Dangers of Political Law

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BOOK REVIEWS

THE DANGERS OF POLITICAL LAW

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW.

Senator Orrin G. Hatch

Throughout his confirmation hearings, Judge Robert H. Bork lionized the virtues of neutral judicial decisions based on the Constitution's original meaning. His testimony warned against judicial decisions based on politics rather than on the words of the law. With the political defeat of Judge Bork, his opponents heralded the demise of original meaning jurisprudence. Judge Bork's defeat, however, proved him correct: American institutions, including courts, have strayed from the original meaning of the Nation's Constitution and laws.

Judge Bork has devoted much of his life to decrying the danger of judicial policy making. This lifelong record proved his defeat in the unfettered fray of Senate politics. Ironically, the defeat also proved Judge Bork's thesis.

If, as Judge Bork advocates, judges must uphold literally the language of the Constitution and federal laws, then the Senate only need ensure that a judicial candidate is willing and able to construe those legal documents. After all, the Constitution and laws of the United States, not judges, will dictate the outcome of cases. In fact, Congress, which makes law, should have more influence over the outcome of lawsuits than judges. If, however, as Judge Bork fears, judges read their own political views into the Constitution and laws, then the Senate must carefully consider who those judges are and what views they espouse. With political judges, personal predilections rule instead of the Constitution and laws. Congress has reason to worry when judges will not obey legislative instructions.

Thus, the bitter opposition to Judge Bork betrayed too much. Judge Bork's opponents conceded that the type of judges they favor do make policy. Nonetheless, Judge Bork unequivocally committed to follow the laws as written by Congress. But Judge Bork's opponents did not want a judge who would religiously follow the words of the Constitution and federal laws—instead, they preferred a judge who would follow his own heart. Moreover, they hoped that
the judge’s heart would beat to the rhythm of their own political drums. In legal matters, Judge Bork neither followed his heart nor strove to synchronize his political preferences to those of a majority of the Senate. Thus he lost.

Yet Judge Bork’s defeat proved his point. He lost in the Senate because he had become a symbol. He stood for the traditional, now questioned, concept that law is more important than the political leanings of judges. Judge Bork’s loss showed that political forces indeed threaten to supplant the rule of law.

With further irony, Judge Bork’s opponents claimed victory over original meaning jurisprudence at the very moment its banner began to triumph. President Reagan soon nominated Judge Anthony Kennedy to the Supreme Court seat intended for Judge Bork. With the addition of Justice Kennedy, the majority of the Supreme Court appeared ready to follow the language of the law, rather than policy considerations. Moreover, Judge Bork has not quietly withdrawn from this intellectual battle. To the contrary, in The Tempting of America: The Political Seduction of the Law, Judge Bork again charges the entrenched forces who would subvert the law to political uses. This charge promises to put Judge Bork’s opponents on the defensive.

As his work The Antitrust Paradox redefined antitrust law, so does The Tempting promise to draw new battlelines in the conflict over constitutional law. The Tempting shows that legal institutions, particularly the Supreme Court, unfortunately have used the law as a political tool to pursue particular policy goals. The Tempting also shows that politicization of law endangers freedoms. The book compellingly argues that original meaning jurisprudence is the only workable theory of constitutional interpretation for a democratic society. Most important, Judge Bork’s call for a return to the original meaning of the Constitution stems not from a conservative political agenda but from the Constitution itself.

I

THE TEMPTING OF AMERICA—THEME AND STRUCTURE

The Tempting features three sections, each of which illustrates the politicization of law within a different legal institution. Part I documents the politicization of constitutional law by the Supreme Court. Specifically, The Tempting traces the development of substantive due process, an open-ended doctrine that the Court fashioned

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to reach desired political results. Part II details the politicization of law among legal academics. *The Tempting* describes in exhaustive detail an array of conservative and liberal scholarship that advocates departure from the text of the Constitution. Despite lofty and appealing expression, these theories undercut self-government and reverence for the law. Finally, Part III offers a thorough account of Judge Bork's confirmation battle. This section illustrates how the Senate distorts the judicial selection process to ensure that the law generates particular political results.

