

# Book Reviews

## Robert Bork's Grand Inquisition

*The Tempting of America: The Political Seduction of the Law.* By Robert H. Bork.\* *New York: The Free Press, 1990. Pp. 432. \$22.50.*

**Bruce Ackerman†**

This book is a call to battle—against the enemy within. The rhetoric is martial. We are in the midst of “a long-running war for control of our legal culture, which, in turn, [is] part of a larger war for control of our general culture.”<sup>1</sup> It is also religious—the struggle is against “heresy” on behalf of an embattled “orthodoxy.”<sup>2</sup> The enemy? Subjectivists who turn their backs on history; relativists who seek to impose their moral prejudices on the American people by reading them into the Constitution. These heretics have entrenched themselves in America’s law schools, where they seek to bedazzle and intimidate the judiciary by their fancy theories and false erudition—and thereby lead the next generation of lawyers astray.

But it may not be too late. So let us take our stand. Against subjectivism, and for the historical Constitution. Against relativism, and for the neutral derivation of constitutional principle.

Lest there be any doubt, I am ready to enlist. Law isn’t just politics. It isn’t morals either. It’s distinctive—and precisely in some of the ways Bork emphasizes. Judges begin by looking backwards—to the decisions of authorized lawmakers. They take interpretation seriously. Their job is to

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1. R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 271 (1990) [hereinafter by page number].

2. P. 6.

make sense of the legally relevant sources, recognizing that the messages they receive may prove inconsistent with their personal or political morality. One mark of a great judge is the way she confronts this tension: When she finds that the law does not conform to her Utopian vision, does she recognize that politics is one thing, law quite another? Or does she seek to dissolve the tension by treating the law as if it were an indeterminate vessel for her political and moral ideals? Bork is also right to suggest that much trendy "theory" runs rough-shod over these distinctions.

And yet, judging from Bork's performance, the time isn't ripe for a Great Crusade. Bork has succumbed to his own temptation. Proclaiming his fidelity to history, his constitutional vision is radically ahistorical. Pronouncing an anathema on value relativism, his jurisprudence brings skepticism to new heights. Insisting on the sharpest possible line between law and politics, his bitter concluding section transforms a legal treatise into a Red-baiting<sup>3</sup> political tract. *Tempting* reveals that Bork's ordeal has transformed him into a human type that I, at least, had previously encountered only in Dostoyevsky novels. *Mutatis mutandis*, he is America's Grand Inquisitor—grimly excommunicating heretics in the name of a Cause he has inwardly betrayed.<sup>4</sup>

The Inquisition proceeds on three fronts. The first Part exposes the heretical opinions of the Supreme Court, tracing the judicial disease to its historical roots. The second Part confronts and confutes the leading heretics of the modern academy. The final Part turns to Washington, D.C., and refights the confirmation battle.

It would have been better for all concerned if the last Part had not been published. It is remarkably opaque about the human side of Bork's struggle for confirmation, unless there be hidden meaning in his decision to republish verbatim copies of the letters he and President Reagan exchanged upon Bork's resignation from the Court of Appeals.<sup>5</sup> Its brief-like refutation of the more extreme charges levelled by his critics only serves to save them from oblivion by republishing them in a book that has become a best seller. Last and worst, Bork turns this Part into a political tract by lashing out at his opponents without restraint, going so far as to suggest that they are crypto-Marxists unwilling to come clean in public by ac-

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3. I regret the use of such a harsh word, but I can find no other that accurately describes a passage like this one:

The new left is probably unprogrammatic because it is frustrated by its inability to articulate its natural policy preferences. The new left adopts Marxist critiques of American society because Marxism offers the most fully developed and prestigious adversarial system ready to hand. Yet the new left cannot afford to put forward a Marxist program. . . . The result is that those who dislike this society have only a policy of severe criticism without an alternative program they can articulate.

P. 341.

4. F. DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 255-74 (C. Garnett trans. 1st ed. 1937).

5. Pp. 317-20.

knowledging the nature of their true beliefs.<sup>6</sup> How could Bork sink to this level, after condemning his opponents for the unprecedented “ferocity”<sup>7</sup> of their judicial politics? The less said, the better, about this egregious lapse.

In the first two-thirds of the book, Bork does succeed in rising above the fray. His first Part makes it clear that heresy is no monopoly of the Warren Court. Bork traces it back to 1798<sup>8</sup> and convincingly establishes that there has never been a period in our history when judges have failed to succumb to the temptation he denounces. His second Part is similarly broad based in its critique of the modern academy. Not only liberals like Laurence Tribe<sup>9</sup> but conservatives like Richard Epstein<sup>10</sup> are denounced for their heretical views. Indeed, the historical depth and intellectual breadth of the “temptation” Bork seeks to extirpate might well daunt a less determined critic. If the judicial expression of heresy extends backward before *Marbury v. Madison*, and unites such disparate sorts as Tribe and Epstein, perhaps it is a mistake to think of it as a “heresy.” Why isn’t it better to view such an historically entrenched and politically diverse theme as part of the *main line* of American constitutional development?

But Bork is prepared to take on all comers: From John Marshall<sup>11</sup> to William Rehnquist,<sup>12</sup> the heretics are legion. Each victim must be called to the dock. Each can be condemned only after a representative sample of his or her error is considered. The overall impression is one of furious dispatch, as one hapless heretic or heresy is led from the dock, to be replaced by another destined to meet the same fate a few pages later.<sup>13</sup> In these brief encounters, Bork has more or less interesting things to say—though it must be tough for his best-seller readership to guess why he is wasting his time with such cartoon characters.

## I. ORTHODOXY

My aim, in any event, will not be to pass judgment on Bork’s treatment of individual heretics and heresies. I will focus on an issue that is easily obscured in the swirl of particular inquisitions. This is Bork’s view of orthodoxy, which is surprisingly underdeveloped. Bork is so interested in correcting error that he cannot find room for the systematic development of the truth. As we shall see, crucial steps in his affirmative argument are developed—insofar as they are developed at all—as part of one or another

6. See *supra* note 3.

7. P. 338.

8. This is the date of Justice Chase’s famous opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). For Bork’s discussion of the case, see pp. 19–20.

9. Pp. 199–206.

10. Pp. 229–30.

11. Pp. 25–27.

12. P. 240.

13. My turn comes at pp. 214–16.

counterpunch. Yet it is plain that none of his particular critiques can stand on ground any higher than his affirmative vision of constitutional law.

