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Thomas M. Melsheimer

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BOOK REVIEW

BORK'S APOLOGIA

THOMAS M. MELSHEIMER*

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

On July 1, 1987, Senator Edward Kennedy took the microphone on the floor of the Senate and proclaimed before a nationwide television audience, in tones and words intended to evoke action, and perhaps panic, the following assessment of a judge then sitting on the United States Court of Appeals for the District of Columbia Circuit:

Robert Bork's America is 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, school children could not be taught about evolution, writers and artists would be censored . . . and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.¹

Senator Kennedy's characterization was the opening salvo of one of the most intense and vitriolic political battles of the 1980's. In the end, Judge Robert Bork's nomination to fill the Supreme Court vacancy created by the resignation of Justice Lewis Powell was de-

* B.A., University of Notre Dame; J.D., University of Texas Law School. Assistant United States Attorney, Northern District of Texas; Adjunct Instructor in Law, Southern Methodist University School of Law. The views expressed in this review are those of the author only and do not necessarily reflect the views of the Department of Justice.

¹ *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 33 (1987) (statement of Sen. Kennedy).*

feated by a decisive margin in the Senate.²

*The Tempting of America: The Political Seduction of the Law*³ represents Judge Bork's intellectual counterattack. With the battle surrounding his nomination long over, Judge Bork has attempted to do what he was not permitted to do throughout the nomination process—set out, in clear terms, a coherent judicial and constitutional philosophy.⁴ In addition, Bork has set out a “view from the front” of the political battle and provides a comprehensive account of the reports, rumors, charges, and counter-charges that characterized his nomination.⁵ (Bork's book is filled with military ‘similes and metaphors and this review cannot avoid military imagery.)

Bork's personal account of his nomination is entitled “The Bloody Crossroads,” which refers to the “crossroads where politics and law meet.”⁶ It is at these crossroads that Bork, to his dismay, encountered “a seemingly ceaseless torrent of falsehoods about [his] views and record.”⁷ A detailed assessment of the factual accuracy of Bork's account of his nomination is beyond the scope of this review. But this much is certain: Bork's account is a powerful antibody to some of the more virulent attacks on his views. For the record, Bork is not anti-black, anti-women, or anti-working class. He does not, nor has he ever, “advocated” a return to segregated lunch counters or gestapo-style police searches. Nor should it come as any surprise that Bork is not “for” compulsory sterilization⁸ or “against” contraception.⁹ The fact that any of these things could

² 133 CONG. REC. 515, 011 (1987).

³ R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

⁴ Judge Bork, of course, has expressed his views in a variety of non-judicial publications, perhaps most notably in *The Antitrust Paradox: A Policy At War With Itself* (1978). Nowhere before, however, has he set out a far-ranging explanation of his constitutional jurisprudence.

⁵ R. BORK, *supra* note 3, at 271-316.

⁶ *Id.* at 269. Bork paraphrased Lionel Trilling's description of the crossroads where politics and literature meet. See L. TRILLING, *THE LIBERAL IMAGINATION* 10 (1979).

⁷ R. BORK, *supra* note 3, at 269.

⁸ Bork's participation in the review of a decision by the Occupational Safety and Health Administration concluding that a particular action by an employer did not fall within the Occupational Safety and Health Act, see *Oil, Chem. & Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984), was cited by an uninformed Senator Metzenbaum as an example of Bork's “pro-sterilization” bent. R. BORK, *supra* note 3, at 306-07, 327.

⁹ Bork's scholarly critique of the reasoning in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was widely cited as evidence of his “anti-contraceptive” view. See, e.g., *Washington Post*, Sept. 15, 1987, at A9 (Planned Parenthood advertisement depicting Bork as extremist

have been said (and in some quarters believed) about a man who spent over a decade in estimable public service is a troubling testament to this country's tabloid democracy. This section of Bork's book merits reading for this reason alone.

