BOOK REVIEW

The Tempting of America: The Political Seduction of the Law, ROBERT H. BORK, The Free Press, New York, New York and London, England, 1990, pp. 432.

Anthony K. Modafferi, III *

When President Reagan announced his nomination of Judge Robert H. Bork to the United States Supreme Court in the summer of 1987, few realized that the nomination would provoke such fiery opposition. Yet, Senator Edward Kennedy's televised speech, made forty-five minutes after President Reagan's announcement, presaged the bloody battle to ensue:

> Robert Bork's America is a land in which women would be forced into back-ally abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim or [sic] government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.[1]

Senator Kennedy's speech was merely "the opening salvo" in an orchestrated political campaign mounted by a coalition of liberal interest groups. That Judge Bork's ideas were subject to grotesque distortion, that his record and previous writings were misrepresented by the press and others, is conceded by liberal and conservative alike.[2] After Judge Bork's nomination was defeated by the

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* Partner, Pressler & Modafferi, Hackensack, New Jersey; B.S., Seton Hall University 1982; J.D., Seton Hall Law School 1985.

[1] 133 CONG. REC. S9188 (daily ed. July 1, 1987) (statement of Sen. Kennedy).

[2] Indeed, as John Patrick Diggins noted in a review of Judge Bork's book:

> [I]t appeared the nation's highest bench was about to gain a first-rate mind, a scholar who would give intellectual substance to its decisions. Judge Bork was already well known for his conservative views, which favored judicial restraint, Congressional prerogative and local control, and it seemed he would be confirmed with the same ease with which Mr. Reagan had been re-elected president in 1984. Then the anti-Bork forces galvanized their followers effectively and liberals enjoyed a rare success in seeing the Senate reject the nomination. A victory won at the expense of truth, it was not liberalism's finest hour.

Diggins, *The Judge Pleads His Case*, N. Y. Times, Nov. 19, 1989, § 7 (Book Review), at 15, col. 1.

The Wall Street Journal reported, in its Review & Outlook column, that the

Senate, he resigned from his position as a judge of the United States Court of Appeals for the District of Columbia Circuit to "speak, write, and teach about law and other issues of public policy more extensively and more freely than [was] possible [as a judge]."[3]

In a provocative, forcefully argued treatise entitled *The Tempting of America: The Political Seduction of the Law*, Judge Bork defends his theory of judicial review with aplomb, and vigorously explores the appropriate limits of judicial power in the face of what he perceives is a dangerous reversal of constitutional values.[4] To Judge Bork the Supreme Court has achieved a position of unhealthy dominance in our governmental system, in part, as a result of a war for control of our legal culture.

In a nutshell, Judge Bork's thesis is that the Supreme Court has acquiesced in the temptation[5] of political judging by transporting into the Constitution the principles of a cultural elite[6] that has re-

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Book of the Month Club elected to offer Ethan Bronner's account of the Bork nomination, *Battle for Justice*, rather than carry Judge Bork's book. The article continued to note that anti-Bork groups sent broadcasters and editors suggested questions to be asked of Judge Bork. Finally, the Journal reported that NBC cancelled an appearance of Judge Bork scheduled to coincide with the publication of *The Tempting of America*, citing a previous interview with ABC 22 months earlier as the reason.

[3] R. BORK, THE TEMPTING OF AMERICA 317 (1990).

[4] In this regard, Judge Bork contends that "a major heresy has entered the American constitutional system" through the dislocation of an important aspect of our scheme of government. "The heresy that dislocates [our constitutional system] is the introduction of the denial that judges are bound by law." R. BORK, *supra* note 3, at 4.

[5] For Judge Bork this "moment of temptation" in the law is "when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his vision of justice and abiding by the American form of government." *Id.* at 1.

Judge Bork offers a solution:

> The democratic integrity of the law, however, depends entirely upon the degree to which its processes are legitimate. A judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result. Those who would politicize the law offer the public, and the judiciary, the temptation of results without regard to democratic legitimacy.

Id. at 2.