### A. *Bork and History*

Bork's difficulties begin at the very first step in his argument. According to him, courts are to do no more, but no less, than effectuate the will of the Framers—as revealed by reading the constitutional text against the background provided by “debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.”<sup>14</sup> The problem arises when one reflects on the formidable research project that Bork has assigned himself. As anyone acquainted with the Founding and Reconstruction will attest, Americans accompanied their efforts at constitution-writing with an enormous outpouring of public debate. While it is not impossible to gain a sense of the action and the actors, it does demand a good deal of hard work, requiring years, not days, of disciplined reading and reflection. And it is at this point that we are in for a surprise. Despite his confident pronouncements about the intentions of the Framers, there is absolutely no evidence that Robert Bork has done any of the hard work that would entitle his judgments to respect.

For starters, this book fails to cite, much less discuss, the contribution of *any* seminal twentieth-century interpretation of the Founding or Reconstruction.<sup>15</sup> Bork's ignorance of the secondary literature is ecumenical—he fails to cite historians who might support him just as he fails to confront those who make his confident judgments seem problematic.<sup>16</sup> Perhaps this

14. P. 144.

15. Thus, Bork can speak confidently about the Founding without mentioning (in roughly chronological order of their first major contribution): Charles Beard, Forrest MacDonald, Carolyn Robbins, Hannah Arendt, Edmund Morgan, Bernard Bailyn, Gordon Wood, John Pocock, or Joyce Appleby. He talks about “Madisonian” thought without mentioning Douglass Adair, Martin Diamond, or Morton White. He does note Gary Wills' book, *Inventing America*, dealing with the Declaration of Independence, pp. 235, 397 n.41, but fails to note the existence of Wills' *Explaining America*, which is more relevant to Bork's purpose since it deals with Federalist thought.

Similarly, he discusses the Civil War Amendments without mentioning the work of Michael Les Benedict, William Brock, David Donald, Eric Foner, Eric McKittrick, Kenneth Stampp, C. Van Woodward, or even William Dunning.

The only major historians cited are Eugene Genovese, p. 380 n.21, Robert Fogel and Stanley Engerman, p. 380 n.21, and Richard Hofstadter, p. 397 n.4, but not for research into the original understanding that prevailed at the time of the Founding or Reconstruction.

Among more conventional legal historians, Bork's pickings are very slim: Charles Fairman is used once in dealing with Reconstruction. P. 381 n.40. For the rest, the references deal with Bork's interpretation of particular cases: Don Fehrenbacher is cited once, p. 381 n.31; David Currie, three times. Pp. 380 n.18, 381 nn.26 & 38. Leonard Levy is also cited once, p. 395 n.131, but as a legal theorist, rather than legal historian; Raoul Berger is cited once in support of Bork's exhortation that the Court “Go and sin no more.” P. 389 n.39.

Bork does rely heavily on Russell Caplan's historical research into the origins of the Ninth Amendment. See pp. 183–85. I shall discuss his treatment of this problem at length. See *infra* text accompanying notes 37–47.

16. Thus, while Bork does mention Raoul Berger with approval twice, see pp. 223, 389 n.39, he never actually uses Berger's voluminous work, despite the fact that it is congenial to Bork's general

ignorance might be forgiven the heroic autodidact, who immerses himself in the original sources without distorting his vision by consulting conventional authorities. But Robert Bork is no Hugo Black, communing with the Founders during long nights at the Library of Congress. His rare references to the original sources are restricted to old chestnuts served up by the academic theorists he condemns for their ahistorical methods. He gives no indication, for example, that he has pondered the differences between James Madison's performance at the Virginia Ratifying Convention and James Wilson's at Pennsylvania's; or that he has thoughtfully considered the relationship of Charles Sumner's Senate speeches to Northern opinion during the ratification of the Fourteenth Amendment. Indeed, he manages to write a 400-page book in praise of the Framers without ever finding it necessary to cite the standard edition of Madison's Convention Notes<sup>17</sup> or a single page from the *Congressional Globe* containing the debates of the Reconstruction Congresses.

The historical vacuum at the core of Bork's orthodoxy may seem surprising, since the man spent much of his life as a professor at Yale and had the time to engage in the disciplined historical reflection that his orthodoxy demands. The mystery dissolves when one recalls that Bork's principal academic specialty was antitrust, not constitutional law. He did not win national leadership in this field by dint of historical research, but by championing the Chicago School of Economics' notably ahistorical and theory-laden approach to antitrust. Few readers of Bork's major book, *The Antitrust Paradox*,<sup>18</sup> would guess that its author would next try to

views.

17. On the only occasions that Bork makes use of Madison's Notes, he cites them in the following way: "P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 7 (3d ed. 1988) quoting 1 Farrand, *The Records of the Federal Convention* 21 (May 29) (1911)." P. 388 n.18. Bork's next two footnotes also quote remarks made by Framers at the Convention at second-hand, citing to the same page seven of Hart and Wechsler. Perhaps Bork was merely saving a bit of time here; perhaps he was allowing Hart and Wechsler to do his research for him. In any event, at no other point does he find it necessary to cite the standard edition of Madison's Notes, edited by Max Farrand, even indirectly.

18. R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). *Paradox* addresses the historical intentions of the Framers of the Sherman Act at 19-21, 61-66. This brief treatment summarizes an earlier study, Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7 (1966), that is notable for its anachronistic treatment of the congressional debates. Rather than trying to relate the Sherman Act to the political movements and regnant ideas of the late nineteenth century, Bork comes to the materials with the concerns of the twentieth-century Chicago economist, aiming to persuade us that "Congress intended the courts to implement . . . only that value we would today call consumer welfare." *Id.* at 7. By saying this, Bork would have us understand that the innumerable congressional expressions of "concern for farmers, laborers, or small businessmen," *id.* at 26, were strictly subordinate to the Framers' fundamental concern for consumers. It is but a short step from this finding to the happy conclusion that the Framers would have been admirers of the Chicago School's approach to antitrust if they had been fortunate enough to witness the great progress of microeconomic analysis that has occurred since the passage of the Act.