While these sections seem disparate, they actually present a unified theme. The lure of short-term political gains tempts American legal institutions to abandon the sometimes tedious processes of the law. Yielding to the temptation may produce some immediate pleasure, but it does so at the expense of generations of pain. Thus, political law "contains the seeds of its own destruction."3

*The Tempting*, therefore, calls for a return to "[t]he orthodoxy of original understanding, and the political neutrality of judging it requires."4 This approach to constitutional adjudication confines the federal judiciary to its "intended function," which is "to apply the law as it comes to [it] from the hands of others."5 In so doing, the jurisprudence of original meaning preserves the legal protections for individual freedom.6

II

**POLITICIZATION OF LAW AND THE SUPREME COURT**

A. Substantive Due Process and Equal Protection

According to Judge Bork, a passion for quick political results tempts judges to abandon the processes and language of the law. This passion sets several seductive snares. *The Tempting* starts with a classic example. With mid-nineteenth-century America racked by disagreement over slavery, the Supreme Court sought a quick political solution. At the time, a majority of the Court favored the Southern States. Not surprisingly, the Court departed from the language of the Constitution to create a right to hold slaves.

*Dred Scott v. Sandford* was the Court’s first venture into the uncharted wilderness of substantive due process.7 Since that infamous case, the Court often has employed the doctrine of substantive due process to achieve short-term political gains. The Supreme Court also used substantive due process to overturn health and safety reg-

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4 *Id.* at 7.
5 *Id.* at 6.
6 *Id.*
7 60 U.S. (19 How.) 393 (1857).
ulations and to create a generalized right to privacy.

The Supreme Court of the early twentieth century even used substantive due process to create "an entire new set of freedoms, including a liberty to enter into contracts the legislature had prohibited, then refused to say what contracts were protected, but promised to go from case to case deciding in each whether the legislature or the Court would govern." Some may believe that Supreme Court activism always generates liberal doctrines, but the early twentieth century aptly illustrates that the Court also can stray from the Constitution to reach so-called "conservative" results. In short, the decisions from this era often protected business property at the expense of a state's health and safety concerns.

In search of other politically attractive results, more recent Courts similarly have created rights of privacy not found in the Constitution. Again, thorny political problems have seduced the Court into seeking predetermined results. In Griswold v. Connecticut, for example, members of the Court, abhorring a state's regulation of contraceptives, sought to solve a societal problem. The Court did so by creating a right of privacy that covered the decision of married couples to use contraceptives. The noncontroversial political result in Griswold, however, led to extremely controversial results in cases dealing with abortion and homosexual activity. Moreover, the Court has yet to explain the limits of privacy rights. Judge Bork laments:

The Court majority said there was now a right of privacy but did not even intimate an answer to the question, "Privacy to do what?" People often take addictive drugs in private, some men physically abuse their wives and children in private, executives conspire to fix prices in private, Mafiosi confer with their button men in private. Moreover, the Court has extended the right of privacy to activities that can in no sense be said to be done in private. The truth is that "privacy" will turn out to protect those activities that enough Justices to form a majority think ought to be protected and not activities with which they have little sympathy.

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8 See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (child labor law invalidated); Lochner v. New York, 198 U.S. 45 (1905) (maximum hours law invalidated); see also Adkins v. Children's Hospital, 261 U.S. 525 (1923) (law setting minimum wage for female workers invalidated).


10 R. Bork, supra note 1, at 44.

11 381 U.S. 479 (1965).

12 See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972); abortion cases cited infra note 22.

13 R. Bork, supra note 1, at 99.
Again the Court succumbed to the temptation of departing from the Constitution to resolve political issues.

The doctrine of substantive equal protection similarly politicizes constitutional interpretation. Congress and the states created the equal protection clause primarily to protect the newly freed slaves from oppression. When judges exceed this original purpose, they inject their own moral or political preferences into the Constitution. Judge Bork observes:

When a judge assumes the power to decide which distinctions made in a statute are legitimate and which are not, he assumes the power to disapprove of any and all legislation, because all legislation makes distinctions. . . . The case for confining the [fourteenth] amendment to statutory distinctions drawn in terms of race or ethnicity is that permitting the judges to choose subjectively which grounds of classification they will treat like race confers upon the courts a power to tell legislatures how all of their statutes on every subject must be written.\(^\text{14}\)

According to *The Tempting*, the Court has abused the equal protection clause to address transient political ills like poll taxes.\(^\text{15}\)

B. The Demise of Federalism and the Separation of Powers

In the quest for desirable results, the Court also has ignored constitutional provisions against centralization of local decisions. The Constitution envisions clear divisions between national and local authority. In Judge Bork’s eyes, the Court has blurred these distinctions. The Court has a parochial interest in elevating local decisions to the national level, as it is the final arbiter of national affairs. In other words, the Court advances its own importance by nationalizing social issues.