[6] Judge Bork, believes that an umbrella of elites seeks to impose its political agenda which it cannot achieve at the polls (read democratically) through the "politicization" of the courts. Judge Bork presumes that the politicization of the courts is part of the larger crisis facing American institutions. In the introduction to his book, he states:

> In the past few decades American institutions have struggled with the temptations of politics. Professions and academic disciplines that once possessed a life and structure of their own have steadily suc-

peatedly sought and failed to achieve its agenda through the normal majoritarian process. Thus, Judge Bork believes that the Supreme Court has usurped the prerogative of the legislative branch of our government.[7]

The book is divided into three parts. The first part is primarily a survey of Supreme Court opinions dealing with issues which Judge Bork maintains reveal the historical scope and nature of judicial review in shaping constitutional theory.[8] Judge Bork's examination of

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> cumbed, in some cases almost entirely, to the belief that nothing matters beyond politically desirable results, however achieved. In this quest, politics invariably tries to dominate another discipline, to capture and use it for politics own purposes, while the second subject . . . struggles to maintain its independence. But retaining a separate identity and integrity becomes increasingly difficult as more and more areas of our culture, including the life of the intellect, perhaps especially the life of the intellect, becomes politicized. 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.

Id. at 1.

[7] Judge Bork reasons that in the contest between law and political expediency, the law will inevitably lose its legitimacy. He believes that what is at stake is representative democracy: "When the Supreme Court invokes the Constitution, whether legitimately or not, as to that issue the democratic process is at an end." *Id.* at 3.

The proper role of the court according to Judge Bork is

> to apply the law as it comes to [the judges] from the hands of others. The judiciary's great office is to preserve the constitutional design. It does this not only by confining Congress and the President to the powers granted them by the Constitution and seeing that the powers granted are not used to invade the freedoms guaranteed by the Bill of Rights, but also, and equally important, by ensuring that the democratic authority of the people is maintained in the full scope given by the Constitution.

Id. at 4.

Judge Bork continues by noting that insofar as federal judges are given life tenure for the purpose of insulating them from the popular mood of the nation they must conduct their vital role "bound by law that is independent of their own views of the desirable. They must not make or apply any policy not fairly to be found in the Constitution . . . ." How else, Judge Bork asks, "are we to be guarded from our guardians." *Id.* at 5. Judge Bork answers: "If it were otherwise, if judges were accountable, the people could, when the mood seized them, alter the separation of powers, do away with representative government, or deny basic freedoms to those out of popular favor." *Id.* This ignores the fact that judicial appointments are inextricably linked to political connections.

[8] *Id.* at 15-132. Judge Bork posits that judicial review as a matter of constitutional jurisprudence is the focus of a continuous struggle between competing theories of constitutional adjudication largely based upon political considerations. Constitutional theory centers on the institution of judicial review, the power and corresponding duty of a court to pass upon the validity of legislation in relation to a "higher law" which is regarded as binding upon the legislature and the court. In American constitutional jurisprudence this higher law is the documentary constitution of the United States. Thus, it is through the agency of judicial review that the documentary constitution is given meaning. Early on in American constitutional

the historical antecedents of today's judicial activism is, therefore, based upon his evaluation of 200 years of Supreme Court jurisprudence. In the second part of the book, Judge Bork makes the case for his theory of judicial review, which he calls "original understanding."[9] For Judge Bork it is the only theory of judicial review which fits into the matrix which is our constitutional form of government.

Judge Bork writes with a clarity of purpose and in a style free of complex technical legal terminology. Inasmuch as this book is essentially aimed at a non-lawyer audience, his book must be rated a success from the standpoint of accessibility. Obscure legal concepts are made clear through simple but lucid prose which keeps the reader interested in the subject matter.[10] Judge Bork's approach to judicial review is strongest where other theories fail. He articulates the central problem for constitutional courts; the so-called Madisonian dilemma: How do we reconcile the rights of the majority to rule by force of their numbers against the right of the individual to be free from majority rule? Judge Bork addresses contemporary revisionist theories which to his way of thinking have sought to justify the increasingly political behavior of the Court. By exposing these theories to rigorous evaluation, Judge Bork hopes to persuade the reader that they all end up in the same place—the subjugation of the democratic ideal to a despotism of the judiciary. What is especially alarming to Judge Bork is that the judiciary is influenced by an elite minority whose views are not representative of the majority of the electorate. These elites have their voice in liberal law academics. In the words of Judge Bork, "it is the enterprise of the large majority of this intelligentsia [mostly liberal law professors] to justify the polit-

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jurisprudence Chief Justice Marshall elaborated that it is the duty of the courts when confronted with a conflict between an act of the agents of the people (the legislature) and an act of the people themselves (the Constitution) to follow the latter. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). Alexander Hamilton had earlier suggested in *The Federalist* that the supreme will of the state did not repose in the legislature, but rather in the people and their Constitution.