Unfortunately, Bork's reading of the legislative history has not stood the test of scholarly scrutiny. See Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989) ("Not a single statement in the legislative history comes close to stating the conclusions that Bork drew."); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67, 150 (1982). Hovenkamp's article includes a useful appendix summa-

make a name for himself by championing the use of historical methods against the seductions of abstract theory.<sup>19</sup> Indeed, one question left unresolved in *Tempting* is the extent to which Bork himself is aware of the tension between the ostentatiously theoretical methods of *Paradox* and the putatively historical concerns of *Tempting*.<sup>20</sup>

In any event, this is not the aspect of his Yale experience that Bork brings to the center here. He emphasizes instead his friendship with Alexander Bickel and their collaboration on a joint seminar in advanced constitutional law during his time at Yale. As a student in this seminar in 1967, I too remember the collaborators' obvious respect and affection for one another. It was one of the things that made the seminar so special. Another thing was the polar positions taken by Bickel and Bork in the classroom. Against Bickel's prudentialist historicism, Bork countered with an aggressively ahistorical advocacy of *Lochner v. New York*, claiming in one memorable session that it was "indistinguishable"<sup>21</sup> from (the recently decided) *Griswold v. Connecticut* and praising both decisions. In 1967, Bork was the paradigm of the heresy that he now seeks to eradicate. I remember my surprise on learning, a few years later, of Bork's conversion to a more Bickellian appreciation of history. But it is one thing to praise history; another to do it. By the time of his conversion, Bork's career was moving beyond New Haven to Washington, D.C. This book contains no evidence that he has found the time, in his last two eventful decades, to do the serious historical work his orthodoxy requires.<sup>22</sup> Since leaving the

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rizing all congressional efforts to define the aims of the Sherman Act, thereby permitting the reader to make a preliminary assessment of the interpretive issues at stake between Bork and his critics. Hovenkamp, *supra*, at 41-48.

Bork's historical treatment of the enactment of the Clayton and Robertson-Patman Acts in *Paradox* is even more superficial. See R. BORK, *supra*, at 47-48. In contrast, he treats the early judicial decisions with a good deal more sympathy. His aim, however, is once again anachronistic: to establish some kind of historical pedigree for a Chicago critique of the doctrinal heresies committed by more contemporary judges. See *id.* at 22-47, 73-79.

If we abstract from the very different contents of *Paradox* and *Tempting*, then, a certain similarity in method appears: A poorly developed, and anachronistically conceived, historical account is used to support a frontal assault on judicial doctrine in the name of Bork's highly contentious view of the nature of economic and political life.

19. In contrast to its anachronistic treatment of the original intentions of the Framers of the Sherman Act, see R. BORK, *supra* note 18, at 19-21, 61-66, *Paradox* devotes three chapters elaborating and defending the relevance of the Chicago version of neoclassical price theory, *id.* at 90-133, before devoting the rest of the book to a scathing critique of all judicial doctrines that depart from the Chicago orthodoxy.

20. Bork's passing remarks on antitrust in *Tempting* suggest that, in this area at least, he remains a true believer in the powers of abstract theory to master legal reality. See p. 255.

21. A view he still holds. See pp. 99, 224-25.

22. Indeed, Bork's preface to *The Antitrust Paradox* suggests that he devoted much of his scarce academic time and energy in the 1970's to completing "at long last" this major scholarly project in 1978. See R. BORK, *supra* note 18, at ix-xi. This understandable and admirable determination to do the work necessary to complete *The Antitrust Paradox* makes the failure to do the necessary work here more understandable—since, after 1978, Bork was even more deeply involved in public affairs than before.

bench, he has cast off the constraints of the judge without accepting the disciplines of the scholar.

### B. *Clause-Bound Interpretation*

Bork's failure as an historian gets him into trouble as soon as he starts developing his affirmative creed. While he holds many historically questionable beliefs about the Founding Federalists and the Reconstruction Republicans, one stands out above all others. Bork believes that the Framers of the Bill of Rights and the Civil War Amendments had fixed and relatively concrete objectives in mind. These are to be understood by looking at each clause they left us as if it were a free-standing artifact. In reading the establishment clause, we are to look at evidence of what concrete things the Framers meant to accomplish by enacting *that* clause; and so on, down the list of clauses, taking our time with the most important ones like due process and equal protection.

Once she has filled each clause with its concrete historical content, a judge can then proceed with the business of judicial review. Her job, simply put, is to measure the challenged statute against each of the historically defined clauses: If it violates any of the Framers' particular objectives in enacting any particular clause, then it is unconstitutional; if, however, she cannot point to a particular clause, she must let the legislative judgment stand and resist the "temptation" to impose her subjective will on the body politic.

In taking this "clause-bound" view of constitutional interpretation, Bork is careful to avoid easy caricature as a latter-day partisan of mechanical jurisprudence. In particular, he recognizes that there is much room for reasoned judgment and good-faith disagreement in determining whether a modern statute falls within the proscribed zones of Framer intention.<sup>23</sup> He draws his line between orthodoxy and heresy at the point where the judge moves beyond the original understanding of one or another particular clause.

So much for a summary statement of the Borkian orthodoxy. In assessing its distinctive character, consider how it diverges from the interpretive path most lawyers follow in dealing with all other complex texts. No good tax lawyer, for example, would ever think of reading the Internal Revenue Code one clause at a time, in the manner Bork recommends. While, of course, the text of each particular clause is always important, a good lawyer cannot fix its meaning without construing it in the light of principles that make sense of the larger Code of which it is a part. In attempting this familiar kind of holistic interpretation, the reader tries to understand the text as something more than an odd assortment of particularized

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23. See pp. 162-63, 167-69, 218.

commands. She tries to organize the rules in terms of principles that give the rules an intelligible order, working from particular clauses to more general principles until she reaches reflective equilibrium.

It is this holistic exercise that Bork would have us reject in construing the Constitution—at least when it comes to interpreting the nature of our fundamental rights. I add this caveat because Bork does not have a similar animus against holism when it comes to other aspects of the Constitution. For example, he has never had any trouble treating the “separation of powers” as a fundamental principle even though there is no separation of powers clause in our basic text. Though the principles defining the separation of powers can only be found amongst the “penumbras” and “emanations” of Articles One, Two, and Three, Bork seems untroubled by the need for holistic interpretation in finding solid constitutional ground for his very extreme understanding of this structural principle.<sup>24</sup> He draws the line, however, when it comes to rights. Thus, Justice Douglas’ famous effort, in *Griswold*, to establish a constitutional principle of privacy by a holistic reading of the Bill of Rights is, for Bork, the very *pons asinorum* of judicial heresy.<sup>25</sup> Similarly, holistic readings proposed by John Ely and myself are displayed amongst the academic heresies of our time.<sup>26</sup> In repudiating such heresies, Bork makes it clear that he is not quibbling with one or another effort at holistic interpretation. He wants to reject the very idea of moving beyond “clause-bound” interpretivism in a holistic manner.<sup>27</sup> In interpreting the nature of our constitutional freedoms, we should be emulating the interpretive practice of the worst kind of tax lawyer: one who zeroes in on “the applicable” subsection without reflecting on the purposes of the sentences, paragraphs, and larger textual structures within which it is imbedded.

