The Court and the Temptations of Politics

The Tempting of America: The Political Seduction of the Law. By Robert H Bork. (New York: The Free Press, 1990).

As the title of Bork's book suggests, temptation precedes seduction., In law", Bork writes, "the moment of temptation is the moment of choice, 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" (1). This temptation becomes a seduction when that same judge decides that "nothing matters beyond politically desirable results, however achieved". (1). The temptation, the seduction, and the resulting delegitimization of the law forms the core of Bork's book.

The Tempting of America is divided into three major sections. The first traces the idea of judicial activism from early dissenting opinions to contemporary majority opinions. In the second section, Bork critically examines current literature on constitutional interpretation and presents his own *views* on original intent which, in his opinion, is the only legitimate method of interpretation. The final section presents Bork's view of his divisive confirmation hearings and the effects of the hearings on future nominees.

We will proceed by setting forth the major arguments and positions advanced by Bork in each of these sections. By way of concluding, we will offer an analysis of his contention that his theory of constitutional interpretation, that of original intent, is the only legitimate form of interpretation, the only theory compatible with a republican form of government. In this endeavor, we will compare Bork's position with that advanced in *The Federalist* concerning the proper role and function of the judiciary in a constitutional republic. *The Federalist* provides a good point of reference for it purports to

discuss "The conformity of the proposed Constitution to the true principles of republican government" (1).

The Temptation and Seduction of the Law

While Bork singled out the Warren Court for its "unprincipled activism," which resulted in a "Court that had spun out of control," the temptation and seduction of the law is not a recent phenomenon (73). *As* early as 1789, Justice Samuel Chase presented the general outline of the temptation and seduction in his dissent in *Calder v. Bull:* "`I cannot subscribe to the omnipotence of the State legislature...although its authority should not be expressly restrained by the Court, of fundamental law, of the State'" (19). The question, according to Bork, is if the "fundamental law" or the Constitution does not restrain a legislature, where is the judiciary to look when it considers the constitutionality of legislative action? Chase tells the judge to look to "`the great first principles of the social compact ¯ and to the "`general principles of law and reason'" (19). These principles will provide guidance in determining the legitimacy of legislative action. As Bork points out, these principles are extra-constitutional, unwritten, and therefore subject to personal interpretation. In effect, this position presents the judge with unlimited power because Chase presents the judiciary with a "power beyond any written law" (20). A more contemporary notion of a judge's authority was expressed by Chief Justice Salmon Chase in the 1870 case of *Hepburn v. Griswold,* when he questioned if a congressional action was "`consistent with the spirit of the Constitution'" (35). Again, an extra-constitutional, unwritten standard is the measure for constitutional interpretation.

Bork's point is that from almost the very beginning of our republic, the criterion for judicial review included notions of the "first principles of the social compact" and "the spirit of the Constitution;" notions which are not defined and whose meaning is therefore subject to considerable disagreement. This indefiniteness enables the judge to apply his subjective standards to determine the constitutionality of legislative actions. This in turn means that the actual content of legislation, not the process through which the measure was enacted,

becomes the central question. The result of this, as Bork notes, is that the "fudge has begun to rule where a legislator should" (1).

This is, of course, a deviation from the very notion of representative government. As originally instituted,, our republic was to be governed by our elected representatives, representatives who would reflect the popular attitudes and values of the American people. These representatives would fashion legislation in accordance with these attitudes and values within the procedural constraints and outright prohibitions found in the Constitution. However, when the judicial branch is given the power to determine public policy through judicial review, Bork contends that the whole notion of popular sovereignty, of"We the People," is denied. Bork argues that this is all the more dangerous if we accept the fact that "judges are by definition members of the intellectual class" who, given the nature of judicial activism mentioned above, are then free to make the "morality and politics of the intellectual or knowledge class into constitutional law" and, hence, the law of the land (8). In this situation, lacking the constitutional procedures and prohibitions that control Congress, there are no limitations on the activism of the judiciary.

The idea that the judge should rule is closely associated with the idea of substantive due process; an idea which, Bork argues, can be traced to Chief Justice Roger Taney's decision in the *Dred Scott* case of 1856. In *Dred Scott,* Justice Taney simply declared that slavery was a form of property protected by the due process clause of the 5th Amendment, a determination which prohibited Congress from abolishing slavery by ordinary legislation in either the states or the territories. Taney ignored the fact that "The definition of what is or is not property would seem, at least as an original matter, a question for legislatures" and' simply declared that there is a constitutional right to own slaves (30). With this declaration, Taney transformed due process froma requirement "that the substance of anylawbe applied to a person through fair procedures by any tribunal hearing the case" to a "rule about allowable substance" (31). Bork *terms the Dred Scott* decision a "momentous sham," a decision that formally introduced substantive due process into American constitutional law and permit

ted the judge to write his "personal beliefs into a document that, most inconveniently, does not contain those beliefs" (31). The very notion of substantive due process, Bork re-emphasizes, "is never more than a pretense that the judge's views are in the Constitution" (43).

The ratification of the 14th Amendment; Bork points out, pro - vided the proponents of an active judiciary with "an embarrassment of riches" (38). In the addition to the due process clause, the courts now had the equal protection clause, two concepts that could now be applied to state governments. Not content with this, Bork notes that the Court extended the 14th Amendment to individual action in the 1948 case of *Shelly v. Kramer and* arbitrarily expanded the due process clause of the 14th Amendment in the 1954 case of *Bolling v. Sharpe* (83) The Court could now apply its extra-constitutional reasoning to all aspects of political and individual life in America.

