — at least in this chapter. The full flavor of Bork's "originalism" and its total saturation with his strained sense of personal morality and social propriety become plain, however, only when he undertakes to discuss alternative theories of constitutional interpretation, and then assigns to them the blame for the moral malaise he sees infecting the nation. It is only when the reader confronts Bork's entire discussion that his moral agenda stands out starkly; only then does the "temptation" theme take on the real meaning Bork intended for it.

Thus, what distinguishes Bork as an "originalist" is what distinguishes this book: it combines a closed system of antique moralizing (disguised in a respectable costume of eighteenth-century constitutional finery) with a snide, dyspeptic denunciation of nearly the entire history of American constitutional jurisprudence and of anyone who might be prepared to apologize for it. Anyone who came away from the public fight over Bork's nomination to the Court with the sense that he was simply discontent with the outcomes declared by the

3. 109 S. Ct. 2333 (1989) (divided Supreme Court upheld against due process challenge of putative natural father, and due process and equal protection challenges of child, a California statute creating presumption that a child born to a married woman was the child of the marriage if, at the time of the birth, the woman was living with her husband).

4. Scalia's scathing denunciation of Justice O'Connor in Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3064-67 (1989), was a kind of Borkian intolerance run riot. Although Bork does not say so in his book, one may assume that he would have approved of Scalia's attack, so rabid is Bork in his hostility to Roe v. Wade, 410 U.S. 113 (1973). Says he in the book: "[N]o one, however pro-abortion, has ever thought of an argument that even remotely begins to justify *Roe v. Wade* as a constitutional decision. . . . [T]he decision was the assumption of illegitimate judicial power and a usurpation of the democratic authority of the American people." Pp. 115-16.

"Warren Court" or was simply out of the present-day constitutional "mainstream" must read this book to see, with utter clarity, how deeply Bork is persuaded that almost no one else, ever, has gotten the Constitution right.[5] But what is even more astonishing about this book is its overheated Know-Nothingism: anyone who would dare to speculate, afresh, about the meaning of the Constitution is found, by that fact alone, to be propagating illegitimacy. Chapter Twelve, for example, declares hyperbolically in its heading *The Impossibility of All Theories that Depart from Original Understanding* (p. 251), and Bork smugly declares a few pages later his "firm intention to give up reading this literature" of alternative theory (p. 255). Bork's attack on creative learning and speculation, on intellectual endeavor, would do credit in its brutishness to a stevedore or a "redneck."

Indeed, the reader is almost embarrassed by the opening pages of the core of the book, dealing with theory (pp. 133-38), where Bork foolishly suggests that the mere volume of constitutional theorizing alone tends to prove that all of it must be unworthy. "Self-confident legal institutions," he says, "do not require so much talking about. If this is so, then the rising flood of innovative theories signifies not the health of scholarship and constitutionalism but rather a deep-seated malaise and, quite possibly, a state of approaching decadence" (p. 133). A "redneck" would not put it that way, but would surely agree if that same thought, that the expenditure of intellectual energy is a hedonistic endeavor, were put in homelier terms. In fact, like so many passages in the book, that one, with its choice of words and negative imagery, is deeply telling. The word "decadence" is the most telling of all. Its use helps to resolve an early riddle that the reader confronts — a riddle which simply must be solved before this book's essence becomes clear.

As the reader moves into *The Tempting of America,* a disquieting sense begins to develop. The acerbic tone is a problem, a very serious problem. And the fundamental premise of the book — that American law has been "seduced" by politics — has a little too strong a hint of peekaboo smut to it, especially when that theme is warmly exploited, page after page. The combination is troubling, but it is not immediately clear why. Sensing a creeping discomfort, the reader starts to wonder, is it because I am reacting to the sound of this, or to the substance? One gets the idea, in the very first pages of the introduc-

5. Bork's grievance goes all the way back to 1798, and Calder v. Bull, 3 U.S. 386 (1798). Preparing to denounce Samuel Chase, Bork begins chapter 1 thus: "The Constitution was barely in place when one Justice of the Supreme Court cast covetous glances at the apple that would eventually cause the fall." P. 19. (The imagery of sexual temptation, of course, begins at the beginning for Bork.) Even the great John Marshall does not escape Bork's punishing lash. The gestures of complaint are less harsh and shrill, but the message nonetheless emerges: Marshall could not cut it either. Pp. 20-28.

tion,[6] that Bork is unburdening himself of gut feelings as well as thoughts about morality, and his reactions and declarations seem to deal with a kind of pinched morality — a vague disquiet over the relaxation of traditional taboos which govern behavior and conduct. Victorian rigidity?, the reader speculates. Is temptation, by definition, a sin — especially when it is temptation discussed in the vernacular of sexuality? In time, that kind of speculation proves to be close to the reality of this book's evangelical message: this is Elmer Gantry gone to court, preaching in apocalyptic terms of constitutional hellfire and damnation. The old ways of the law were good enough for our grandparents, Bork seems to say, so why not leave all learning about the law well enough alone?