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24. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring), where Bork is “guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches’ conduct of foreign relations.” In deferring to the political branches, Bork does not point to narrow text or particular history in the manner of a clause-bound interpretivist; instead, the opinion presents a holistic understanding of separation of powers that explores its relationship to the political question doctrine (another odd favorite for a clause-bound textualist). *Id.* at 801–06. Whatever one may think of Bork’s conclusion in this case, it demonstrates his willingness to engage in the kind of holistic reasoning that he condemns in the definition of fundamental rights. It is possible that, as an appellate judge, Bork felt himself bound by Supreme Court opinions that express a holistic understanding of the separation of powers. Certainly, he skillfully uses these cases to support his holistic arguments. The general tone of the opinion, however, does not suggest a grudging acceptance, but an eager embrace, of the holistic approach to separation of powers and political questions expressed in the leading Supreme Court opinions. I have been unable to find any text, however, where Bork seriously reflects on the tension between his generalizing interpretation of government powers and his narrowing interpretation of individual freedoms. See generally *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 1987: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 3, at 1313–41 (1987) (statement of Cass R. Sunstein, Professor of Law, University of Chicago Law School).

25. Pp. 95–100. I defend *Griswold* as a legitimate act of holistic interpretation in Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 536–44 (1989).

26. Pp. 194–99, 214–16.

27. See pp. 178–85.



Bad tax law makes even worse constitutional law. For obvious reasons, the Code tries to be precise and detailed. Holism is required principally to avoid losing sight of the forest as one seeks to clear a path through the statutory underbrush. In contrast, both the Bill of Rights and the Civil War Amendments contain sub-sections *which cannot be interpreted at all* without reflecting on the fundamental principles expressed by the larger constitutional whole. In writing the Fourteenth Amendment, the Reconstruction Republicans demanded the constitutional protection of "privileges or immunities of citizens of the United States" without giving any further content to this formula. No matter how long one stares at *this* sub-section, it will remain meaningless. How, then, to give meaning to *this* clause if we are forbidden, on pain of heresy, to engage in a holistic interpretation of the implications of the general themes established elsewhere in the text? The Founding Federalists prove no more cooperative when recruited into Bork's crusade. In drafting the Ninth Amendment, they explicitly warned that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Given such explicit textual instruction, Bork's orthodoxy threatens to dissolve in internal contradiction: The Framers seem to be explicitly repudiating the very orthodoxy that Bork would impose on us in the name of the Framers.

In taking aim at the internal contradiction at the heart of Bork's orthodoxy, I am by no means making a new contribution to the subject. As Bork is well aware, John Ely reminded us of the problem ten years ago in his book, *Democracy and Distrust*.<sup>28</sup> How, then, does Bork cope with Ely's challenge?

## II. THE TRUTH ABOUT THE FRAMERS

On one level, Bork responds in an admirably forthright way. He identifies Ely's problem as the principal intellectual stumbling block on the path to orthodoxy.<sup>29</sup> He does not try to trivialize the problem by relying on the fact that judges have failed to give much content to the Ninth Amendment and the privileges or immunities clause. Since Bork spends much of his book denouncing judges from Marshall to Rehnquist for ignoring the "obvious" meaning of many other clauses, he does not hide behind the judicial peripheralization of the texts that most seriously embarrass his "clause-bound" orthodoxy. Instead, he rightly concludes that "we must examine Ely's evidence with some care."<sup>30</sup> In the pages that follow, Bork

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28. J. ELY, *DEMOCRACY AND DISTRUST* 11-41 (1980).

29. Indeed, with characteristic understatement, he describes it as "the only kind of claim . . . that makes any possible sense." P. 179.

30. P. 179.

confronts Ely's evidence and seeks to establish that the Framers intended us to be clause-bound, after all. How "care[ful]" a job has he done?

A. *The Privileges or Immunities Clause*

Begin with Bork's treatment of the Fourteenth Amendment's privileges or immunities clause. He recognizes that leading Republicans explicitly and repeatedly relied on *Corfield v. Coryell*'s definition of "privileges and immunities"<sup>31</sup> to give content to their proposed constitutional formula. Here is the famous definition provided by Justice Washington in the case:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental . . . . They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, *and many others which might be mentioned*, [emphasis added] are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."<sup>32</sup>

Given his stated principles, one would expect Bork to pause on this text. As he repeatedly insists, it is not his job to second-guess the Framers. If they said that Justice Washington had the right idea about the meaning of "privileges and immunities," this should serve as an important source for Bork's own reflections. Unfortunately, Bork does not even reprint

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31. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). Washington is giving substance to the "privileges and immunities" clause in section two of Article Four of the original Constitution. The Fourteenth Amendment speaks in terms of "privileges or immunities" (emphasis added). I do not think anything important turns on this change in the connective.

32. *Corfield*, 6 F. Cas. at 551-52.

Washington's text for the reader's inspection. Instead, he condemns it *in absentia*:

It is true that Representative Bingham and Senator Howard, who introduced the fourteenth amendment in their respective Houses of Congress, referred to *Corfield v. Coryell*, a singularly confused opinion in 1823 by a single Justice of the Supreme Court setting out his ideas of what the original privileges and immunities clause of article IV of the Constitution meant. Most people have always thought that the article IV clause simply prevented a state from discriminating against out-of-staters in favor of their own citizens, but *Corfield* lists rights already secured by the Constitution against adverse federal action and goes on to suggest a number of others.