That Bork is not a man brimming with malice toward all does not mean he was wrongfully denied a seat on the Court. History will make that judgment. Nor does it mean that his scholarly and powerful explication of his own constitutional philosophy is wholly persuasive. Indeed, the religious fervor with which Bork advances the theory of original understanding overstates the utility of the theory in constitutional decision-making. A brief evaluation of Bork's constitutional theory is the goal of this review.

Bork's book opens by tracing the development of two centuries of Supreme Court cases, beginning with *Calder v. Bull*¹⁰ and ending with the more recent Texas flag burning case, *Texas v. Johnson*.¹¹ Throughout, Bork notes the progress of "constitutional revisionism" and the imposition by the Court of moral values not enshrined in the Constitution by the Framers:

From first to last the Court has been a strong force for centralization in our national life. With the Marshall Court that was a deliberate strategy of solidifying national powers. But any Court that imposes values not found in the Constitution to that degree makes national policy that obliterates local and state policies. The New Deal Court centralized with gusto by refusing to limit Congress's powers over commerce, taxation, and spending. The Court in the era of Earl Warren and after has imposed political and moral uniformity across wide areas of American life.¹²

The imposition of non-constitutional values by the Court thus creates a polity "governed not by law or elected representatives but by an unelected, unrepresented, unaccountable committee of lawyers applying no will but their own."¹³

Bork's familiar attack on non-originalist constitutional jurisprudence is far-ranging. He finds fault, sometimes with the result and always with the reasoning, in dozens of Supreme Court deci-

who rejects concept of right to personal privacy).

¹⁰ 3 U.S. (3 DALL.) 386 (1798).

¹¹ 109 S. Ct. 2533 (1989). Bork not only criticized the decision, but, in the months following the decision, vigorously advocated a constitutional amendment prohibiting flag burning.

¹² R. BORK, *supra* note 3, at 129.

¹³ *Id.* at 130.

sions. No era escapes his criticism, but the decisions of the Warren Court are the focus of his most savage criticism.¹⁴

Bork's discussion of *Shelley v. Kraemer*¹⁵ provides a good non-Warren Court example of what Bork perceives to be the constitutional problem resulting from the departure from the original understanding of the Constitution. *Shelley* involved racially restrictive covenants that prevented landowners from selling their property to blacks. When the landowners attempted to sell in violation of the covenants, white owners of neighboring properties sued to prevent blacks from purchasing the properties. The state courts upheld the restrictions as valid, thus preventing blacks from occupying the properties. In reversing, the Court reasoned that the state court's enforcement of the restrictive covenants constituted "state action" within the meaning of the fourteenth amendment and was thus a violation of that amendment's guarantee of equal protection.¹⁶

Shelley fails as a constitutional decision in Bork's analysis because it is a non-neutral application of the otherwise valid constitutional principle of "state action," the notion that the fourteenth amendment operates as a restriction only upon state governments and not private citizens. Neutrality, for Bork, embraces three distinct levels: the level at which the principle is *derived*, the level at which the principle is *defined*, and the level at which the principle is *applied*.¹⁷ Only the theory of original understanding, in Bork's opinion, enables a judge to derive, define, and apply constitutional principles with neutrality.

The principle of state action was not neutrally applied in *Shelley*. According to Bork:

The Supreme Court in *Shelley* said that the decision of a state court under common law rules constitutes the action of the state

¹⁴ See *id.* at 69-100. Bork writes that the rate of constitutional revisionism became "explosive" under Chief Justice Warren, whom he called a "judicial radical." *Id.* at 130-31. Bork attributes some of the problems regarding his nomination to his earlier criticism of Warren. *Id.* at 349. Bork referred to the nomination debacle as "the revenge of the Warren Court." *Id.*

¹⁵ 334 U.S. 1 (1948). For Bork's treatment of *Shelley v. Kraemer*, see R. BORK, *supra* note 3, at 151-53.

¹⁶ *Shelley*, 334 U.S. at 20.