Initially the 14th Amendment was used to strike down legislation dealing with economic regulations. These regulations were declared unconstitutional on the grounds that they violated the liberty mentioned in the Amendment-a liberty which, as defined by Justice Peckham in *Lochnerv. New York* (1905), even included "'The general right to make a contract'" (44). The Court granted that certain restrictions could be imposed by state legislatures under the general police power; but these powers "had inherent limits independent of any constitutional prohibition," limits which could only be determined by the judiciary. Again, the substance of legislation was subject to judicial review based on extra-constitutional grounds which, Bork maintains, principally involved the personal philosophies of the judges. As Bork points out, judges tend to reflect the bias of the intellectual elite and these biases during the Lochner Era included the protection of business interests; a bias that was simply read into the notions of substantive due process which determined what legislatures could and could not legislate.

This business bias began to change in the 1930s. Bork cites *West Coast Hotel Company v. Parrish* (1937) as an indicator of the shift in attitude (57). The *Parrish* decision upheld a Washington state minimum wage law for women and overruled the 1923 *Adkins* decision which declared a similar law in the District of Columbia

unconstitutional. While the *West Coast Hotel* decision would seem to be in line with Bork's general thinking that the legislature has a broad area of discretion in determining public policy (a matter to be discussed later), Bork criticizes it on the basis of the rationale used by the Court. He notes that Chief Justice Hughes upheld the regulation based on "the conditions and economic arguments that made the law desirable," rather than on the grounds that minimum wage legislation is not prohibited by the Constitution and therefore can be enacted by the legislature (58). Hughes's rationale allows the Court to judge the substance of the legislation, that is, whether or not it is "desirable," as it relates to social and economic conditions, rather than simply confining itself to procedural considerations. This rationale, we are told, led to an even more pernicious approach to questions of individual liberty and legislative power," an approach outlined by Justice Stone in his famous footnote four in the 1938 case of *United States v. Carolene Products (58).*

In the *Carolene Products* decision, the Court acknowledges the fact that the political process was designed to protect minorities, and to guard against factious majorities legislating in their own interest. However, the Court also maintains that this is not a fool proof process, that minorities may in fact be discriminated against in the legislative. process. In deciding on the constitutionality of a statute, Justice Stone's footnote four makes clear that the Court can inquire into "'whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of these political processes ordinarily to be relied, upon to protect minorities (59). In investigating this, Stone writes that a "'more searching judicial inquiry" is appropriate (59). Should this searching inquiry find prejudice, the Court possesses the authority to provide a judicially mandated remedy. This remedy, according to Bork, does not answer the question of "how is the Court to know whether a particular minority lost in the legislature because of 'prejudice,' as opposed to morality, prudence, or any legitimate reason" (60)?The answer, accord- ing to Bork, is that "the Justices will read into the Constitution their own subjective sympathies and social preferences" (61).

Bork maintains that this is far more dangerous than previous

decisions which were based on substantive due process *and* linked to actual provisions in the Constitution. Even though such decisions were all too frequently examples of judicial activism, the pretense of constitutionality was at least maintained. The *Carolene* case drops this pretense and signals the end of economic substantive due process; henceforth the Court would be concerned with prejudice in the political process and with the active protection of minorities in that process. "Footnote four, then, adumbrated a constitutional revolution. In those few lines the doctrinal foundation of the Warren Court was laid" (61). A new legal culture was beginning to take hold and Bork maintains that *a* new legal principle, substantive equal protection, came to be the foundation of that culture (61).

Bork cites *Skinnerv. Oklahoma* (1942) as one of the first examples of the use of substantive equal protection. Writing for the majority, Justice Douglas cites denial of equal protection as the reason for striking down an Oklahoma law requiring sterilization for certain categories of repeat criminal offenders. In his decision, however, Douglas goes beyond equal protection in the application of the law to the substance of the law, sterilization: "`It is by *no* means clear whether . . this particular constitutional difficulty [denial of equal protection] might be solved by enlarging *on* the one hand or contract ing on the other.. .the class of criminals who might be sterilized- (62). We are led to conclude from this *line* of reasoning that the application of the statute does not matter *to* Douglas, he simply objects to the substantive idea of serialization. This decision led to the idea, attributed by Bork to Professor Thomas Reed Powell, that the Court will operate on the premise that -the less favored in life will be the more favored in law- (70). ' The *Skinner* case leads Bork to a consideration of the Warren Court which embraced the philosophies of *Carolene* and *Skinner;* that is, to eliminate what is perceived as prejudice in our political and social life and to protect those "less favored in life."

Ironically, the first case decided by the Warren Court was "one of constitutional law's great triumphs," the 1954 decision in *Brown v. Board of Education* (73-74). But, as Bork emphasizes, the triumph of *Brown "was* a triumph *so* misperceived" that it "led to some of the

law's most blatantly illegitimate decision" (74). It is necessary to bear in mind that Judge Bork supports the conclusion reached in the *Brown* decision, he refers to it as "a great and correct decision" (75). However, he holds that the reasoning behind the decision is "very weak" and has" caused an enormous amount of trouble in law." (75). The "problem" with *Brown* arises because the result is generally accepted as being "good," but the decision is based on extra-constitutional grounds that are then applied to issues and circumstances not present in *Brown.*

We may put Bork's reasoning with respect to the *Brown* case as follows: The separate but equal doctrine that *Plessy* established was struck down for reasons primarily social and psychological; e.g., that segregated education produced feelings of inferiority in black children. Moreover, the decision was based on "social science studies" and was limited to educational matters (76). However, Bork maintains that this was not the real intent of *Brown-its* real intent was to establish the principle that "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" (76). As evidence of this, Bork cites a series of cases striking down segregation of public beaches, golf courses, parks, and courtrooms "with nothing more than the citation of *Brown v. Board of Education" (76).* This, Bork points out, is disingenuous and it is this disingenuous coupled with "the obvious moral rightness of its [the *Brown* decision] result" that had a "calamitous effect upon the law" (76).