Bingham and Howard meant these additional rights. That the ratifiers did is far less clear. But even the full list of rights set out by one Justice in *Corfield* is something far different from a judicial power to create unmentioned rights by an unspecified method. Certainly there is no evidence that the ratifying conventions intended any such power in judges, and it is their intent, not the drafters', that counts. Nor is it easy to imagine that Northern states, victorious in a Civil War that led to the fourteenth amendment, should have decided to turn over to federal courts not only the protection of the rights of freed slaves but an unlimited power to frustrate the will of the Northern states themselves.<sup>33</sup>

The passage makes a hash of Bork's protestations of originalism. Rather than trying to understand Washington's definition, he calls it "singularly confused." Then, he belittles it by calling it a "list of rights set out by one Justice in *Corfield*"—before conceding that leading Framers, like Bingham and Howard, explicitly adopted Washington's meaning as their own. Perhaps to allay his originalist conscience, Bork then reassures us that Washington's list is "something far different from a judicial power to create unmentioned rights." What to make, then, of Washington's *explicit* reminder that "many other[]" rights "might be mentioned" in addition to those enumerated in his exceptionally broad-ranging list? Instead of misrepresenting *Corfield*, shouldn't a dispassionate originalist provide his readers with the text so that they could puzzle over its troubling implications together?

Not that Bork succumbs to temptation all that easily. After conceding that Bingham and Howard did clarify their intentions by citing Washington's dictum, he tries to impugn these Framers by refusing to "imagine" that these leading Republicans were representative of larger currents of Northern public opinion. Bork chooses his words carefully here: "imagine" specifies his precise relationship to nineteenth-century historical

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33. P. 181.

sources. He does not mention, let alone grapple with, important books that attempt to place the views of Bingham and Howard in the mainstream of Republican constitutional thought then current throughout the North.<sup>34</sup> To make matters worse, Bork concludes his argument, in the passage immediately following the one I have quoted, by denying that there is a “shred of evidence”<sup>35</sup> that the Republican majority intended to use the courts to enforce their understanding of privileges and immunities—without even citing a classic monograph dealing with evidence of the Reconstruction Republicans’ complex love-hate relationship to the courts.<sup>36</sup>

### B. *The Ninth Amendment*

Perhaps we should be grateful, then, that Bork tries to decipher the Ninth Amendment without an independent examination of extrinsic sources. Sticking to the text, he reports that it “states simply, if enigmatically, that ‘[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’”<sup>37</sup>

The puzzle here is why Bork should find the text “enigmatic.” It seems, almost preternaturally, to be written with him in mind. What Bork is up to is *precisely* to use “the enumeration in the Constitution, of certain rights” to “disparage” the idea that there are other constitutional rights of fundamental importance. I especially admire the Framers’ choice of the word “disparage.” I can think of no better word to describe Bork’s general tone. Nonetheless, Bork finds the text enigmatic and yearns for greater clarity:

Nothing could be clearer, however, than that, whatever purpose the ninth amendment was intended to serve, the creation of a mandate to invent constitutional rights was not one of them. The language of the amendment itself contradicts that notion. It states that the enumeration of some rights shall not be construed to deny or disparage others retained by the people. Surely, if a mandate to judges had been intended, matters could have been put more clearly. James Madison, who wrote the amendments, and who wrote with absolute clarity elsewhere, had he meant to put a freehand power concerning rights in the hands of judges, could easily have drafted an amendment that said something like “The courts shall determine what rights, in addition to those enumerated here, are retained by the people,” or “The courts shall create new rights as required by the principles of the

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34. The best place to start, I think, is M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986). Important aspects of the larger context of Republican constitutional thought are provided by W. NELSON, *THE FOURTEENTH AMENDMENT* (1988), and J. TENBROEK, *EQUAL UNDER LAW* (rev. ed. 1965).

35. P. 181.

36. S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* (1968).

37. P. 183 (quoting U.S. CONST. amend. IX).

republican form of government,” or “The American people, believing in a law of nature and a law of nature’s God, delegate to their courts the task of determining what rights, other than those enumerated here, are retained by the people.” Madison wrote none of those things, and the conventions ratified none of them.<sup>38</sup>

It is, of course, an old lawyer’s trick to create uncertainty by writing hypothetical texts that, in the writer’s mind, do a better job than the Framers’. Bork, however, does not seem to recognize that what the Framers wrote is stronger, not weaker, than the texts he considers as replacements. His hypothetical “clarifications” would narrowly address the courts and explain to them that they should not “disparage” unenumerated rights. In contrast, the Ninth Amendment speaks to all interpreters of the Constitution, presidents no less than courts, citizens no less than legislators, and expressly cautions all of them against committing the interpretive blunder that Bork would impose in the name of the Framers.

Bork is quite right to note that the Ninth Amendment does not expressly authorize courts to invalidate statutes. But, then again, nobody has ever suggested that the Ninth Amendment provided an independent textual support for judicial review. If any are to be found, they are to be found elsewhere. While Bork never does identify the particular clause that explicitly authorizes judicial review, it is quite unfair to fasten this deficiency on the Framers of the Ninth Amendment. It is he, not the Framers, who has never faced up to the implications of the fact that the Constitution contains no judicial review clause that remotely passes Bork’s explicitness test.<sup>39</sup> Despite this fact, Bork endorses judicial review—so long as it occurs on his terms, not those of the Framers of the Ninth Amendment. Finding its command peculiarly “enigmatic,” he manages to write a whole book on the theme that “the enumeration in the Constitution, of certain rights, shall ~~not~~ be construed to deny or disparage others retained by the people.”

The seriousness with which the Founding generation took these words may be inferred from the fact that the Ninth is the *only* constitutional amendment aimed at proscribing an interpretive technique; all the other parts of the Bill of Rights are concerned with substantive or institutional

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38. P. 183.

39. Bork is critical of *Marbury v. Madison*, pp. 22–25, finding its redeeming feature only in Marshall’s decision to place “the Court’s power to declare laws unconstitutional directly upon the fact that the United States has a written Constitution.” P. 24. But, as Alexander Bickel explained long ago, the mere existence of a written constitution does not entail judicial review. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 3 (1962). Bork neither questions this piece of Bickellian wisdom nor supplies the more explicit textual arguments that he generally requires to satisfy his clause-bound conscience. Instead, he allows his doubts about the foundations of judicial review to surface selectively, as in his discussion of the Ninth Amendment, pp. 183–85, to discredit uses of judicial review that do not meet with his approval.

matters.<sup>40</sup> Of all the disputes in constitutional law, this seems a poor one to choose for purposes of drawing the line between orthodoxy and heresy—especially when the Grand Inquisitor himself admits that the text is “enigmatic.” Why should he issue an interdict against the benighted souls who find holy writ clear enough in its warning against the “disparagement” of unenumerated rights?