*The Tempting* documents that the demise of federalism established an expanding role for the Court. Judge Bork faults the Court’s decision in *Wickard v. Filburn*,\(^\text{16}\) which sustained the constitutionality of the Agricultural Adjustment Act, for subjecting “the most trivial and local [farming] activities”\(^\text{17}\) to national judicial regulation. The Court “refus[ed] to enforce limits of any kind” on Congress’s power to create national policy, despite the enumerated powers of article I of the Constitution.\(^\text{18}\) The Court’s action “worked a revolution in the relationship of the federal government to the state governments and to the people, and the revolution did

\(^{14}\) Id. at 65-66.

\(^{15}\) Id. at 90-91.

\(^{16}\) 317 U.S. 111 (1942).

\(^{17}\) R. Bork, *supra* note 1, at 56.

\(^{18}\) Id. at 57.
not have to await a constitutional amendment."\(^{19}\)

As the divisions of power within the Constitution evaporate, the Court's role in the policy arena expands. Over the past several decades, the Supreme Court has rendered sweeping decisions on some of society's most controversial political issues,\(^{20}\) including school desegregation,\(^{21}\) abortion,\(^{22}\) the death penalty,\(^{23}\) and welfare administration.\(^{24}\) The Court similarly has mandated social change by ordering or scrutinizing the apportionment of election districts,\(^{25}\)

\(^{19}\) Id.

\(^{20}\) For a complete survey of the areas of pervasive judicial involvement, see Bradley C. Canon, _Defining the Dimensions of Judicial Activism_, 66 Judicial Administration 41 (Dec.-Jan. 1983).

\(^{21}\) E.g., Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (upholding lower court desegregation plan which reassigned 42,000 of the system's 96,000 students to new school districts, relocated teaching staff, closed 33 schools, and reorganized the grade structure of elementary schools), reh'g denied, 444 U.S. 887 (1979); Keyes v. School Dist. No. 1, 413 U.S. 189 (finding segregation in one part of school system creates presumption that disproportionate attendance in other parts of the system is not adventitious), reh'g denied, 414 U.S. 883 (1973); Wright v. Council of City of Emporia, 407 U.S. 451 (1972) (city could not, after district court ordered implementation of a county-wide desegregation plan, exercise option under Virginia law to operate its own separate school system); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (upholding desegregation plan issued by district court principally on basis of attendance statistics, not finding continued discriminatory intent), reh'g denied, 403 U.S. 912 (1971); Green v. County School Bd. of New Kent County, Va., 391 U.S. 430 (1968) (invalidating school board's adoption of free choice plan).


\(^{25}\) E.g., Hadley v. Junior College Dist., 397 U.S. 50 (1970) (election of junior college trustees on any basis other than one person-one vote is unconstitutional); Kilgarlin v. Hill, 386 U.S. 120 (legislative reapportionment plan resulting in population variances from +14.84% to -11.64% among districts could not survive strict scrutiny), reh'g denied, 386 U.S. 999 (1967); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964) (apportionment which took into account additional factors as well as population failed to base representation sufficiently on population); Reynolds v. Sims, 377 U.S. 533 (representation in state legislature must be based on population), reh'g denied, 379 U.S. 870 (1964).
pervasively supervising the criminal justice system, and overseeing voter eligibility.

This discussion leads Judge Bork to another hallmark of political law: the rise in the power of the Court has coincided with a decline in the power of federal and state governments to make autonomous decisions. With time, the Court has deferred less and less to federal and state legislatures. From 1803 through 1896, the Supreme Court nullified only 19 federal statutes and 167 state laws. In the 27 years from 1897 through 1924, however, the Court nullified 28 federal statutes and 212 state laws. In the 30 years between 1940 and 1970, the Court nullified approximately the same number of federal statutes but invalidated state legislation 278 times. Most notably, 1970 through 1980 represents the period where the Supreme Court invalidated more federal and state legislation than in any other 10-year period. The Court struck down 18 federal statutes and 184 state laws, which is more than the Court typically invalidated in past 30-year periods. The Tempting accurately charts the swift growth of judicial, at the expense of legislative, power.