¹⁷ See R. BORK, *supra* note 3, at 146-53. Bork borrows from Professor Herbert Wechsler the view that reasons for a particular judicial decision must in "their neutrality transcend any immediate result that is involved." See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

and therefore is to be tested by the requirements of the Constitution. The racial discrimination involved was not the policy of the state courts but the desire of private individuals, which the courts enforced pursuant to normal, and neutral, rules of enforcing private agreements.¹⁸

In Bork's view, the Court went out of its way to reach a result that favored blacks in an opinion whose general principle—action of a state court is action of the state under the fourteenth amendment—could not be applied sensibly outside the context of the obvious racial discrimination present in the case.¹⁹

Bork cites many other examples of *ultra vires* judicial decision-making. The "right of privacy" cases take several turns on Bork's intellectual spit and are characterized as an unwarranted judicial imposition of a morality not supported by the text of the Constitution. In Bork's view, these cases pervert traditional concepts of legal reasoning and substitute morally desirous results for ones that can be justified by principled analysis. "The Court employs sort of a reverse syllogism: from the result we may infer the minor and major premises."²⁰ Thus, from a desire to protect a woman's right to abort a fetus, the Court infers principles about the "fundamental" nature of certain decisions. The decision whether to bear or beget a child in *Griswold v. Connecticut*²¹ becomes the decision to abort in *Roe v. Wade*,²² and later emerges, for the four dissenters in *Bowers v. Hardwick*,²³ as the decision to engage in homosexual sodomy.

Bork's defense of the original understanding theory possesses an almost religious intensity. He dismisses contrary views as heretical.²⁴ He will never be accused of interpretive ecumenism.

The religious metaphor in constitutional interpretation is particularly appropriate and has been cultivated and refined by the constitutional "revisionist" Sanford Levinson.²⁵ In his highly ac-

¹⁸ R. BORK, *supra* note 3, at 152.

¹⁹ Bork's view here is sensible and is neither an indication that he is "pro" racially restrictive covenants nor that he is "anti" black.

²⁰ R. BORK, *supra* note 3, at 264.

²¹ 381 U.S. 479 (1965).

²² 410 U.S. 113 (1973).

²³ 478 U.S. 186 (1986).

²⁴ See R. BORK, *supra* note 3, at 6. Originalism "is the American orthodoxy. The heresy, which dislocates the constitutional system, is that the ratifiers' original understanding of what the Constitution means is no longer of controlling, or perhaps of any, importance." *Id.*

²⁵ See *id.* at 217-18. Levinson's analysis of the religious strains in constitutional inter-

claimed book *Constitutional Faith*,²⁶ Levinson draws on one of the fundamental tensions in western religious thought—the tension between protestantism and catholicism—to illustrate his views about constitutional interpretation.²⁷ “Protestantism” is shorthand for an adherence to a belief that revelation is found exclusively, or nearly so, in the words of scripture. “Catholicism” is shorthand for an adherence to a belief that revelation, in addition to being found in the written word, is also manifested in the traditions and teachings of the institutional Church.²⁸

Bork is a Protestant interpreter of the Constitution and its principles. He relies mainly on the text of the Constitution. His reliance is limited to discerning what the original drafters of the document meant by the language they employed.

That Bork's interpretation is “correct” is far from obvious, any more than Billy Graham's interpretation of a particular biblical passage is necessarily “correct.” Interpreting the Constitution is far more complex than interpreting a will or a contract between two parties. Constitutional terms like “due process,” “equal protection,” and “cruel and unusual punishment” are expansive and imprecise.²⁹ Indeed, it is questionable whether a court, applying common law contract principles, would even choose to enforce a contract that purported to guarantee the parties “due process.” The provision might be considered void or unenforceable on the grounds of vagueness.