Bork's pervasive message becomes clear and bold: he is talking about "moral relativism" (p. 246), and how the courts are to blame for that (as the sometimes willing, sometimes unwitting captives of the loose morality of the Left, originating among the "modern liberal elites" (p. 214), especially in the demonstrably decadent law schools). His entire argument about the proper way for courts to interpret the law is not, in the end, an argument for a preferred structural arrangement originating in the Constitution. Rather, it is Bork's relief as he contemplates a day when "almost unlimited personal autonomy" (p. 249) and "rampant individualism" (p. 246) are held in check by the electorally sensitive legislature, left alone by the courts.

The emotional and ideological heart of this book is located in the mere ten pages (pp. 241-50) of Chapter Eleven, *Of Moralism, Moral Relativism, and the Constitution.*[7] There, he dissects "a powerful American subculture whose opinions differ markedly from those of most Americans" (p. 241), "a unified adversarial culture within our general culture" (p. 245 n.*), which embraces values borne of "egalitarian or redistributionist ethos" (p. 245). Yet perhaps its worst sin is that this "segment of our culture emphatically denies the right of majorities to regulate abortion, homosexual conduct, pornography, or even the use of narcotics in the home" (p. 245). The reader's memory runs quickly to the political adoration of "Middle America" as the source of right-thinking values which contrasts so vividly with Eastern or Californian cultures, with their "me-ism" and other hedonistic ex-

6. Before reading two pages into the introduction, the reader has encountered such phrases as these: "the moment of temptation is the moment of choice" (p. 1), "[t]o give in to temptation" (p. 1), "the song of the tempters" (p. 2).

7. An admirer of this book, Washington Post Writers Group columnist Edwin M. Yoder, Jr., has suggested that Bork's attack on "the cultural and moral relativists" is "the least persuasive strand of what is otherwise a compelling argument." Yoder, *Robert Bork: The Trouble With the Law*, Wash. Post, Nov. 19, 1989, Book World, at 3, col. 1. Yoder, one of journalism's most distinguished and gifted analysts of the Court, is certainly right about that. But he is totally wrong in suggesting further that this strand "is not exactly essential to Bork's theory of jurisprudence." *Id.* The entire structure of Bork's argument about political "seduction" of the law is built upon these moral perceptions, and, for Bork, they alone give "originalism" its essence.

cesses; some readers, too, will be reminded of George Bush's fear-mongering preachments during the 1988 presidential campaign against the American Civil Liberties Union and that "L" word.[8]

There is much in this book, explicitly and between the lines, about the grand division of America into camps of Left and Right; Bork spells it out very directly on one of the concluding pages. That division is perceived to be a "war in both our legal and general culture" that will continue to be waged, with "more blood at the crossroads where law and politics meet" (p. 343). The language is political or martial, but the message, fundamentally, is that of morals, and Bork can be heard repeatedly — above the subtlety of theoretical constitutional expression — summoning his followers to a holy war. Yet he disingenuously seeks to suggest that the fight in the Senate was not about him but rather centered on "the issue of whether the Court would become dominated by the neutral philosophy of original understanding and thus decisively end its long enlistment on one side of the war in our culture" (p. 343).

To Bork, his brand of "originalism" is neutral in character only because he insists that it is devoid of moral preference. But the degree to which he insists upon judicial abdication — a renunciation of constitutional authority that is breathtaking in its scope — suggests that he is only troubled about the moral preferences which courts have chosen (really, throughout American history) and yearns for the reestablishment of traditionalist values in representative assemblies.