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred to the statute, the intention of the people to the intention of their agents.

THE FEDERALIST No. 78, at 395 (A. Hamilton)(G. Wills ed. 1982).

9 R. BORK, *supra* note 3, at 133-265.

10 Indeed, Judge Bork's examination and interpretation of the Supreme Court decisions in the first part of his book would serve as an excellent primer to the traditional first year course in Constitutional Law taught in law school.

ical behavior of the Court in the past and to provide theories that will draw the Court even further along the path of left-liberal Constitution rewriting."[11]

Judge Bork's treatment of the various revisionist constitutional theories, which he states are "regnant in the law schools," is illuminating. He laments the profusion of "books, articles, and symposia" on constitutional theory. Judge Bork contends that modern commentators have unnecessarily complicated the Constitution. Argues Judge Bork, "[t]heir concepts are abstruse, their sources philosophical, their arguments convoluted, and their prose necessarily complex."[12] This section should be of interest to the non-lawyer and specialist alike, for Judge Bork delves into the realm of academia and gives the reader a taste of what is going on in the Nation's best law schools. We are treated to a plethora of legal philosophies prevalent in the law academies.[13] In a somewhat humorous passage, Judge Bork relates the complexities of modern constitutional study:

> To understand the new constitutions being built in the law schools, it is necessary to be a philosopher, at least an amateur one. . . . [S]ince many of the professors regard themselves as philosophers, it would be necessary to read widely in moral philosophy, hermeneutics, deconstructionism, Marxism, and who-knows-what-will-come-next. The reader is supposed to be familiar with utilitarianism, contractarianism, Mill, Derrida, Habermas, positivism, formalism, Rawls, Nozick, and the literature of radical feminism. It turns out, though previously it had never been suspected, that in order to understand the American Constitution ratified in 1787, one must study not John Locke or even James Madison, but a modern German Marxist.[14]

In part three, Judge Bork turns to his confirmation battle which, in his words, was "ultimately about whether intellectual class values, which are far more egalitarian and socially permissive, which is to

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[11] *Id.* at 12.

[12] *Id.* at 134.

[13] Judge Bork informs the reader that the necessary result of so much Constitutional theory is that the new theorists of constitutional law must be exposed, not because their theories are good, but because of their influence upon the courts:

> There was a time when the ideas of the law, particularly constitutional law, were fully accessible to educated people. That is no longer the case. Legal thought has become an intellectual enclave inhabited primarily by academics whose efforts are directed at influencing courts. The nature and extent of that influence are unsuspected by the general public and even by public policy intellectuals.

Id. at 136.

[14] *Id.* at 134.

say left-liberal, than those of the public at large and so cannot carry elections, were to continue to be enacted into law by the Supreme Court."[15] Judge Bork offers that the battle for his confirmation was at the center of a war, still raging, for control of our legal institutions.

The starting point for Judge Bork's analysis is the case of *Calder v. Bull*[16] decided by the Court in 1798. It was this case which first raised the inevitable dispute as to the proper scope and nature of judicial power vis-a-vis the Nation's written Constitution.[17] Judge Bork criticizes Justice Samuel Chase's dissenting opinion in *Calder v. Bull*, arguing that Justice Chase "was prepared to strike down laws that violated no provision of any constitution, federal or state."[18] Judge Bork suggests that "[Samuel Chase's] opinion was supported less by legal reasoning than by frequent recourse to the typographic arts."[19] Judge Bork quotes Justice James Iredell's majority opinion, refusing to embrace Chase's appeal to natural rights, as a basis for the correct judicial philosophy.