In deciding as it had, Bork continues, the Court "departed from the original understanding in order to do the socially desirable thing" (76-77). The Court was tempted, seduced, and provided the rationale for future seductions. Those who sought to "further a particular policy agenda" pointed to *Brown* and noted that original understanding could never have produced the *Brown* decision, could never have resulted in what Bork terms "the greatest moral triumph constitutional law ever produced" (77). Because of this, *Brown* became the test for constitutional interpretation and since it was felt that "original understanding cannot meet that test . . . the courts may do as they wish, or as the

intellectual class wishes, in all future policy issues" (78)., The rationale, doing the right thing, became, on Bork's showing, the rationale for the Warren Court's future decisions; decisions based on a particular liberal social agenda and not on the principles found in the Constitution. To illustrate this point, Bork provides brief discussions of the one man-one vote decisions *(84-90),* the abolition of the poll tax (90-91) , the Voting Rights Act of 1965 (91-93), and the incorporation of criminal procedure and establishment clause provisions of the Bill of Rights to the states *(93-95).*

It is in the area of civil rights and affirmative action that most Americans feel the impact of the Court, and Bork maintains that the Court has significantly altered the intent of civil rights legislation. This alteration transformed "Title VII of the Civil Rights Act of *1964* into a group entitlement law rather than an antidiscrimination law" (104). The law clearly states that there can be no discrimination on the part of an employer based on race, sex, color, religion, or national origin, an intent totally subverted in 1987 by *Johnson v. Transportation Agency, Santa Clara County.* At issue in this case was an affirmative action program adopted by Santa Clara County, a program was put into effect because the county felt that "`mere prohibition of discriminatory practices"' as not sufficient to eliminate the effects of past discrimination. This policy was challenged by Johnson when a women was promoted over him despite the fact that his test scores were higher; a decision clearly based on gender. In hearing this case, the Court declared that "`the Agency appropriately took into account as one factor the sex"' of one of the applicants for the position (104). As Bork points out, "What happened to Johnson violated the statute. His employer discriminated against him because of his sex;" yet the Court upheld this as being in the spirit of the law (105). In deciding *as* it did, Bork feels that "The Court made of the 1964 Civil Rights Act a law that Congress had not written" (103). The Court justified its actions because it felt it was the "right" thing to do.

Bork then turns his attention to what may be termed the most blatant example of judicial activism, the creation of new autonomous rights in general and the right to privacy in particular, a development that Bork terms the "Construction of a Const itutional Time Bomb" (95).

The creation of the modern right of privacy began, according to Bork, with the 1965 case of *Griswold v. Connecticut,* a decision that "was insignificant in itself but momentous for the future of constitutional law" (95). In this case, the Court simply held that Connecticut could not forbid the counseling: or use of contraceptives to married couples. To do so, it reasoned, was a violation of a right to privacy. As with *Brown,* Bork does not seem to be at odds with the actual decision of the Court as written by Justice Douglas; rather, its rationale is unsettling for Bork. Connecticut's law on contraception was never enforced and its purpose seemed to be a "precatory" statement or an affirmation of moral principle (96). Although the argument can be made that this is not the proper use of the law, anyone brought to trial for violating the anti-contraception statute could have the law declared void "by reason or desuetude" or could argue that the "law had not provided fair warning" of application and, therefore, could not now be applied. As Bork points out, this was not the, rationale behind Douglas' majority opinion. Douglas did not consider the fact that the law had not been enforced, rather he "dealt with the case as if Connecticut had devoted itself to sexual fascism" and wrote that the issue involves "`a right of privacy older than the bill of rights'" (97).

Douglas then launches into his famous "penumbras" and "emanations"which prohibit certain governmental actions that, by themselves, are not prohibited by the Constitution, but are likely to lead to infringements of other rights specified in the Constitution (97). In defense of his penumbras, Douglas cites *NAACP v. Alabama* (1958), which held that the state of Alabama cannot require the NAACP to disclose membership lists because this would deter people from joining that organization and would, thereby, adversely affect the first amendment's rights of speech, assembly, and petition. [In addition to this case, Douglas cites the 3rd, 4th, and 5th Amendments in an attempt to create a right to privacy.]

Bork points out several inconsistencies in Douglas' argument: none of the amendments cited dealt with the issue of contraceptives; none of the guaranteed freedoms mentioned in the amendments were threatened by the Connecticut statute; the *NAACP* case was

concerned with public activities of politics and litigation," not with the issue of privacy in and of itself (98). Bork concedes that the *Griswold* decision does speak of the sanctity of marriage and the family and that this does establish a relationship to the decision reached *in NAACP v. Alabama.* Both cases linked the notion of privacy *to* other "fundamental" rights or institutions; the right to assemble and petition government and the institution of the family. Thus, the Court could maintain that privacywas a means to an end, not an end in itself.

This was, Bork insists, a fiction which disappeared *in* 1972 when *the Court* decided *Eisenstadt v. Baird. The* principle *in Griswold was* extended to single people and "the argument of the Court shifted from the sanctity of a basic institution, marriage, to the sanctity of individual desires" (1'11). Privacy is seen as an end itself, it liberates the concept from being defined and limited by other considerations. And, Bork adds, the entire argument is extra-Constitutional, there is nothing in the Constitution that addresses a generalized, independent right to privacy (111).

These cases provided a rationale for the *Roe v. Wade* decision in 1973, which admits that "`The Constitution does not explicitly mention any right of privacy" but nonetheless claims that the right to privacy does exist (113). Bork points out that the Court is not certain where to find this right, it may be in the 14th Amendment, it maybe in the 9th Amendment-its somewhere, the court insists, in the Constitution (113). In this assessment, Bork receives the support of Justice White who, in his dissent, accuses the Court of simply fashioning and announcing "` a new constitutional right for pregnant mothers;" the Court does not define this new right to privacy, it simply tells us that it is broad enough to include abortions (115). This, according to Bork, is "not legal reasoning," it is legal "fiat" (114).