But such an option is not available when dealing with a document that establishes itself as the “supreme Law of the Land.”³⁰ Or is it? According to Bork, certain constitutional language must

pretation provides illumination of both the appeal and the limits of Bork's exclusive reliance on a text-rooted approach.

²⁶ S. LEVINSON, *CONSTITUTIONAL FAITH* (1988).

²⁷ *Id.* at 18-53.

²⁸ *Id.* at 18-19, 27. Levinson observes:

It should be clear by now that the ability of “the Constitution” to provide the unity so desperately sought as a preventive against disorder depends on the resolution of the same [interpretative] issues that split Judaism, Christianity, Islam, and, indeed, all other religions that have texts as a central part of their structure . . . Only if there is widespread agreement on “principles and methods of correct interpretation” can a written Constitution be said to be a source of stability.

Id. at 51.

²⁹ See, e.g., Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 515 (1964) (quoting concurring opinion in *United States v. Lovett*, 328 U.S. 303, 321 (1946), where Justice Frankfurter asserted that such terms are “broad standards of fairness” which permit a wide range of legal interpretation).

³⁰ See U.S. CONST. art VI.

remain moribund precisely because it is too vague for its plain meaning to be interpreted and there exists insufficient evidence to determine what the drafters intended. Relegated to moribund status, for example, is the ninth amendment, which, as some scholars have pointed out, seems to compel reference to a variety of rights not delineated by name in the Constitution.³¹ Bork writes:

There is almost no history that would indicate what the Ninth Amendment was intended to accomplish. But nothing about it suggests it is a warrant for judges to create constitutional rights not mentioned in the Constitution.³²

Bork is not at his best here. As a Protestant interpreter he is uncomfortable with the idea of departing from scripture. Such a departure invites anarchy, or worse, an assertion of control by the institutional "Church" known as the Supreme Court. Bork cannot assent to the proposition that the ninth amendment's broad and expansive reference to rights "retained by the people" gives the federal courts the authority to look beyond the Constitution's text in order to protect a right of privacy or any other right not specifically enumerated in the text. Bork's position in this regard is supported by neither the words of the ninth amendment nor the intent of its drafters, because, as Bork himself points out, the intent of the drafters is unclear. Bork's Protestant interpretation leaves him paralyzed. He must simply cast the ninth amendment aside. A fundamental deficiency in the original intent approach to constitutional jurisprudence, as Levinson points out, is that it requires more than just a simple ascertainment of what the Framers "meant."³³ Bork argues that this process involves no moral choices and thus no opportunity for a judge to impose *his* morality on others. Indeed, for Bork, this is the beauty of original intent. It allows judges to vindicate the choices made by the Framers instead of imposing their own nebulous, undemocratic notion of morality. Bork observes:

The moral philosophers of constitutional revisionism will . . . be unable to persuade all of us to accept either their premises or their conclusions. There is going to be no moral philosophy that can begin to justify courts in overriding democratic choices where

³¹ See generally J. ELY, *DEMOCRACY AND DISTRUST* 34-41 (1980) (discussing ninth amendment and unenumerated rights).

³² R. BORK, *supra* note 3, at 183.

³³ See S. LEVINSON, *supra* note 26, at 77-78.

the Constitution does not speak.

The judge who takes as his guide the original understanding of the principles stated in the Constitution faces none of these difficulties. His first principles are given to him by the document, and he need only reason from these to see that those principles are vindicated in the cases brought before him.³⁴

Reliance on original intent, however, cannot supplant the need to make moral choices. Levinson provides a memorable example of this problem. Suppose a baby-sitter has written instructions from a parent that her son must "under no circumstances" remain at the sitter's house past 5:00 p.m. At 4:58 p.m., as the sitter sends the child out the door, a tornado makes its way down the street.³⁵ How does a sitter remain faithful to the instructions in such a situation? The instructions are quite clear and admit to no exceptions. Nonetheless, achieving the "right" result, keeping the child from being exposed to the tornado, requires going beyond the text and imposing a value on the instructions, a value that may or may not be shared by the drafter. If the sitter decides to keep the child from leaving and thus decides to violate the literal terms of the instructions, he can justifiably do so only by making an assessment of the values held by the parent-drafter. In other words, he must assume that the parent's highest concern is the welfare of the child and that the vindication of that concern requires "violating" the instructions. This assessment is no easy task and becomes even more difficult in the context of broad constitutional provisions such as "equal protection of the laws" or "due process." The values sought to be vindicated by these phrases are often unclear.³⁶