Through review of the early decisions of the United States Supreme Court, beginning with Chief Justice John Marshall's opinion in *Marbury v. Madison*,[20] Judge Bork dramatically illustrates his position that the Court is least legitimate when it rules outside the written Constitution. He declares approvingly that "[t]he good news about *Marbury* is that Marshall placed the Court's power to declare laws unconstitutional directly upon the fact that the United States has a written Constitution."[21] Judge Bork, however, is critical of Justice Marshall for deciding *Fletcher v. Peck*[22] on grounds seem-

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15 *Id.* at 337.

16 3 U.S. (3 Dall.) 386 (1798).

17 Judge Bork noted that *Calder* "set out opposing philosophies that remain with us today." R. BORK, *supra* note 3, at 20.

18 *Id.* at 19.

19 *Id.* Judge Bork's position here is weakest since he seems to be saying that there was no legal basis for Justice Chase's opinion. The central concept here is that of judicial review of legislative acts. Judge Bork believes that judicial review must be anchored to the four corners of the written Constitution. The theory of original understanding implements this theory of judicial review. But Judge Bork is wrong to imply that judicial review of legislative acts first began with a written constitution. *See, e.g.*, Dr. Bonham's Case, 8 Rep. 113b, 118a, 77 Eng. Rep. 646 (1610) (Lord Coke, Chief Justice of Common Pleas, famous decision as authority for disallowing acts of the English Parliament which were against "common right and reason, or repugnant, or impossible to be performed . . . .")(dictum). Lord Coke's dictum was well received by early jurists in this country before the American Revolution. *See* Robin v. Hardaway, Jeff., 109 (Va. 1772).

20 5 U.S. (1 Cranch) 137 (1803).

21 R. BORK, *supra* note 3, at 24.

22 10 U.S. (6 Cranch) 87 (1810).

ingly outside the four corners of the Constitution. Nevertheless, he notes that "*Fletcher v. Peck* was the end of the Marshall Court's flirtation with the idea that legislative acts could be overturned on grounds of natural justice or the nature of government and society."[23]

Judge Bork cites Justice Marshall's opinion in *McCulloch v. Maryland*[24] as "a magnificent example of reasoning from the text and the structure of the Constitution."[25] Similarly, he praises Justice Marshall's decision in *Barron v. Baltimore*[26] for "refusing to apply the prohibitions of the Bills of Rights to the states, drawing inferences from the Constitutional text, structure, and history."[27]

Judge Bork contrasts his theory of original understanding, which precludes the importation of the judges, "politics and morality" into the Constitution, with the practice of sanctioning political results through court decisions in a compelling analysis of *Dred Scott v. Sandford*.[28] After terming it "the worst Constitutional decision of the nineteenth century,"[29] Judge Bork explains that there is no constitutional provision which confers a right of individuals to own slaves. Thus, asks Judge Bork, "[h]ow, then, can there be a constitutional right to own slaves where a statute forbids it?"[30] The answer is found in substantive due process:

> [Chief Justice Taney] quotes the guarantee of due process, which is simply a requirement that the substance of any law be applied to a person through fair procedures by any tribunal hearing a case. The clause says nothing whatever about what the substance of the law must be. But Taney[ ] . . . transforms this requirement into a rule about the allowable substance of a statute. The substance Taney poured into the clause was that Congress cannot prevent slavery in a territory because a man must be allowed to bring slaves there. . . .
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> How did Taney know that slave ownership was a constitutional right? Such a right is nowhere to be found in the Constitution. He knew it because he was passionately convinced that it *must* be a Constitutional right. Though his transforma-

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23 R. BORK, *supra* note 3, at 26.

24 17 U.S. (4 Wheat) 316 (1819).

25 R. BORK, *supra* note 3, at 27.

26 32 US (7 Pet.) 243 (1833).

27 R. BORK, *supra* note 3, at 27.

28 60 U.S. (19 How.) 393 (1856).

29 R. BORK, *supra* note 3, at 28. Regrettably, Judge Bork makes this statement regarding "the constitutional legitimacy of the decision," not regarding the abhorrent result. *Id.*

30 *Id.* at 31.

> tion of the due process clause from a procedural to a substantive requirement was an obvious sham, it was a momentous sham, for this was the first appearance in American Constitutional law of the concept of "substantive due process" and that concept has been used countless times since by judges who want to write their personal beliefs into a document, that most inconveniently, does not contain those beliefs.[31]

Thus, Judge Bork concludes that Chief Justice Taney provided the doctrinal basis for subsequent judges to usurp power that Judge Bork believes properly reposes in the legislative branch of government.