Given the undefined nature of this newly created right, the Court has placed itself in the position of being the moral advisor to the American people. This follows, Bork argues, from the notion that the Court *is* to decide on matters of substance, not on matters of procedures. *In* the case of privacy, the Court *must* decide what behavior is constitutional and what behavior is not. The best illustration of this

dilemma is the 1986 case of *Bowers v. Hardwick* which asked the Court to rule that there is "a fundamental right to engage in homosexualsodomy(117). The majority of the Court decided against this position.

Bork concludes this first section with an analysis of the features that characterized the Court's performance. . : First and foremost, "the Court has been a strong force for centralization in our national life" (129). The focus of this centralization has shifted from the economic centralization of the New Deal Court which refused to limit Congress' commerce, taxation, and spending powers to the Warren and post-Warren Court which have "imposed political and moral uniformity across wide areas of American life" (129). This centralization was not, Bork reminds us, guided by the Constitution, rather the rationale was "the moral imperatives and self-righteousness of the hour" (132).

In, reviewing the Court's activities in recent decades, Bork identifies a worrisome trend in which "ideas. . .that originate outside the Constitution" have an overwhelming "influence" on judges deciding constitutional issues (250). Others, of course, see this trend in a more favorable light. As Bork notes, this development was and continues to be buttressed by "a torrent' of literature from law professors. The next section is devoted to an examination of the theories designed to justify this trend and of Bork's own views on the original intent doctrine.

Theories of Constitutional Interpretation

Bork notes the "sheer volume" of contemporary constitutional theorizing and concludes that this is not a sign of a healthy legal profession for, unlike the physical sciences in which "theoretical advances are a sign of health," the "basic question of how judges and lawyers 'should go about deriving doctrine from legal materials" should have been settled and should remain relatively constant (133). "Self-confident legal institutions do not require so much talking about" and the fact that there is so much talking about our legal institutions could signify "a deep-seated malaise and, quite possibly, a state of approaching decadence" (133). Bork's review of

the literature confirms his fears. Modern constitutional commentators employ concepts that are "abstruse," sources that are "philo ¯ sophical," arguments that are "convoluted," and prose that is "necessarily complex" (134). Instead *of* looking to our written Constitution to determine the validity *of* law, Bork maintains that modern theorists refer us to "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" *(134).* In this endeavor, modern constitutional interpretation is engaging in what Justice Story warned *us* against, "the alteration *of* the Constitution by `ingenious subtleties,' `metaphysical refinements,' and `visionary speculation' to make it not a document addressed to the common sense *of* the people but one addressed to a specialized and sophisticated clerisy *of* judicial power" (134). I will only examine certain *of* the liberal and conservative theorists mentioned in *The Tempting Of America.*

Liberal theorists *of* constitutional interpretation dominate the field *of* constitutional law. According to Bork, their theories, though united by a nonoriginalist approach, differ greatly both in respect to their perceived role for the Court and the extra-constitutional principles to which they appeal. Liberal revisionist theories are divided into two categories, those that proclaim some vague adherence to principles *in* the Constitution and those that simply reject the Constitution.

The most sympathetic treatment is given to Bork's colleague, the late Alexander Bickel, who is credited as being the first law professor to "set out a complete justification for and theory *of* nonoriginalist judging" (188). While admitting that his theory is anti-democratic, Bickel saw a need for an active Court because he felt that "Society needs both principle and expediency" *(189).* While the legislature can provide the expedient, the short-term solution, Bickel views the Court as the only institution of government capable *of* applying principle to policy making, judges are to pursue "`the ends *of* government¯

(189). Yet, Bork points out that, Bickel did not argue for an active Court in the same sense that other liberal activists have and do. Because he admitted the anti-democratic nature of his view, Bickel attempted to link his activist Court to a democratic principle, acceptance by the people. Therefore, in seeking the "'fundamental presuppositions'" in our society's traditions and philosophy, Bickel held that the judge must only apply those presuppositions when he feels that they have gained widespread acceptance or are likely to gain widespread acceptance in the "'immediate foreseeable future'" (190). The main problem with Bickel, as Bork sees it, is that the "fundamental presuppositions" involve principles that are not found in the Constitution-itself a document of "fundamental presuppositions" (191). Bork feels that what Bickel does not understand is that the ideas of expediency and principle are mixed in a republican society and it is up to the legislature, not the judiciary, to determine that proper mix (191), Bork points out, that the argument that the Court decisions are not final unless they gain acceptance neglects to consider how long it can take to overturn a decision: "The argument that a Supreme Court decision is not really final, and so not at odds with the theory and practices of democracy, assumes ...that in the long run none of us will be dead" (193).

John Hart Ely takes a different approach to the role of the Court. Bork maintains that Ely is not concerned with the discovery of fundamental principles, but with the "discrete and insular minorities" of the Carolene Products decisions (198). Ely contends, that when minorities consistently lose in the political process because of prejudice by the majority, it becomes the job of the Court to remove this prejudice from the system (198). This, Bork writes, is a theory of "representation-reinforcement," a theory not found in the Constitution and a theory that leads to "some extremely liberal versions of what the Constitution commands," e.g., striking down all laws that disadvantage aliens, homosexuals, women, murderers, and so on (198).

Perhaps the best known of the contemporary liberal theorists is Professor Lawrence Tribe of Harvard. Bork holds that Tribe's theory simply "takes whatever form is necessary at the moment to reach a desired result" (199). Yet, Tribe still maintains that he is basing

his interpretation on the Constitution. This, Bork points out, is a fiction. He cites Tribe's" `antisubjugation principle'" as an example of this. Tribe maintains that the 14th Amendment was an attempt to prevent the legal subjugation of blacks (201). From this rather limited reading of the 14th Amendment, he deduces the much broader constitutional principle of "antisubjugation," which compels the Court "`to break down legally created or legally re-enforced systems of subordination that treat some people as second-class citizens;" this principle applies to both state and individual action (202). Based on his antisubjugation principle, Tribe also creates rights ofpersonhood and privacy that become, according to Bork, "an extreme form of modern liberalism's moral relativism" for these new rights of personhood and privacy encompass the use of mind altering drugs, homosexuality, and, *interalia,* obscene material (204).