An unarticulated premise of Bork's whole approach is that judges and courts have no accountability, moral or otherwise, for the real consequences which emerge from acts of legislatures or the executive in the face of determined judicial abstinence or abdication. Yet, law itself may be thought of as an abiding moral expression, and it is brought to bear frequently, one supposes, precisely because there are some ultimate questions upon which the political winds cannot be trusted to blow fairly. To turn a constitutional question presented for decision into a political question, by perverse avoidance, is almost to invite trifling with the moral expression in law. A judge who refuses to use judicial authority, especially constitutional authority, which does exist (even if its existence is an arguable proposition) is a judge who has made a choice to let known or at least predictable consequences flow elsewhere in the governmental structure — that is, consequences flowing from democratically elected and accountable legislatures. It is simply choice by another name,[9] and Bork cannot pretend that it is not a choice at all merely because he, as a theorist,

8. Not surprisingly, the ACLU comes in for some explicit denunciation by Bork for its central role in the "left-liberal culture." Pp. 243-45.

9. Has any serious student of the law, or of morals, ever sought to argue, for example, that the mythical Justice Tatting made no moral election whatsoever when his astonishing abdication from decision in *The Case of the Speluncean Explorers,* meant a 3-3 tie, thereby allowing Profes-

would contend that the particular use of the power would have been illegitimate. Consequences follow the choice to withhold judicial authority, as they do all choices.[10]

Robert Bork, the "originalist," steps out of this book as a stiffly proper, hard-shell, fundamental moral literalist who harangues the courts for having cheated America of her innocence. He is unable to disguise, behind constitutional theory, his passionate desire that legislators be left free to take whatever steps they deem appropriate to regulate some of the most intimate and private activities of human life, with no check save the quite remote possibility that an electoral majority might somehow grow disgruntled with the enactment of its very own value system! Thus, for him to analyze "originalism" by his definition as if he were guided by neutral moral preferences is to oversimplify so extravagantly as to tax the reader's credulity.

Simplistic reasoning, in fact, is quite notably a main feature of this book. Subtleties or gradations in constitutional thinking are made to disappear in the Borkian world, as everything gets cut along a hard and fast line of separation — essentially, his constitutional system versus virtually everyone else's. The "cultural war" most clearly described in this book is not, as he suggests, between the Left and "originalists," or even between constitutional Good and Evil. Rather, the war is between Bork and decade upon decade of established constitutional history, which is subjected repeatedly to pained and even shrill complaint.

The constitutional system on his side of that war is shown to be essentially closed, one in which he alone writes the rules and the definitions. He tosses off declarations, in tones of profundity, which turn out — upon close examination — to be mere prejudices, made to suit his moral and political notions. For example, he pontificates that "one thing our constitutional orthodoxy does not countenance is a judiciary that decides for itself when and how it will make national policy, when and to what extent it will displace executives and legislators as our governors" (p. 153). Notice the way in which thoroughly debatable propositions become unarguable conclusions by mere declaration:

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sor Lon Fuller's four explorers to be put to death for murder? Fuller, *The Case of the Speluncean Explorers,* 62 HARV. L. REV. 616, 626-31 (1949).

10. One wonders how many guffaws or snickers were heard privately in the lobbies of the Louisiana legislature when the anti-abortion bloc there — probably the most militant in any legislature in the nation — heard of Chief Justice William Rehnquist's reassuring comments, in Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989), that the Court's partial withdrawal of constitutional protection for abortion rights was not an invitation for the enactment of "abortion regulation reminiscent of the dark ages." 109 S. Ct. at 3058. Within the very week after the *Webster* decision, the Louisiana Legislature told district attorneys across that state to begin enforcing an 1855 law which banned abortions in all circumstances, even to save the life of a pregnant woman — a law that had been enjoined as unconstitutional since 1976. *See* Marcus, *Louisiana Moves Against Abortion,* N.Y. Times, July 8, 1989, at A7, col. 4. (The effort faltered in the first test case, Weeks v. Connick, Civil Actions 73-469, 74-2425, 74-3197 (E.D. La. Jan. 23, 1990) (Westlaw, Unreported Dist. Ct. Cases).

"decides for itself," "make national policy," "displace . . . our governors." It is easy to win an argument when one undertakes courageously to slaughter defenseless strawmen. But that is not scholarship; it is not even fair debate.

It surely is not the least arrogance on display in this book that Bork suggests that all constitutional adjudication must be based upon a complete philosophical system (and, of course, his system alone is free of error). The case he seeks to make for a wholesale withdrawal of judicial power to interpret the Constitution rests entirely upon the need for a unitary constitutional principle, incapable of growth and maturation, enduring (one supposes that he thinks it is eternal), unchangeable. The severity — nay, the impossibility — of that proposition in an open and changing society is manifest. His longing for a constitutional yesterday that, in fact, may never have existed in America drives Bork to this desperate end. It is, surely, quite a fall.