Sensing some weakness perhaps, Bork is not content to propound the Sphinx-like riddle he has made of the Ninth Amendment. He next provides the definitive solution to his textual predicament—without, however, doing any original research, or even attempting to canvass the substantial secondary literature.<sup>41</sup> Apparently, an essay by Russell Caplan<sup>42</sup> towers over the field—though, truth to say, it is rather equivocally described:

One suggestion, advanced by Russell Caplan and supported by some historical evidence, is that the people retained certain rights because they were guaranteed by the various state constitutions, statutes, and *common law*. [emphasis added] Thus, the enumeration of certain rights in the federal Constitution was not to be taken to mean that the rights promised by the state constitutions and laws were to be denied or disparaged.

This meaning is not only grammatically correct, it also fits the placement of the ninth amendment just before the tenth and after the eight substantive guarantees of rights.<sup>43</sup>

Bork's endorsement of Caplan's hypothesis as “grammatically correct” is curious. The Amendment speaks in negative terms: Do *not* “disparage” unenumerated rights. It is silent about what to do next: *Any* affirmative method that seeks to elaborate the content of unenumerated rights is “grammatically consistent” with its command. Even more curious is Bork's note of triumph when he recognizes that the Amendment protects rights guaranteed by the “common law.” For this concedes what Bork has tried so hard to deny: The Ninth Amendment proscribes the disparagement of *judge-made* rights.

Bork thinks he has removed the sting only because he unquestioningly accepts another, and far more controversial, aspect of Caplan's argument.

40. The Eleventh Amendment also takes the form of an interpretive canon rather than a substantive command, but here the Framers' concern with canons of interpretation is obviously secondary to the protection of a particular institutional value: federalism.

41. Some of these contributions were certainly hard to overlook. How could Bork have failed to notice Charles Black's Holmes Lectures on the subject at the Harvard Law School? C. BLACK, DECISION ACCORDING TO LAW (1981). I do not agree with some of the premises that inform Black's ongoing confrontation with the Ninth Amendment. See, e.g., Black, *Further Reflections on the Constitutional Justice of Liveliness*, 86 COLUM. L. REV. 1103 (1986). Nonetheless, I think an encounter with his work is absolutely vital for reaching a judgment worth having. Disagreeing with Charles Black is an education in itself.

42. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

43. P. 184 (footnote omitted).

On Caplan's view, the Ninth Amendment does not require interpreters to construe the Constitution as protecting unenumerated "rights of the people." Instead, it merely remits the protection of these rights to the state governments, which could modify or alter them at will. While Bork follows Caplan here, he does make the very point that should give him pause: "the placement of the ninth amendment just before the tenth." If we follow Bork's suggestion, and read the two amendments together, we will find that Caplan's reading has reduced the Ninth Amendment into a pointlessly redundant repetition of the Tenth. After all, the Tenth Amendment *already* contains abundant reassurance to the states that they may use their reserved powers to protect or revise any individual rights that have not otherwise been guaranteed by the Federal Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>44</sup> Given this reassurance of continuing state power in Ten, surely Nine means to do more than make the same point one more time.

If anything, reading Nine and Ten together only raises further suspicions about the Caplan-Bork reading. Notice that Ten is not strictly a "states rights" provision, but carefully distinguishes between the powers "reserved to the States" and those "reserved . . . to the people." Thus, Ten hardly suggests that the unenumerated rights "of the people" recognized by Nine can be manipulated at will by the states—any more than that they can be "disparaged" by the National Government.<sup>45</sup> Caplan and Bork, however, turn a blind eye to the textual emphasis on the protection of unenumerated rights in both the Ninth and the Tenth Amendments. Instead, they are willing to distort the meaning of the Tenth if this will allow them to render the Ninth a dead letter.

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44. U.S. CONST. amend. X.

45. While Caplan briefly notes the redundancy problem, *see* Caplan, *supra* note 42, at 263-64, he does not solve it. He claims that the Ninth "preserves rights existing under state laws already 'on the books' in 1791 plus those rights which the states would thereafter see fit to enact. The Tenth, by contrast, permits the states, by virtue of the powers delegated to them by the people, to continue to exercise their allocated functions." *Id.* (footnotes omitted).

Quite frankly, I have trouble understanding why Caplan believes his commentary saves the Ninth Amendment from redundancy. The best I can do is to read Caplan as suggesting that the Tenth Amendment looks only to the future, while the Ninth Amendment looks to the past and guarantees individual "rights existing under state laws already 'on the books.'" But if this is what Caplan has in mind, it seems very unpersuasive. The Tenth Amendment does not, as Caplan suggests, affirmatively "allocate" functions to the states; it "reserves" powers to the states that they *already* possessed and had not given up. Thus, there was no need for the Ninth Amendment to reassure the states that the "laws already on the books" were not to be casually impugned. For the Tenth's "reserv[ation]" accomplished this purpose.

It is even less clear why Caplan supposes that the Tenth Amendment was inadequate for reassuring the states that they were free to act in the future to protect "those rights which [they] would thereafter see fit to enact." Caplan's belief that Nine was necessary for this purpose only emphasizes how profoundly he has misconstrued Ten's recognition of the "reserv[ation]" of lawmaking power to the states. In any other context, I am sure that Robert Bork would never endorse a position that supposes, as Caplan's does, that the Tenth Amendment affirmatively granted the states lawmaking power, rather than explicitly recognizing that the states possessed reserved powers that preexisted the Federal Constitution.

But assume, for purposes of argument, that Caplan is correct: perhaps it *was* one of the purposes of the Ninth Amendment, as well as the Tenth, to reassure citizens that the fundamental rights guaranteed them by state law had not been modified by implication. Even then, Bork has not yet gotten where he wants to go. So far as he is concerned, it is not enough to grant the states unfettered control over fundamental, but unenumerated, rights. He insists, no less imperatively, on allowing the National Government a similar power over individual freedom. It is, however, one thing to say that the Ninth Amendment aims to reassure the states; quite another, to assert that this was its *only* objective. Whatever its impact on state law, an Amendment to the *National* Constitution that explicitly warns against “disparag[ing]” fundamental rights speaks, first and foremost, to the danger that the *National* Government might use its formidable powers to endanger those freedoms.