Professors Michael Perry of Northwestern and David AT Richards of New York University, maintain their theories are based on Constitutional interpretation, but a cursory examination of their ideas makes one wonder. Perry pledges allegiance to the Constitution but, as Bork points out, argues that in addition to the original meaning of that document there is an -aspirational meaning and the judge is encouraged to "`rely on his- or her own beliefs as to what the aspiration requires'" (216). Richards sees the Constitution as an important text but one that is unconcerned with establishing a procedural republic for "`the central premise of our constitutional order is not democratic rule but moral principles of justice (211). This leads Richards to a new definition of civil liberty as the "`principle of love'" (211) and, Bork notes, a conclusion that the Gay Rights Movement is "`a form of political, social, and moral dissent on par with the best American dissent and even subversive advocacy- (212).

Among those who simply reject the Constitution are Professor Mark Tushnet at Georgetown and adherents of the Critical Legal Studies program at Harvard, a program categorized by Bork as "a nihilistic neo-Marxist movement" (207). Tushnet is quite open about his requirements for judicial review; the judge is advised to "`make an explicitly political judgement'" that will be likely ¯to advance the cause of socialism" and then reason back from that judgement (214).

Professor Duncan Kennedy, a leading figure in the Critical Legal Studies movement, not only expresses hostility towards the Constitution but seeks to eliminate all law in order to create a "`shared vision of a social harmony so complete as to obviate the need for any rules at all" (207).

Bork ends his section on liberal theorists with a consideration of Justice William Brennan. Brennan, like Richards and Perry, maintains adherence to the Constitution, but the judge must link "`the constitutional text'" to "`the demands of human dignity, demands which "`will never cease to evolve ¯ (219). Bork emphasized the point that Brennan's view includes the notion that new circumstances require new principles of justice which has the effect of making human dignity "a clause of the Constitution that judges may apply in accordance with their own philosophies" (220).

While the majority of constitutional theorists are liberal, two prominent conservative professors, Bernard Siegan of the University of San Diego and Richard Epstein of the University of Chicago, are covered in the book.

Siegan would like to have the Court exercise "Substantive due process" in such a way that it "becomes a policy of laissez faire, not just with respect to economics but with respect to all human activity" (225). Bork points out that this position, which presumes all governmental activity is erroneous, would place the Court "in a stance of across-the-board libertarianism" (225).

While Bork indicates some sympathy with the idea of closely scrutinizing governmental regulation when constitutional principles are involved, he differs from Siegan in the area where such principles are not evident. In answering the important question of "who is to apply the presumption of error, players in the political process or judges" when clear constitutional principles are not involved, Siegan would answer that the judges would provide the answer, whereas Bork would opt for the political process (225).

Epstein, a proponent of economic libertarianism, focuses on economic rights. Again, Bork indicates agreement with Epstein's general approach to government, but disagrees with the Court being the final decision maker. Epstein would have the Supreme Court

implement economic liberalism by prohibiting such policies as "progressive income taxation, welfare, and the National Labor Relations Act;" Bork would rely on the legislature to make these kinds of decisions.

This same dedication to legislative discretion leads Bork to criticize Justice John Marshall Harlan, often admired by proponents *of* judicial restraint. Citing Harlan's dissent in *Poe v. Ullman* (1961), Bork points out that Harlan's methodology offers "no protection against judicial imperialism" *(235).* The Court, in *Poe,* dismissed a challenge to Connecticut's anticontraception law because there was no live controversy, it had never been enforced. Harlan, *using* a substantive due process argument, objected to this decision and maintained that the Court must decide which legislative regulation are-arbitrary impositions and 'purposeless restraints'" *(232).* Bork concludes that Harlan's view of the role *of* the Court is just as arbitrary and open to the *imposition of* the subjective values of a particular judge as are the views *of* the liberal theorists *(234).*

The defect *of* these "revisionist constitutional theories" *is* that they "contain inherent and fatal flaws" by which Bork means that modern constitutional thinking relies on the moral choices of judges in determining the wisdom *of* legislation with constitutional considerations playing a distinctly secondary role (251). This results in what Bork terms "the classic form *of* the eternal temptation" in which *we* "trade the right *of* self-government for the protection *of* benevolent judges" *(261). This* leads, Bork insists, to an inversion of traditional legal reasoning.' The orthodox style of legal reasoning "was to listen *to a* controversy between people, ascertain the facts, and then determine which side of the dispute was better supported by the relevant body of legal doctrine, whether that doctrine was expressed in judicial opinions, statutes, *or* the Constitution" *(262).* This method only makes sense *if* "the object *is* to carry the intended meaning of the legal text forward into the decision *of* real controversies" *(262).* Modern legal reasoning, Bork argues, reverses this process. The first question raised is what *is* the political *or* moral result desired by the judge; *once* that is established a rule is devised that will achieve the result. The resulting rule in constitutional law "does not come out of, but is

forced into the Constitution. It is a process of personal choice followed by rationalization; the major and minor premises do not lead to a result, the result produces the major and minor premises" (262). According to Bork, this is legal fiat, not legal reasoning.

This disagreement between the orthodox and modern interpretationis, Bork claims, ultimately a disagreement regarding the nature of our political system. Orthodox legal reasoning "is rooted in a concern for legitimate process rather than preferred results" and is "an instrument designed to restrict judges to their proper role" in our constitutional system. Whereas, modern legal reasoning, according to Bork, is an attempt to free judges from the Constitution (262). This leads us to a consideration of the doctrine of original interpretation.