Cases of importance to conservatives and liberals alike are surveyed by Judge Bork in the remainder of the first section of his book. These cases support his hypothesis that substantive due process is a two way street; supporting whatever the view of the judge was at the time of the decision. Judge Bork cites, as an example, Justice Miller's opinion in *Loan Association v. Topeka*[32] for the "astonishing" fact that Justice Miller, who had earlier refused to become a "perpetual censor" in the *Slaughter House Cases*,[33] became just that in *Loan Association*. *Loan Association* involved a state statute permitting cities to issue bonds and transfer the money collected to private businesses, encouraging them to locate in the cities. Justice Miller, however, thought it inappropriate for a state to tax private citizens for private purposes. Judge Bork posits: "[Justice Miller] insisted that people could not be taxed except for a public purpose, and it was up to the courts not only to impose this limitation but to define what such a purpose was."[34]

Judge Bork believes that the better view was enunciated by Justice Nathan Clifford, the sole dissenter in *Loan Association*:

> [W]here the constitution of the State contains no prohibition upon the subject, express or implied, neither the State nor Federal courts can declare a statute of the State void as unwise, unjust, or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution. . . .
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> Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the

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31 *Id.* (emphasis in original).

32 87 U.S. (20 Wall.) 655 (1874).

33 83 U.S. (16 Wall.) 36 (1872).

34 R. BORK, *supra* note 3, at 40.

> courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism.[35]

Judge Bork is in full agreement with Justice Clifford that it is the legislature that speaks for the people, not the courts:

> Clifford made the case for the correct judicial role about as well as it can be made. The security furnished by the "interest, wisdom, and justice" of the legislature is at least as good as that provided by free-ranging judges, with the added advantage that legislative despotism . . . can be cured at the polls.[36]

Thus, Judge Bork argues that substantive due process "is never more than a pretence that the judge's views are in the Constitution."[37]

Judge Bork's treatment of *Lochner v. New York*[38] demonstrates that Judge Bork's constitutional jurisprudence is markedly similar to that of the great Justice Oliver Wendall Holmes, Jr.[39] Judge Bork refers to the decision as "the symbol, indeed the quintessence, of judicial usurpation of power."[40] In *Lochner* the reader will recall, the State of New York had passed legislation setting maximum daily and weekly hours for bakers. A majority of the Justices overturned the legislation on the grounds that it was a "meddlesome interference" in the general right of the individual to enter into contractual relations.

Judge Bork cites Justice Holmes' famous dissenting opinion in *Lochner* approvingly for the proposition that we are all at the misery

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35 87 U.S. (20 Wall.) 667, 668-69 (1874) (Clifford, J., dissenting)(footnotes omitted).

36 R. BORK, *supra* note 3, at 42.

37 *Id.* at 43.

38 198 U.S. 45 (1905).

39 Sanford Levinson, a professor of law at the University of Texas Law School and a liberal critic of Judge Bork, states in his review of *The Tempting of America* for *The Nation* magazine that:

> Professors should remember that for most of American History we were the ones who condemned judicial activism and urged great deference to ostensibly majoritarian legislatures. Two justices famous for promoting this theory were Oliver Wendall Holmes and Hugo Black, both heros to many liberals. . . . It was Holmes in his famous dissent in the *Lochner v. New York* case in 1905, who counseled the Court to acquiesce even in "tyrannical" laws as long as they expressed the will of the majority. . . . So why didn't Bork try to hoist liberals with their own petards by asking if they the Senate Judiciary Committee] would really refuse to confirm Holmes. . .?

Levinson, *Battle For Justice: How The Bork Nomination Shook America*, THE NATION, Dec. 18, 1989, at 756.