To continue with Levinson's example, suppose the sitter knows the parent to be a child abuser who might take perverse delight in having the child exposed to risk. Under Bork's approach, the sitter cannot override the values of the parent, no matter how sordid.³⁷ The sitter is stuck with the results "intended" by the drafter.

Levinson's example can be complicated further. Suppose the instructions were drafted by both parents—one, a child abuser, the

³⁴ R. BORK, *supra* note 3, at 257.

³⁵ S. LEVINSON, *supra* note 26, at 81-82.

³⁶ See Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 458 (1984).

³⁷ R. BORK, *supra* note 3, at 146. Once a judge finds a constitutional principle as originally understood, "he need not, and must not, make unguided value judgments of his own." *Id.*

other, not. How is the sifter to resolve the interpretative conflicts? He cannot, at least not with exclusive reliance on a theory of intent.

Bork deals with the type of problem Levinson presents in a brief discussion of another constitutional revisionist, Dean Paul Brest.³⁸ Brest's observation is now familiar: the derivation of the values inherent in a particular constitutional provision requires an "arbitrary choice among levels of abstraction."³⁹ In other words, the breadth with which a judge reads the term "equal protection" turns on a choice whose ultimate roots are external to the term.⁴⁰ Bork admits this problem and points to "the words, structure, and history of the Constitution" as his limiting principles.⁴¹ But Bork's formula does not eliminate discretion and value judgments. How much is the "plain meaning" of a term to be tempered by the Constitution's structure? What happens when "history" is ambiguous?

The limits of original intent were illustrated in the controversial decision in *Bowers v. Hardwick*.⁴² Hardwick had been charged with violating a Georgia criminal statute proscribing sodomy. Hardwick challenged the law in federal court, arguing that the decision to engage in the prohibited sexual activity was beyond the reach of state regulation because of the due process clause of the fourteenth amendment. The Court rejected this argument and held the law a valid exercise of state authority.⁴³

Bork applauds the *Bowers* decision for its refusal to engage in moral analysis by finding rights not explicitly set forth in the Constitution.⁴⁴ The Constitution says nothing about sodomy, and any decision by the Court invalidating a state sodomy law would be nothing more than the vindication of its own moral values. All law is based on morals, as Bork acknowledges,⁴⁵ and there is no such thing as a moral "fact" to which the Constitution requires assent. Thus, unless specifically prohibited by the Constitution, Georgia's

³⁸ R. BORK, *supra* note 3, at 148-49; see Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

³⁹ Brest, *supra* note 38, at 1091.

⁴⁰ See Tushnet, *Following the Rules Laid Down: A Critique of Interpretation and Neutral Principles*, 96 HARV. L. REV. 781, 791 (1983).

⁴¹ R. BORK, *supra* note 3, at 150.

⁴² 478 U.S. 186 (1986).

⁴³ *Id.* at 191.

⁴⁴ R. BORK, *supra* note 3, at 119.

⁴⁵ *Id.* at 122.

moral choice to outlaw sodomy must stand.

A choice has, however, clearly been made by the *Bowers* majority; a choice favoring the state's authority to regulate the conduct of its citizens. Bork suggests that the theory of original understanding can keep all moral decisions in the hands of legislators, yet he ignores the fact that judicial review of such decisions will force a court to take sides in a moral dispute.⁴⁶ The role of original understanding in this process is unclear. The ninth amendment's broad reference to "rights retained by the people" is broad enough to include a right to engage in certain sexual conduct. To hold that such conduct is beyond the scope of the ninth amendment, when the language is unclear and the historical record murky, requires a moral assessment (perhaps the correct one) that certain rights are worthy of protection and others are not.