With each successive case, the Court shrinks the sphere of legislative decision making and expands the role of the judiciary:

We observe . . . the increasing importance of the one counter-majoritarian institution in the American democracy. . . . What is worrisome is that so many of the Court's increased number of declarations of unconstitutionality are not even plausibly related to the actual Constitution. This means that we are increasingly

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29 See id.

30 See id.

31 See id.

32 R. BORK, supra note 1, at 130.
governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own.33

C. The Supreme Court’s Use of Expansive Theories in its Decisions

The Court’s assumption of a political role also manifests itself in the systematic failure to choose the most narrow grounds as the basis for decisions. By using expansive theories to decide cases, the Court reserves for itself a future role in shaping the direction of social and political issues. Judge Bork accurately illustrated this practice in his discussion of voter malapportionment cases.

According to Judge Bork, the Court adopted an expansive basis for decision in Baker v. Carr34 and Reynolds v. Sims,35 the seminal voter reapportionment cases. Again the Court sought a speedy path out of a thorny political thicket. The Supreme Court interpreted the equal protection clause to require reapportionment of state legislatures according to population, so as to endow each citizen’s vote with equal weight. Thus, these decisions not only required reapportionment but also prescribed the particular method that states must use in restructuring their state governments. In other words, the Court chose one theory of political representation over another without any guidance from the Constitution.

*The Tempting* observes that the Court could have found for the plaintiffs in *Baker* and *Reynolds* without establishing such a pervasive judicial role. The Court could have relied on the Republican guarantee clause of article IV to order the state governments to conduct redistricting as required by their state constitutions.36 Such a decision “would have resulted in an order that a majority of the state’s voters be permitted to reapportion their legislature,” but “would not tell...voters what system of representation they were required to ‘choose.’”37 The Court by choosing the route it did instead maximized federal judicial control of reapportionment, despite a shakier constitutional basis for doing so.

In the face of political need, the Court often has abandoned the Constitution for a political solution. The long-term results, however, have always undercut rights to democratic choice. The Court has, in Judge Bork’s words, “cut through procedure to substance,

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33 Id.
34 369 U.S. 186 (1962).
36 U.S. CONST. art. IV, § 4.
37 R. BORK, supra note 1, at 86.
and through substance to political outcome.”

III

POLITICIZATION AND THE LEGAL SOPHISTS

The Supreme Court, though a primary architect, has no monopoly on the politicization of constitutional law. Both liberal and conservative legal academicians continuously strive to revise the premises of constitutional law. These revisionists have constructed theories of judicial review that merely cloak politically oriented judging in high-sounding theories about moral philosophy. Judge Bork approaches these scholars as he approaches the law—without a political agenda. The Tempting equally faults revisionists of the political right and left. Judge Bork explains:

[The modern political theorists’] concepts are abstruse, their sources philosophical, their arguments convoluted, and their prose necessarily complex. These writers are in fact undertaking what Justice Story forswore, 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.

The Tempting blames these modern theories for giving the Court license to exceed legal and constitutional limits. Professor Thomas Grey of Stanford Law School, for example, counsels judges to follow natural law. The judge, of course, decides what law is natural.

Professor Ely’s representational model of constitutional interpretation similarly places the judiciary in the business of making political judgments. According to Ely, judges must protect minority participation in the political decision-making process. In Judge Bork’s view, however, Ely’s theory injects judges into the policy-making process:

Ely’s theory, which purports to take judges out of the business of making policy decisions, in fact plunges them into such decisions by requiring that they distinguish between cases in which groups lost in the legislative process for good reason (burglars) and those in which they lost for discreditable reasons (aliens, the poor, homosexuals, etc.).

38 Id. at 132.
39 Id. at 134 (footnotes omitted).
40 See Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975).
42 R. BORK, supra note 1, at 199.
Unlike Ely, Michael Perry of Northwestern University and the former Justice Brennan make little effort to tie their theories of interpretation to the text or structure of the Constitution. According to Perry, the Constitution represents fundamental aspirations. Judges should divine this unwritten aspirational content when deciding cases. Similarly, Justice Brennan tied the text of the Constitution to notions of human dignity. The Tempting responds that this theory does not apply "old principles to new circumstances but . . . chang[es] the principles themselves." Judge Bork exposes these theories as attempts to allow judges to apply the Constitution "in accordance with their own philosophies." Neither theory identifies the source or the parameters of the "judge's authority to invalidate legislative acts."