40 R. BORK, *supra* note 3, at 44.

of the legislature where the Constitution is silent. Justice Holmes emphatically stated:

> I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state law may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interferes with the liberty to contract.[41]

Judge Bork believes that even the great Justice Holmes erred when he qualified his prior statement:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the tradition of our people and our law.[42]

For Judge Bork, this means that even Justice Holmes accepted substantive due process. The difference, then, between Justice Holmes and the other Justices was only a matter of degree. Thus, Justice Holmes "merely disagreed with . . . the majority about which principles were fundamental."[43]

Judge Bork's analysis of the New Deal Court is particularly interesting. As he notes, "[t]he Supreme Court's behavior, its systematic frustration of the political branches, eventually erupted into a constitutional crises."[44] Importantly, he posits that "the crises arose less because the Court's behavior was illegitimate than because the judge-made values it protected suddenly went out of political and intellectual fashion."[45]

In a persuasive analysis of the dilemma which forced President Roosevelt to attack the Supreme Court directly after his landslide victory of 1936, Judge Bork asks rhetorically:

> The Supreme Court may be issuing rulings that have no basis in the Constitution, but how is the nation to cope with that unconstitutional assumption of power? Jefferson tried impeachment; Andrew Jackson ignored the Court when it suited him; Abraham Lincoln ignored Chief Justice Taney's writ of habeas corpus during the Civil War ("I must violate one provi-

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41 198 U.S. 74, 75 (1905) (Holmes, J. dissenting).
42 *Id.* at 76.
43 R. BORK, *supra* note 3, at 45.
44 *Id.* at 51.
45 *Id.*

> sion of the Constitution so that all the rest may be saved"); Ulysses Grant did manage to enlarge the Court to alter its course . . . . Roosevelt tried to "pack" the Court; and in recent years there have been a number of proposals to eliminate the Court's jurisdiction over particular classes of cases under the congressional power, given in article III of the Constitution . . . .[46]

Judge Bork's solution to this dilemma is telling:

> [T]he only safeguard we have in the long run against the abuse of a judicial power, which we have agreed in advance to obey, is the formation of a consensus about how judges should behave, a consensus which, by its intellectual and moral force, disciplines those who are subject, and properly so, to no other discipline.[47]

Obviously this "consensus" should be that the Justices will look no further than the Constitution itself. A decision setting aside an act of legislature should be based upon some principle or stated value that is observable in the text, structure, or history of the Constitution. This, of course, is Judge Bork's theory of "original understanding."

Judge Bork writes disparagingly of Justice Stone's opinion in *United States v. Carolene Products Co.*[48] It was the famous footnote to that opinion which, Judge Bork argues, "adumbrated a Constitutional revolution."[49] According to Judge Bork, Justice Stone's formulation in footnote four was simply another mechanism allowing "the Justices [to] read into the Constitution their own subjective sympathies and social preferences."[50] The decision in *Carolene Products* is viewed as a critical turning point in Supreme Court jurisprudence: it saw the eclipse of the "free market as an ideal and of the business class as a dominant elite,"[51] and heralded the rise "of elites advocating the causes of minorities, whether in genuine sympathy or out of the expectation of power— or both."[52]

As might be expected, Judge Bork is harshly critical of the Warren Court. Judge Bork's evaluation of the basis of the Warren

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46 *Id.* at 54.

47 *Id.* at 55.

48 304 U.S. 144 (1938).

49 R. BORK, *supra* note 3, at 61. Footnote four in *Carolene Products* provided that "prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry." 304 U.S. at 153 n.4.

50 R. BORK, *supra* note 3, at 61.

51 *Id.*

52 *Id.*

Court's decision in *Brown v. Board of Education*[53] provides insight into his objections to the philosophy of the law embraced by the Warren Court. The *Brown* decision is, for Judge Bork, "a great and correct decision."[54] Nevertheless, Judge Bork is critical of the *Brown* Court's reliance on psychological studies showing that black children had lower self-esteem as a result of the "presence or absence of legal segregation."[55] Judge Bork posits that the Court was disingenuous to rest its decision on such a tenuous rationale, when the root of the problem ran much deeper. Consequently, the Court "cheapened a great moment in constitutional law."[56] Cited as evidence is the fact that the Court issued orders setting aside segregation as unconstitutional in connection with parks, golf courses, beaches, and courtrooms, in each case citing *Brown v. Board of Education*:

> That necessarily meant that the rationale of *Brown* was not the rationale offered in the opinion. Racial segregation by order of the state was unconstitutional under all circumstances and had nothing to do with the context of education or the psychological vulnerability of a particular age group. The real meaning of *Brown*, therefore, was far better than its professed meaning.[57]

Judge Bork emphasizes this point because of what he perceives as the *Brown* Court's mistaken belief that they had produced a ruling not at all anchored to the historic Constitution. The Court had purposely departed from the Constitution's original understanding to achieve a socially desired result. "This was massively ironic, because the result in *Brown* is consistent with, indeed is compelled by, the original understanding of the fourteenth amendment's equal protection clause."[58] In so doing the Court learned that it could rule with impunity when its result had a significant political constituency. Moreover, law professors, perceiving this, were now interested in justifying political results over principles found in the Constitution. Judge Bork explains that *Brown* has become a focal point for constitutional theorists who seek to discredit original understanding since they argue that original understanding could not have produced the results in *Brown*.

Judge Bork considers the legislative reapportionment cases as

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53 374 U.S. 483 (1954).
54 R. BORK, *supra* note 3, at 75.
55 *Id.* at 76.
56 *Id.*
57 *Id.*
58 *Id.*

the penultimate expression of the Warren Court's radical egalitarianism and disregard for the Constitution. Judge Bork exhorts that "it may sound obvious that every American's vote should have the same weight. The principle, stated in the abstract, sounds admirable. But it is neither obvious nor admirable when it is forced upon people who have chosen democratically to arrange their state governments in part upon a different principle."[59] In a passage which dramatically illustrates this point, Judge Bork explains that during his confirmation hearings he was accused of opposing the "one person, one vote" rule. He continues by noting that several senators who had voted against his nomination because of this position had been elected *because* such a dilution of voting power was "deliberately written into the Constitution."[60] Judge Bork finds the Court's action especially meddlesome because most states voluntarily chose to base their government on the federal model, in which representation in one house is based upon population and the other upon political units.

Judge Bork's criticism of the Court's decision in *Baker v. Carr*[61] is based on the Court's reliance upon the equal protection clause. Believing that reapportionment was proper in *Baker*, Judge Bork would have simply applied the Constitution's guarantee in article IV, section 2 that every state in the Union have a republican form of government. Judge Bork maintains that the use of this clause would have permitted the state's voters to reapportion their legislature in accordance with their own particular requirements. As a basis for breathing life into the long dormant guarantee clause, Judge Bork notes:

> Madison's writing on the republican form of government specified by the guarantee clause suggests that state governments, which were structured as representative democracies, could take many forms, so long as those forms do not become "aristocratic or monarchical." That is not easily translated into a rigid requirement of equal weight for every vote. It translates far more readily into Justice Stewart's position that the apportionment, or system of representation, chosen need only be rational and "must be such as not to permit the systematic frustration of the will of a majority of the electorate of

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59 *Id.* at 84.

60 *Id.* at 84-85. Judge Bork notes that a California Senator represents 26,000,000 people, while a Wyoming Senator represents only 550,000 people. *Id.* at 84.

61 369 U.S. 186 (1962).

the State."[62]

Throughout the remainder of the first part of his book, Judge Bork warns us about a constitutional doctrine that rests not on a morality of the general American public, but on a parochial class-bound version. He concludes the section by noting that, although the Court may have receded from its left-liberal position, the Court recently permitted flag burning and "dial-a-porn," while invalidating public display of a creche and state tax exemptions for sales of the Bible.[63] The conclusion Judge Bork offers is that *all* constitutional revisionism, liberal or conservative, is equally illegitimate: "The Constitution is too important to our national well-being and to our liberties to be made into a political weapon."[64] Having been treated to Judge Bork's insights into the major decisions in the history of the Court, the reader can only agree.