"The central problem," Bork asserts, "for constitutional courts is the resolution of the `Madisonian dilemma'" (139). That dilemma is the reconciliation of the opposing positions of majority rule and minority rights. Bork maintains that Madison attempted to resolve this dilemma through limited government, separation of powers, checks and balances, and a bill of rights that "directly addresses the specific liberties minorities are to have" (139). "We have," Bork writes, "placed the function of defining the otherwise irreconcilable principles of majority power and minority freedom in a nonpolitical institution ... the Supreme Court of the United States", (139). Because of this, the judiciary is nonpolitical, it must have a rationale acceptable to the principles of popular sovereignty; a rationale that will permit the Court to be "energetic in protecting the rights of individuals while being equally scrupulous to respect the rights of majorities to govern" (140), Bork insists that such a rationale is found in the original understanding approach: "In truth, only the approach of original understanding meets the criteria that any theory., of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the, design of the American Republic" (143).

Bork's original understanding is based on the premise that law is "a rule that we have no right to change except through prescribed procedures," the law has a "meaning independent of our own desires" (143). This premise applies to ordinary statutes and to the Constitu-

tion, and requires that law is to be applied neutrally. This neutrality, Bork feels, is guaranteed through the original understanding approach (146). Neutrality, as he views it, encompasses three aspects, "neutrality in deriving, defining, and applying principle" (146). The principle to be applied in any decision must be found in the Constitution, and the judge must accept the "ratifiers' definition of the appropriate ranges of majority and minority freedom" (146). This means, he writes, that the judge may "never create new constitutional rights or destroy old ones" (147). He returns to the *Brown* decision for an illustration of what he means. The Court held that the equal protection clause of the 14th Amendment forbids racial segregation by state governments, but this, according to Bork, cannot be extended to questions ofprivate discrimination because the 14th Amendment only addresses state action (147). Congress, not the Court, can extend this principle to individual behavior and did just that in the 1964 Civil Rights Act. Bork contends that it was proper for Congress to increase the scope of minority in this instance, but that it was improper for the Court to do so. In defining the principle, he would require the judge to look at the level of generality that was intended by the framers of the principle, "The judge must not state the principle with so much generality that he transforms it" (148). The 14th Amendment serves as the example: its ratifiers, he asserts, intended that "blacks should be treated bylaw no worse than whites" (149). To raise the level of generality from this limited concept to a level requiring affirmative action is, he insists, to change the substance of the amendment.

Once the principle has been derived and defined, it must be applied in a neutral fashion: Bork cites the case of *Shelly v. Kraemer* (1948) to illustrate this point. In that case, the Court used the 14th Amendment to strike down restrictive covenants, an example, he feels, of a "nonneutral application ofprinciple" because the 14th Amendment, to repeat, is directed at state action, not at individual action (151). While the judge may not like the discriminatory conduct, Bork insists that the remedy is to be found in the legislative branch of government, not in the judiciary.

There are several objections to Bork's theory of original intent that he answers by way of elaborating on the original understanding

approach.

One such objection centers around the impossibility of ever knowing the intention of Madison, Hamilton, or any of the Founders. Justice William Brennan raised this point in his 1985 speech at Georgetown University: "`It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific contemporary problems- (161-162). Bork argues that Brennan's criticism misses the whole point of original intent which does not attempt to provide the judge with "a conclusion," but only the "major premise" (162). Thus, Bork writes, it is possible to apply the major premise of the 4th Amendment that government cannot arbitrarily search and seize people, their homes, papers, or effects to the circumstances created by the modern electronic age. The Amendment, in Bork's view, outlines a procedure that must be followed before the government can take action. Whether the action takes place in 1789 or in 1990, the procedure is the same. As Bork puts it, the "major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislative or executive action" (162-163).

Another criticism discussed by Bork is related to the first and linked to the notion of a "living" Constitution. This school claims that the framers "lived in an entirely different society" and what they were concernedwith no longer applies (164). This school of criticism does not recognize that while the circumstances may have changed, the principles in the Constitution have not; the Constitution is concerned with the principle, not with the conclusion.

The most radical objection, Bork notes, is the assertion that the Constitution is simply not law. Dean Paul Brest of Stanford, a proponent of this school of thought, wrote that "`a document cannot achieve the status of law, let alone supreme law, merely by its own assertion."' He continued with the observation that "`We did not adopt the Constitution, and those who did are dead and gone" (172).

According to Bork, this argument proves too much and too little. It proves too much in the sense that the "dead man theory" can be used as an excuse not to enforce various provisions of the Bill of Rights for its ratifiers are also dead and we, the living, have never

ratified the Bill of Rights (173). The Brest position seeks to avoid this conclusion by holding that legitimacy is granted to his Court's interpretation if a majority of the voting age public acquiesce in its decisions, a position that would ensure that the Bill of Rights will remain in tact (173). However, this argument proves too little. It is, in Bork's words, a "very peculiar method of giving the Court authority to redo the Constitution, for it means that the Constitution may be amended if *a* simple majority of the American people delegate, or do not protest the delegation of, that authority to the Court" (173). This misses the "whole point of the Constitution which is to establish law that cannot be amended bymajorityvote, much less by mute acquiescence"(173). Here, Bork is referring to constitutional amendments, not statutory law, and his point is that the Constitution was ratified by an extraordinary majority of the people; its authority is not self-proclaimed. In addition, the document contains an amendment process which is spelled out in Article V. It can be argued that every time the American people or their elected representatives either propose or ratify an amendment to the Constitution, that very same process reaffirms the authority of the Constitution itself. Likewise we obey ordinary statutory legislation because it was passed under the authority of the Constitution. Bork points out that Article VI clearly indicates that the framers intended the Constitution to be law, and that it was binding of the judiciary for "`judicial Officers . . . shall be bound by Oath and Affirmation, to support this Constitution" (174). Bork adds: *This* Constitution, not one they make up themselves, is to bind federal judges" (174). The Brest view of the role of the Court can be easily linked to the idea that the Supreme Court is an on-going constitutional convention wherein each Court represents a "new" founding. Bork tends to reject this notion as simply wrong.