This discussion highlights two significant problems in the original understanding theory: defining what intent is and determining whose intent counts. Bork defines intent textually and thus blends the two problems together. "[W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean."⁴⁷ Thus, intent is what the words mean and the source for such meaning is "the words used and . . . secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like."⁴⁸

But words did not have immovably fixed meanings in 1789, nor do they today. Moreover, many of the secondary materials, such as records of the ratifying conventions, are speeches of individuals advocating or opposing particular provisions, and thus

⁴⁶ The Court will impose either its own morality or that of the Framers.

⁴⁷ R. BORK, *supra* note 3, at 144.

⁴⁸ *Id.* Bork easily dismantles a caricature of the original intent approach that suggests a search for intent requires a judge to "gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." See Justice Brennan, Speech at the Text and Teaching Symposium (Oct. 12, 1985) (*reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11 (1986)). No sensible theory of intent has ever advanced the "requirement that the judge know what the specific intention of the law-giver was regarding the case at hand." R. BORK, *supra* note 3, at 162. Rather, as Bork observes:

[A]ll that a judge committed to original understanding requires is that the text, structure and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect The judge must then see whether that principle of value is threatened by the statute or action challenged in the case before him.

Id. at 162-63.

their value in determining what the words "mean" in any objective sense is limited.⁴⁹

Bork, more than anyone, should recognize this inherent limitation. He spends one third of his book refuting the charges made by the political opponents of his nomination to the Court. He accuses his opponents of political savagery. Two hundred years from now, would Bork want his principles and positions on a variety of issues discerned by reference to the public debates and media accounts surrounding his nomination?

But Bork will admit to the utility of no other theories. Indeed, he spends three entire chapters of his book refuting theories of interpretation not based on original understanding.⁵⁰ The unyielding quality of his argument may well provide some clue to the vitriol that surrounded Bork's nomination to the Court. By rejecting the value of all forms of constitutional interpretation save one, he seems to be sanctioning an interpretive arrogance that is unsettling to many, and not just to the "liberal elite" who are the target of so much of Bork's book.⁵¹

It is certainly true, for example, that in 1791 the Framers contemplated that the imposition of the death penalty was constitutional. Yet they did not use the words: "the death penalty shall in all events be permitted." Instead, the Constitution employs a more flexible phrasing: "cruel and unusual punishment [shall not be] inflicted."⁵² A theory of interpretation exclusively rooted in original understanding freezes the meaning of "cruel and unusual" in 1791 and does not permit it to evolve with society. Moreover, one cannot escape the suspicion, even after nearly 400 pages of Bork's keen prose, that he is using his theory to sanction outcomes he believes are politically desirable. Thus, for example, in his opinion in *Ollman v. Evans*,⁵³ Bork allows the means of protecting first amendment values to evolve with society. He writes:

⁴⁹ See Tushnet, *supra* note 40, at 793-96.

⁵⁰ R. BORK, *supra* note 3, at 187-250.

⁵¹ *Id.* at 9. ("departure from the original meaning of a statute or of the Constitution, resulted in the judicial enactment, or attempted enactment, of an item on the modern liberal agenda"). "The liberal elites will not be satisfied with blocking the nomination of judges who may be expected to adhere to the historic principles of the Constitution." *Id.* at 10. "They intend to root that idea out of the intellectual life of the law . . ." *Id.* "Law school moral philosophy . . . turns out upon examination to be only a convoluted way of reaching the standard liberal or ultra-liberal prescriptions of the moment." *Id.* at 35.

⁵² U.S. CONST. amend. VIII.