Since, as Bork explicitly recognizes, the Founders associated these fundamental freedoms with the judge-made tradition of the common law,<sup>46</sup> the speed with which he dismisses the Ninth Amendment is breathtaking. Within a page of the passage I have quoted, we find him announcing that, despite the commands of the Ninth and Fourteenth Amendments, “[i]t must be concluded that clause-bound interpretation of the Constitution is possible.”<sup>47</sup>

### III. ENLIGHTENMENT?

Why does Bork take such “care” to deny the alternative hypothesis: that the Founding Federalists and Reconstruction Republicans imposed not one but two kinds of limitation on constitutional government? First, they enumerated certain fundamental rights. Second, their text explicitly warns us that their list is partial and that we must complete it holistically, by elaborating the fundamental principles of individual liberty that the Founders and Reconstructors had sought to codify with only partial success.

It is possible, of course, that Bork has worn his erudition very lightly indeed and that he has much more historical insight than appears in this work. If this be true, I urge him to write another book to correct false impressions. *Tempting* suggests that he has fallen victim to the very disease he seeks to diagnose: his ceaseless “disparag[ing]” of unenumerated, but fundamental, rights has no deeper roots than his own personal philosophy. According to him, once a judge moves beyond the enumerated rights listed in the Constitution, “he is at once adrift on an uncertain sea of moral argument.”<sup>48</sup> More radically: “The truth is that the judge who

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46. See p. 184, quoted in text accompanying note 43.

47. P. 185

48. P. 252.



looks outside the historic Constitution [of enumerated rights] always looks inside himself and nowhere else.”<sup>49</sup>

While this is a possible view, it is odd to see it in a book denouncing the moral relativism and subjectivism rampant amongst the heretics. There are many other views, including the one espoused by Bork’s favorite modern philosopher, Alasdair MacIntyre. Bork misreads MacIntyre in the following passage:

The state of affairs in moral theory is summed up, accurately so far as I can tell, by Alasdair MacIntyre. After canvassing the failure of a succession of thinkers to justify particular systems of morality, MacIntyre says that if all that were involved was the failure of a succession of particular arguments, “it might appear that the trouble was merely that Kierkegaard, Kant, Diderot, Hume, Smith and their other contemporaries were not adroit enough in constructing arguments, so that an appropriate strategy would be to wait until some more powerful mind applied itself to the problems. And just this has been the strategy of the academic philosophical world, even though many professional philosophers might be a little embarrassed to admit it.”

Though the names of the players in the legal academic world have rather less resonance than the names on MacIntyre’s [sic] list, the situation is the same in the world of law school moral philosophy. In fact, that is one of the most entertaining aspects of this doomed enterprise. Each of the moral-constitutional theorists finds the theories of all the others deficient—and each is correct, all the others, as well as his own, *are* deficient.<sup>50</sup>

Actually, MacIntyre is making a narrower and different claim than the one Bork imputes to him. MacIntyre does not believe that all philosophers fail; even less does he subscribe to Bork’s view of moral argument as “an uncertain sea” that can be charted only by each judge “look[ing] inside himself and nowhere else.” MacIntyre conceives the West as constituted by a set of rival traditions—Classical, Christian, and that Johnny-come-lately springing out of the Enlightenment. Rather than looking inward, our task is to locate ourselves in one of these disparate traditions. It is at this stage in the argument that MacIntyre casts his scornful eye on the Enlightenment tradition he associates with Kant, Diderot, Hume and the rest. He believes that the Enlightenment, and *only* the Enlightenment, generates the moral chaos that Bork describes; it is precisely for this reason that he urges us to reject the Enlightenment for one of the sounder Western traditions.

It is not surprising to see MacIntyre making this move—unremitting

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49. P. 242.

50. P. 254 (quoting A. MACINTYRE, *AFTER VIRTUE* 51 (2d ed. 1984)).

hostility to the Liberal Enlightenment has been one of the few organizing themes in a philosophical career that has seen him embrace humanist Marxism in the 1960's before turning more recently to Catholicism as mankind's best hope against the moral chaos of modernity.<sup>51</sup> Things stand differently for Robert Bork, self-proclaimed Defender of the Faith of the Founding Fathers. Surely Madison, Washington, and the rest would be surprised to learn that their Grand Inquisitor joins MacIntyre in denouncing the Enlightenment against those "heretics" in the law schools who aren't quite convinced.

While Bork quotes extensively from MacIntyre's *After Virtue*, he does not seem to have read the more recent *Whose Justice? Which Rationality?*.<sup>52</sup> Here MacIntyre is even more explicit in recognizing that Enlightenment Liberalism has transformed itself into an ongoing tradition of political discourse and practice. Moreover, since MacIntyre takes the distinction between orthodoxy and heresy with Borkian seriousness, it is interesting to note how his view of the Enlightenment Cathedral differs:

[T]he contributions of the greatest names in the foundation of liberalism, Kant, Jefferson, and Mill, have been continued by such distinguished contemporaries as Hart, Rawls, Gewirth, Nozick, Dworkin, and Ackerman. The continuing inconclusiveness of the debates to which they have contributed is of course also one more tribute to the necessary inconclusiveness of modern academic philosophy.

What has become clear, however, is that gradually less and less importance has been attached to arriving at substantive conclusions and more and more to continuing the debate for its own sake. . . . [Increasingly] the mark of a liberal order is to refer its conflicts for their resolution, not to those [philosophical] debates, but to the verdicts of its legal system. The lawyers, not the philosophers, are the clergy of liberalism.<sup>53</sup>

I do not take much comfort in appearing at the end of MacIntyre's ironic list of "distinguished" epigones to a tradition he considers bankrupt. But at least he is not surprised to discover that there are some legal academics in America who haven't given up the ghost of the Enlightenment. Bork, in contrast, thinks it would be healthier if the "semiskilled moral philosophers"<sup>54</sup> of the law schools "simply dropped this line of work altogether."<sup>55</sup>

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51. Compare A. MACINTYRE, MARXISM AND CHRISTIANITY 116 (1968) ("Marxist project remains the only one we have for reestablishing hope as a social virtue") with A. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 403 (1988) (expressing hope in enriched Thomistic-Augustinian understanding of Christianity).

52. A. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988). At least Bork does not cite the book.

53. *Id.* at 344.

54. P. 254.

55. P. 255.

Given the Constitution's historic roots in Enlightenment thought, Bork is an odd Defender of the Faith to make this demand. A tradition like the Enlightenment cannot survive without a continuing debate over its basic presuppositions. Do they still make sense? How to respond to the countless efforts at critique from Hegel through Unger? We cannot expect Locke or Kant or Mill to answer these questions for us. They would be the first to urge us to think for ourselves, using their ideas only when they seem sensible. When Bork announces his "firm intention to give up reading this literature,"<sup>56</sup> he is excommunicating himself from the very tradition that seeks to keep the spirit of Madison alive in America's law schools.