The second part of Judge Bork's book is dedicated to his theory of original understanding. In brief, original understanding means that judges must be limited to ruling only on the specific provisions of the Constitution as they were understood at the time the document was adopted. Moreover, judges are not to be bound by the intent of the ratifiers, but by the public understanding of the words used in the document. Thus, judges should look to the words employed in the Constitution as they "would have been understood at the time."[65]

To be true to original understanding, and therefore, to avoid judicial usurpation of political power, Judge Bork maintains that judges must act in a neutral fashion in three respects.[66] First, the judge must be neutral in his derivation of the constitutional principle being applied in a particular case. This is accomplished simply by finding the principle in the Constitution as it was originally understood. Next, the judge must be neutral in his definition of the principle that has been derived. Definition is especially troublesome because the Constitution is framed in "majestic generalities." Thus, the judge must find the appropriate degree of generality; the degree "that the text and historical evidence warrant."[67] Finally, the judge

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62 R. BORK, *supra* note 3, at 87 (quoting Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 753-54 (1964) (Stewart, J., dissenting)).

63 R. BORK, *supra* note 3, at 127-28.

64 *Id.* at 131.

65 *Id.* at 144. "The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like." *Id.*

66 *Id.* at 146-53.

67 *Id.* at 149.

must observe neutrality in application of the principle. This requires the judge to display intellectual integrity—to arrive at the result through reasoning rather than arriving at the result desired and then justifying it. The definitional neutrality requirement reveals what may be a shortcoming of Judge Bork's theory.

He cites, for example, the Bill of Rights as being problematic because of its broad sweep. Consequently, he would limit interpretation to the level of generality warranted by the text and historical evidence of the original understanding of the Constitution. This is so because "no one has ever" read the amendments as broad as their language. But original understanding demands that, for instance, "freedom of speech" mean freedom of speech.[68] Thus, by definition there can be no illegal speech, or time, place, and manner restrictions consistent with the original understanding of the Constitution. Judge Bork's desire to limit their interpretation to a level of generality is not in accord with his invocation to look first to the words used as a means of expounding the Constitution. Additionally, Judge Bork would enlarge the equal protection clause to protect *all* races, while he admits that the amendment was intended to protect recently freed negro slaves. Although original understanding has much merit to it as a philosophy, its limited nature would prevent the Court from achieving much of the necessary good that it has achieved, including some things that Judge Bork would have sought to achieve himself. Ultimately, original understanding, with some minor flexibility, would be the proper approach to constitutional decision making.

The third part of the book relates the battle over Judge Bork's nomination to the Supreme Court, called the "Bloody Crossroads."[69] Viewing his rejection as a combined defeat of President Reagan and of himself, Judge Bork notes that original understanding "is anathema to liberals who have come to view the courts as the branch that will enact their policies when legislatures won't."[70] Thus, Judge Bork quips: "I qualified as a target in my own right."[71]

In Judge Bork's concluding chapter, he quotes from a passage in Robert Bolt's play about Sir Thomas More, *A Man For All Seasons*, to dramatize the danger of a constitutional theory of adjudication not anchored to the written Constitution:

When More was Lord Chancellor, his daughter, Margaret, and

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68 R. BORK, *supra* note 3, at 147.
69 *Id.* at 271-349.
70 *Id.* at 345.
71 *Id.*

> his son-in-law, Roper, urged him to arrest a man they regarded as evil. Margaret said, "Father, that man's bad." More replied, "There is no law against that." And Roper said, "There is! God's law!" More then gave excellent advice to judges: "Then God can arrest him. . . . The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal. . . . I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester."
>
> Roper would not be appeased and he leveled the charge that More would give the Devil the benefit of the law.
>
> More. Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper. I'd cut down every law in England to do that!
>
> More. . . . Oh? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down— . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.[72]

Judge Bork explains that the historic More was true to these sentiments. Similarly, Judge Bork warns that by cutting down man's law to apply "God's law," judges are dangerously weakening the actual rights and protection of the Constitution and of democratic institutions. Admonishing judges to remain true to applying man's law, Judge Bork exhorts that "it is a hard saying and a hard duty, but it is the duty we must demand of judges."[73]

Perhaps it is ironic that Judge Bork places his trust in democratic principles to the extent he does. After all, was not a significant part of the electorate mobilized against his appointment to the Supreme Court? Yet, Judge Bork's rejoinder deserves our careful attention. Judge Bork, the Supreme Court candidate, may have failed. Ultimately, he may be more successful as a spokesman of constitutional theory then he ever dreamed of as a Justice of the Supreme Court.

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72 *Id.* at 354 (quoting R. BOLT, A MAN FOR ALL SEASONS 65-66 (1962)).
73 *Id.*