⁵³ 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

Perhaps the framers did not envision libel actions as a major threat to [freedom of speech] But if, over time, the libel action [evolves so that it] becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines.⁵⁴

First amendment jurisprudence can change to meet new circumstances not foreseen by the Framers. Yet for Bork, the notion of what constitutes "cruel and unusual punishment" within the meaning of the eighth amendment cannot so evolve.⁵⁵ This seems to be precisely the sort of political judging of which Bork is so critical.

Who, then, is seducing whom? Bork's theory of original understanding cannot avoid political and moral choices. Choices are made in Bork's jurisprudence *sub silentio* and without explanation.

Bork writes out of a fear that the willingness of the federal courts to depart from the original understanding of the Framers is undermining this country's democratic structure. For him, the values of a few are allowed to displace the free choices of the many. Many liberal commentators ignore the notion that the "free choice of the many" is a value that merits respect.⁵⁶ Bork recognizes the importance of this value and believes that the original understanding is the only interpretive guide that can both vindicate democratic choice and prevent such choices from overriding clearly expressed constitutional values. He observes:

When a court strikes down a statute, it always denies the freedom of the people who voted for the representatives who enacted the law. We accept that more readily when the decision is based upon a fair reading of a constitutional provision. The Constitution, after all, was designed to remove a number of subjects from democratic control, subjects ranging from the composition of the Houses of Congress to the freedoms guaranteed by the Bill of Rights. But when the Court, without warrant in the Constitution, strikes down a democratically produced statute, that act substi-

⁵⁴ *Id.* at 996 (Bork, J., concurring).

⁵⁵ R. BORK, *supra* note 3, at 9.

⁵⁶ *See id.* at 199-207. Bork points to Professor Laurence Tribe as an example of how the more extreme variants of constitutional liberalism undermine democratic choice on a variety of social and moral issues without producing a governing principle that could rationally limit such undermining. *See id.* at 204-05 (discussing Tribe's assertion that an individual's "liberty" may in some instances make laws regulating narcotics and pornography unconstitutional).

tutes the will of a majority of nine lawyers for the will of the people.⁵⁷

This is familiar stuff, yet it remains powerful in its simplicity and its embrace of democratic values.

Nonetheless, Bork's theory does not provide the sort of intellectual and moral "glue" needed to hold the polity together. By refusing to acknowledge the choices inherent in the application of the original understanding theory, he fails to provide a coherent theory of how such choices are to be made. Moreover, by denying the need for moral choices while actually making them, he raises suspicion about his intentions and true "agenda."⁵⁸

Bork's extended discussion of *Brown v. Board of Education*⁵⁹ is telling in this regard. He believes that *Brown* was rightly decided although "it must be said in all candor that the decision was supported by a very weak opinion."⁶⁰ The result, of which Bork says he is an admirer, is not supported by the original intent of the drafters of the fourteenth amendment.⁶¹ According to Bork, "The ratifiers probably assumed that segregation was consistent with equality but they were not addressing segregation."⁶² Nonetheless, because decades of experience had demonstrated that segregation did not and could not produce the equal protection of the laws guaranteed by the fourteenth amendment, the Court could no longer countenance segregation. Bork concludes: "Since equality and segregation were mutually inconsistent, *though the ratifiers did not understand that*, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation."⁶³

This last passage is quite remarkable. Bork concludes that the ratifiers, the source of the original understanding on which he bases his constitutional theory, were wrong. Because they were

⁵⁷ *Id.* at 264.

⁵⁸ It is interesting to note, for example, that the "advance praise" that decorates the back cover of Bork's book comes from well-known, ultra conservative politicians and commentators—Ronald Reagan, Allan Bloom, Milton Friedman, Irving Kristol, and George Will.

⁵⁹ 347 U.S. 483 (1954).

⁶⁰ R. BORK, *supra* note 3, at 75.

⁶¹ See Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 300 (1981) ("segregated public schooling was present to the minds of the Framers; they did not intend that the [equal protection] clause [should] prohibit it").