Bork's inner estrangement from the Enlightenment also lies at the heart of his assault on the Supreme Court. It prevents him from recognizing what is so obvious to MacIntyre: American law is one of the principal historical achievements of the Enlightenment. It is in American courts, if anywhere, that one should expect people to take the Enlightenment's proud hopes for individual freedom as something more than empty and abstract rhetoric. It is in these courts, if anywhere, that one might find lawyers and judges who understand themselves as part of an ongoing tradition of constitutional argument aimed at realizing in practice the kind of individual liberty the Enlightenment only dreamt about. Indeed, it is precisely Alasdair MacIntyre's emphasis on the constituting powers of tradition that might have provided Bork with an alternative to his grim view that a judge who moves beyond the enumerated rights must "always look[] inside himself and nowhere else"<sup>57</sup> for inspiration. Perhaps the Justices have not been looking inward, but outward. Rather than searching into the hidden recesses of their arbitrary subjectivities, perhaps they have been seeking to interpret the ongoing constitutional meaning of the American tradition of individual liberty—as it was first expressed by the Enlightenment Founders and then transformed through the constitutional politics of later generations of Americans.

There is only one way to test this hypothesis. And that is to read judicial opinions from Marshall to Rehnquist in a spirit very different from the Grand Inquisitor's. Rather than hunting for heresy, our aim must be charity in interpretation.<sup>58</sup> We must try to see how it might have seemed *sensible* to judges in different eras to view the principles of constitutional liberty expressed at the Founding and Reconstruction quite differently from the way we do today. The more deeply we can understand *their* efforts to make sense of the Constitution, the more deeply we will come to understand how *we* might best continue its traditions of liberty under to-

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56. P. 255.

57. P. 242.

58. D. DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* 136–37, 152–53 (1984).

day's conditions. In pursuing charity in interpretation, we might find that even Taney has something to teach us in *Dred Scott*—if nothing else than that we may well have needed a Civil War before the American People could begin to confront the evils of slavery. Though the languages of constitutional liberty have shifted over time from property and contract to privacy and equal opportunity, we should be trying to glimpse the deeper continuities, as well as the obvious differences, in the judicial interpretation of the meaning of the Founding and Reconstruction.<sup>59</sup> Only in the last resort should we follow Bork and condemn as heretical recurring themes that have emerged time after time over the centuries-long judicial effort to make sense of the tradition—especially when that theme is individual freedom.

It is here, alas, where Bork approaches Dostoyevskyan dimension: Like the Grand Inquisitor, his quarrel is with the very idea that our tradition expresses a deep and abiding faith in human freedom. In contrast to the Dostoyevskyan original, however, Bork does not try to reveal the innermost depths of his quarrel with human freedom, the ultimate sources of his grim determination to cut up our constitutional text into such small pieces that the Framers' larger commitment to individual liberty is rendered invisible. Despite his efforts at self-revelation in the final Part, Bork does not succeed in presenting more than a portrait of the Inquisitor as he appears in public: "an old man, almost ninety, tall and erect, with a withered face and sunken eyes, in which there is still a gleam of light."<sup>60</sup>

The "gleam of light": let me emphasize that I agree with Robert Bork on one big point. Reading and writing judicial opinions is not like reading and writing political philosophy. If philosophy is any good at all, it is individual, speculative, undogmatic. The Supreme Court, in contrast, speaks in the collective name of the People; it interprets the People's past achievements and does not try to speculate about the unknowable future; it announces dogmas which may lead some to the electric chair, others to freedom.

In assessing judicial performance, then, it is a category mistake to evaluate Supreme Court opinions in terms of the philosophical conclusions reached by Kant or Mill or the lesser lights of the Enlightenment. Instead, we should be focusing our attention in the direction Bork points us—to the constitutional thought and practice of people like Madison and Lincoln. It is Americans like these, not Kant or Mill, who gained the constitutional authority, after years of political struggle, to speak in the name of We the People of the United States. While these successful spokesmen for the People were deeply influenced by European thought,

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59. For a preliminary effort along these lines, see Ackerman, *supra* note 25, at 486–547.

60. F. DOSTOYEVSKY, *supra* note 4, at 258.

their distinctive language of constitutional freedom can only be learned from them directly.

This is why Bork's failure to come to grips with the history of the Founding and Reconstruction is, in the end, a more serious failing than his philosophical estrangement from the Enlightenment's commitment to individual freedom—though doubtless they go hand in hand.

#### IV. TEMPTATION

Once we allow Bork to read his personal philosophy into the Constitution, *Tempting* becomes tempting. If we cast our philosophical lot with Bork and MacIntyre against the Enlightenment, we can join ranks in holy war against those benighted judges who continue to believe that the Enlightenment tradition of American freedom represents a system of "ordered liberty" capable of rational interpretation. After all, so long as Bork convinces us to abandon this Enlightenment project, I suppose his next step makes a certain despairing sense. If the Founding tradition floats on an "uncertain sea" of moralisms, the very most we can retrieve from the Framers is the odd assortment of wilful commands they happened to have codified in one or another textual formula. As for the rest, it's all politics—best left to our elected politicians.

Though he describes this approach as "Madisonian,"<sup>61</sup> it does not resemble anything Madison would find familiar. Madison did not believe that the Enlightenment was bankrupt. Madison did not believe that the Founding generation had handed down a set of ipse dixits floating on a sea of chaos. He believed that the Constitution *made sense* in terms of a set of rational principles of liberty that provided the framework for the interpretation of its particular provisions.<sup>62</sup> Bork does not believe this, and tempts us to follow him.

Will we?

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61. Unfortunately, however, he elaborates the fundamental principles of Madisonianism in a three-page chapter, whose only citation is to a letter from Lord Acton quoted in a book by Gertrude Himmelfarb. Pp. 139–41. At no other point does Bork present a systematic reading of Madison's thought, either as it appears in the Federalist Papers or elsewhere in Madison's voluminous collected works.

62. See M. WHITE, PHILOSOPHY, *THE FEDERALIST AND THE CONSTITUTION* 13–25, 175–92, 208–28 (1987); G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 95–248 (1981); Diamond, *Ethics and Politics: The American Way*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 75 (R. Horwitz 3d ed. 1976); Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 *YALE L.J.* 449, 453–73 (1989). For my own interpretation of Madisonian thought, see Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1019–31 (1984).