We noted earlier, that the decision in *Brown v. Board of Education* (1954) has become the ultimate test for competing theories of constitutional interpretation, so much so that any theorywhich cannot arrive at the *Brown* result is lacking. Bork admits that the Court's decision in that case was the correct decision, yet detractors of original understanding, which links equal protection to segregation, point to *Brown* as proof of original intent's inability to reach such a conclu-

sion. Thus, the critical test is whether *Brown* could have been decided using the original understanding theory of judicial interpretation. Boric answers that it could, that original understanding could pass such *a* test. The "primary goal" *of* the 14th Amendment, as Bork views its history and intent, was to provide "equality under the law" (82). While the ratifiers of the amendment did not see any inconsistency between this goal and segregation, indeed they "probably assumed that segregation was consistent with equality," the idea of segregation is not mentioned in the Amendment (82). Bork emphasizes that in framing the 14th Amendment, "equality, *not* separation, was written into the text" (83). He then shows that a long line of cases after the "separate but equal" doctrine was announced in *Plessy v. Ferguson* had shown that separate facilities "rarely if ever produced equality" (83). Because of these findings, *Brown* could have been decided on the premise that the equality mentioned in the 14th Amendment precludes "state-imposed segregation," for "The text itself demonstrates that equality under the law was the primary goal" (82). Consequently, had the Court used this as the basis of the *Brown* decision, "its result would have clearly been rooted in the original understanding, and its legitimacy would have been enhanced for those troubled by the way in which the Court arrived at a moral result with demonstrated its mooring in the historic Constitution" (82-83). Using this rationale, Bork feels, would have had the additional benefit of discouraging the Court from embarking *"on* more adventures in policymaking, which is what it thought it had done in *Brown,* and academic constitutional lawyers might not have gone on to construct the apparently endless set of theories that not only attempt to justify *Brown* on grounds other than the original understanding but, in order to do so, advance arguments that necessarily justify departure from the historic Constitution *in* general" (83).

Would Bork's theory of original understanding mean that he would have the Court overturn most of the decisions *on* New Deal and Great Society legislation? While Bork admits that theses decisions were "clearly incorrect," he would not overturn them because they have become "so embedded in the life of the nation, so

accepted by the society, so fundamental to the private and public expectations of individuals and institutions" that overturning them would "plunge us into chaos" (158). Bork admits that he would limit the use of the commerce, spending, and taxing powers in the future because "there remains a constitutional principle of federalism that should be regarded as law more profound than the implications of the past decisions" (159). What of *Roe v. Wade?* Here Boric maintains that there is no reason why this decision could not be overturned, but he indicates that he would rather simply "not apply it again" and allow "the stream of claims" to "dwindle and ultimately dry up" (159).

According to Bork, original understanding is the only constitutional theory that is compatible with the Constitution, and the republican system of government it established. Every "revisionist" theory of constitutional interpretation is rejected by Bork because they involve applying "major moral choices" to legislation but none can offer a satisfactory explanation as to why the judge should impose his morality on society (251-252). These theories, Bork insists, attempt to resolve the Madisonian dilemma by destroying the Madisonian model. This solution, it is pointed out, solves one problem, majority tyranny, by replacing it with another, more serious problem, judicial tyranny.

The Hearings

Bork's final section, "The Bloody Crossroads," presents his views of his Senate confirmation hearings, and his concerns about those hearings for future Supreme Court nominees. The rancor of the hearings, Bork feels, can only be understood when they are placed in the context of the "long running war for control of our legal culture" (271). The tone of the entire process was set by Senator Kennedy's totally unfounded and, in Bork's view, ideologically motivated "Robert Bork's America" speech which described " a land in which women would be forced into back-alley 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, " and so on. In fact, Bork maintains that all these descriptions are totally alien to his actual positions.

While it was Kennedy who opened the attack, Bork claims that it was Howard Metzenbaum who made "some of the most egregious accusations about my attitudes toward women" and completely distorted his decisions related to questions about sterilization and equal pay (306-307).

After reviewing some of the specific charges brought against him, Bork concludes that what appeared to "a lot of people not versed in constitutional law, " including, in Bork's opinion, Senators Kennedy, Metzenbaum, Specter, and Biden, "to be a serious consti - tutional discussion" was, in reality, only a highly partisan and well-orchestrated attack on him (345). Bork maintains that he became "a symbol they needed to destroy" (345), and that the behavior of the liberal senators reflected "a left-wing culture in near despair" (337).

Bork concludes that the affect of the hearings will be the further politicization of the Supreme Court and the law that the Court interprets. This will, he feels, also affect the nomination process and the nature of future nominees: "When the Court is perceived as a political rather than a legal institution," the confirmation hearings will take on the flavor of political campaigns and "the nominees will be treated like political candidates, campaigns will be waged in public, lobbying of senators and the media will be intense, the nominee will be questioned about how he will vote, and he will be pressed to make campaign promises about adhering to or rejecting particular doctrines" (348). Because this is all the more likelyto occur when the nominee is well known and has either written about or decided important public policy cases, Bork feels that the "pool of potential nominees is likely to shrink and change in composition" (347). To avoid another battle, a president "is likely to nominate men and women who have not written much, and certainly nothing that could be regarded as controversial by left-leaning senators and groups" (347). Bork feels that in addition to elevating mediocrity, the tendency "will be to nominate and confirm persons whose performance once on the bench cannot accurately, or perhaps even roughly, be predicted either by the President or by the Senate" (347).

Conclusion

Robert Bork has presented us with a thoughtful analysis of the role of the Supreme Court in our republican political system, and of the dangers we face when the Court usurps its proper role. In this presentation, Bork also maintains that his book attempts to answer broader questions, questions "about who we are and how we live ., about who governs us and how, about our freedom to make our own moral choices, and about the difference that makes in our daily lives and in the lives of generations yet to come" (11).