⁶² R. BORK, *supra* note 3, at 82.

⁶³ *Id.* (emphasis added).

wrong, their original understanding could not be followed and the more general principle, equality, had to be vindicated. If the ratifiers believed that they were not outlawing segregation, would not it have been more faithful to their understanding to permit segregation? Other originalists have long supported this position.⁶⁴

Bork's position is curious for it suggests again that he is guilty of the same sort of "political judging" which he opposes. This is troubling because he is so adamant in his assertion that the theory of original understanding avoids implicating the political preferences of the decision-maker. *Brown*, of course, was rightly decided and Bork is correct to assert so. His position is not supported, however, by the views he espouses. If the ratifiers were "wrong" with respect to segregation, why could they not have been wrong with respect to the death penalty, abortion, and a host of other controversial issues? To these questions, Bork does not provide a satisfactory answer.

Bork concludes his book with an unintended paradox. He lambastes the politicization of the judicial confirmation process as a symptom of the overall politicization of the law:

This book has traced the increasingly political nature of the Supreme Court, which reached its zenith with the Warren Court, and the increasing . . . politicization of the law schools, where much constitutional scholarship is now only politics. When the Court is perceived as a political rather than a legal institution, nominees will be treated like political candidates, campaigns will be waged in public, lobbying of senators and the media will be intense. . . .⁶⁵

Bork's "brave, new world" is "new" only to him. "Politics" is a pejorative term Bork uses to describe the constitutionally mandated "advice and consent" role of the Senate. And such politics are not simply a weapon of "liberal hegemony"⁶⁶—just ask Justice Fortas, a man whose academic and intellectual credentials rivaled

⁶⁴ See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 117-33 (1977) (examination of various sources which evidence that neither ratifiers of Constitution nor 39th Congress, in enacting fourteenth amendment, intended to abolish segregation); L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 21 (1976) (discussing meaning of *Brown v. Board of Education*, 347 U.S. 483 (1954), author notes that adoption of fourteenth amendment in 1868 did not prohibit school segregation, as practice continued to exist with congressional approval after amendment's enactment).

⁶⁵ R. BORK, *supra* note 3, at 348.

⁶⁶ *Id.* at 337-43.

Bork's and whose nomination as Chief Justice met an untimely death at the hands of Southern senators who did not like his politics.

The recent nomination of Justice David Souter to the Supreme Court provided an interesting test case for Judge Bork's prediction that the politicalization of the nomination process will result in the selection of judges "who have not written much, and certainly nothing that could be regarded as controversial by left-leaning senators and groups. . . . The tendency, therefore, will be to nominate and confirm persons whose performance once on the bench cannot be accurately, or perhaps even roughly, predicted by either the President or the Senate."⁶⁷

Bork's observations were prescient. Certainly, Justice Souter qualifies as a man about whom little was known prior to the nomination. His most salient qualifications are his anonymity and his lack of intellectual battle scars on the issues of abortion or civil rights. Indeed, Souter has been portrayed in the popular media as a reticent man removed from the world—a lifelong bachelor who enjoys best the quiet company of his books in an isolated New Hampshire farm-house. If this nomination was the result of the "Bork war," little has been won by either side. In a nation often bitterly divided on issues of abortion and race, to name but two, arid and isolated intellectualism is no potion.

Bork's constitutional jurisprudence puts great faith in the democratic process and believes that expansive readings of the Constitution beyond the precise scope envisioned by the Framers debilitates that process. Yet the process to which he is prepared to leave almost all decisions effecting the polity is the same process that rejected him and his theory of judging. To be sure, the politics to which Judge Bork was subjected was often unsophisticated and even tawdry. But Bork is no more a "victim" of this process than anyone else who ends up on the losing end in a democratic vote. Unlike many such "losers," however, Bork retains, as *The Tempting of America* demonstrates, a substantial forum from which to champion his cause.

⁶⁷ *Id.* at 347.