Bork's critical discussion of the growth of judicial activism from early dissents to contemporary majority opinions illustrates "The judicial assumption of ultimate legislative power" under false claims of being constitutional (11). The false claims are cloaked under notions of substantive due process or substantive equal protection, notions which look to the substance of legislation rather than to the process of the legislation, and strike down otherwise valid laws based on the subjective views of a particular judge. This unconstitutional use of judicial review is buttressed by a flood of constitutional theorizing that is based not on the Constitution, but on obscure philosophers and social scientists. Because the dominant legal culture is liberal, the decisions of the Court have reflected this left-wing bias, a bias toward egalitarianism and redistribution; biases that are not generally shared by the majority of the American people.

Yet, it is obvious that Bork is not arguing for conservative activism and even warns conservatives against using the Court to pursue a social agenda in the same way in which liberals used the Court: "Conservatives . may decide to join the game and seek activist judges with conservative views. Should that come to pass," they will have gained nothing "but will have destroyed a great and essential institution" (2). The Court is to apply neutral constitutional principles, not liberal or conservative principles, to legislation.

How does Bork's view of the proper role of the Court stand up to an analysis by Publius, author of *The Federalist?* What we find is overall agreement between Bork and Publius. With regard to the proposition that the Constitution is a fundamental law, Publius notes that "A constitution is in fact, and must be regarded by judges as a

fundamental law" (Federalist 78, 403). This same view is echoed by Bork in his analysis of revisionist theorists. Both *also* agree of the content of the Constitution. Publius maintains that the Constitution "is merely intended to regulate the general political interest of nation," it *is* not meant to regulate the general political interests of nation," it is not meant to regulate "every species of personal and private concerns" (Federalist 83, 443). Bork sees the Constitution as a "legal document . . . not an expression of a mood or a general injunction to be civilized" (62). Because of this, the role of the Court is limited. Though an important branch of government, Publius speaks of the Court as the "weakest of the three branches of government" because it possesses "neither Force *nor* Will, but merely judgement" (Federalist 178, 402). Its authority is to strike down legislation that is "contrary to the manifest tenor of the Constitution" (Federalist 81, 416). Again, Bork is in complete agreement with this position. He quotes from Justice Stewart's dissent in *Roe* that the law was "`uncommonly silly"' and then adds that "assinitywas not before the Court" (100). As he repeatedly mentions in this book, where the Constitution does not apply, the Court must defer to the legislative branch of government. This leads to the conclusion, a conclusion in complete agreement with *The Federalist,* that "entire ranges of problems and issues are placed off limits for judges (163).

With regard to revisionist theories of constitutional interpretation, liberal or conservative, Publius anticipated Bork. The Court is to apply the "manifest tenor" of the Constitution and not what judges feel is "the spirit of the Constitution" (Federalist 81, 416). Should the attempt be made "of construing the laws according to the spirit of the Constitution," such action would be as unprecedented as it is dangerous" (Federalist 81, 416). Such a position on judicial review is clearly unconstitutional, for there is no provision in the Constitution that "empowers the national courts to construe the laws according to the spirit of the Constitution" (Federalist 81, 416). However, should they attempt to read principles into the Constitution, that same document provides the remedies of either impeaching the judges or removing the appellate jurisdiction from the courts (Federalist 81, 418). While Bork does not advocate impeachment or restricting

appellate jurisdiction, he most emphatically agrees with the prohibi ¯ tion on reading subjective interpretations into the Constitution and cautions that `where the Constitution does not apply, the judge . must adopt a posture of moral abstention" (259).

But what of the Madisonian dilemma? If the Courts are not to protect minorities who is? Both Bork and Publius agree that "We the People" are sovereign and that the procedural arrangements in the Constitution will prevent, or at least make improbable, the suppression of minority rights. Bork notes that, "The orthodoxy of our civil religion, which the Constitution has aptly been called, holds that we govern ourselves democratically, except on those occasions, few in number though crucially important, when the Constitution places a topic beyond the reach of majorities" (153). Publius' discussion of the Constitution being a bill of rights listing specific prohibitions on majority rule mirrors Bork's argument (Federalist 84, 441-444). Yet, Publius goes one step further, a step that Bork does not seem to take. Publius speaks of the "spirit of the people" as being the "only solid basis of our rights" (Federalist 84, 444). He refers to the American people as being "one family" with shared customs, language, religion, and principles of government (Federalist 2, 9). This commonality, which is viewed in a positive light as something that should be perpetuated, will presumably hinder a majority from oppressing a minority. This element seems to be missing in Bork.

When Bork writes that we should "let current democratic majorities rule, because there is no law superior to theirs" he is open to the charge of majoritarian relativism. Yet, this may not be a fair critique of Bork's position. While *The Federalist* does mention the spirit of the people and our commonality, it does not dwell on these subjects. Since it is concerned with designing a republican government, the society within which that government is to operate is beyond the scope of its discourse. Bork also states that our freedoms "depend upon their acceptance by the American people" (353). He writes critically of the rise of moral relativism and the harm that this does to any meaningful sense of a community, and then notes that "Any healthy society needs a view of itself as a political and moral community" (249). However, as with Publius, he does not elaborate

on this because he is concerned with establishing the proper role of the Supreme Court in our governmental and political system. Bork probably agrees with Publius that such a discussion of individual rights "would sound much better in a treatise of ethics than in a constitution of government" (Federalist 84, 443). In this sense, *The Tempting of America is* more than a book on legal theory; it is also a book on how we govern ourselves. It is also, perhaps, a challenge to return to the notion of a community, to something Walter Lippman termed a "public philosophy." This challenge would also embrace Publius' admonition that we should not expect a "perfect work from imperfect man" (Federalist 85, 451). Our system is not tilted towards the City on the Hill, we are not attempting to create a utopia, rather we will. take man as he is and design a political system around a sober definition of human nature. Bork fittingly ends his book with the comment that "Those who made and endorsed our Constitution knew man's nature, and it is to their ideas, rather than to the temptations of utopia, that we must ask our judges to adhere" (355).

Alex Aichinger
Northwestern State University of Louisiana