The Tempting's next victim is Harvard professor Laurence Tribe: [Tribe] insists upon "the non-existence of any satisfactory form of representation," which "puts the burden of persuasion on those who assert that legislatures (or executives) deserve judicial deference as good aggregators of individual preference." This certainly gets rid of the counter-majoritarian difficulty with judicial supremacy, but it does so only by denying that democracy has any claims that judges are bound to respect.

Thus, Tribe's theory of interpretation is antithetical to a democratic government.

Judge Bork is evenhanded in his critique of constitutional theory. He also attacks conservative constitutional revisionism. For example, he calls Professor Bernard Siegan's analysis of economic liberty "a comprehensive version of substantive due process," while Professor Siegan's proposed judicial tasks are "beyond the capacities of courts." Siegan's theory necessarily requires the judici-
ary to act in "a purely legislative manner." Judge Bork also attacks Justice John Marshall Harlan's due process analysis, despite the conservative appeal of his commitment to tradition. Justice Harlan's theory suffers from ambiguity. The Harlan theory permits judges to interpret the Constitution based on their own notions of what constitutes tradition. What tradition should the courts invoke? How widespread and established must something be to constitute tradition? Must the tradition be endorsed by a majority?

In sum, Bork truly is consistent in his evaluation of modern theories of constitutional law. He exposes the flaws of any theory, whether it yields conservative or liberal political results:

If the performance of the Court changes, it is to be hoped that liberal revisionism will not be replaced by conservative revisionism. The two are equally illegitimate. The Constitution is too important to our national well-being and to our liberties to be made into a political weapon.

IV POLICIZATION AND CONGRESS

Congress also has failed to act with intellectual integrity. The Senate often blatantly supports or opposes judicial nominees depending on whether the nominee's views might advance the political agenda of a majority of the body.

In Part III of his book, Judge Bork shows how his confirmation process was a battle to memorialize a political agenda on the Supreme Court:

[In the final analysis, the furor and the venom were less about me than about the issue of whether the Court would become dominated by the neutral philosophy of original understanding and thus decisively end its long enlistment on one side of the war in our culture.]

51 Id. at 229. Justice Holmes similarly chastised the majority in Lochner v. New York, 198 U.S. 45, 75-76 (1905):

[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.


53 R. BORK, supra note 1, at 235 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 60 (1980)).

54 Id. at 131.

55 Id. at 343.
Consequently, the Senate overtly considered for the first time how a nominee's views would affect the outcome of future Supreme Court cases.

The Senate proceedings focused on political results. Many senators probed to discover how a "Justice Bork" would vote on the Court. For example, during private meetings with Judge Bork, many senators indicated that their vote hinged on how he dealt with such issues as abortion. The hearings also featured extensive outcome-specific inquiries. Judge Bork concludes:

Whatever the "advice and consent" function of the Senate may legitimately encompass, prudence suggests that it not consist of an attempt to argue the outcome of specific issues.

56 Id. at 281.
57 See id. at 301. The Senate Report issued after the hearings reflects the overall political tone of the proceedings. S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess. (1987) [hereinafter S. Exec. Rep.]. Specifically, most objections relate not to Judge Bork's competence or integrity, but to concern that he would challenge existing liberal decisions. The report warns: "Judge Bork has applied his theory of the Constitution to attack a large number of Supreme Court decisions, including many landmark cases. Reconsidering these cases would reopen debate on many significant issues." Id. at 21. Yet, it is unclear why such continued judicial debate over constitutional issues is somehow taboo. Such debate is exactly how the Court reached its decision in Brown. Without renewed debate, "separate but equal" would have remained a lasting blot on the American constitutional landscape.

The report similarly expresses a fear that Judge Bork would threaten the existence and gradual expansion of the floating concept of privacy: "Judge Bork's failure to acknowledge 'the right to be let alone' illuminates his entire judicial philosophy. If implemented on the Supreme Court, that philosophy would place at risk the salutary developments that have already occurred under the aegis of that right and would truncate its further elaboration." Id. at 36. Note, however, that this discussion does not criticize Judge Bork for infidelity to the Constitution, but for failing to recognize "salutary developments" and for refusing to engage in "further elaboration."

Throughout the proceedings, the Senate Judiciary Committee engaged in an exhaustive analysis of Judge Bork's judicial views, often demanding answers that pose a threat to judicial independence. Members of the committee explicitly asked Judge Bork for his views on: the meaning of the ninth amendment, the standard to be used in sex discrimination cases, the appropriate standard under the eighth amendment, the appropriate standards for protecting speech, the constitutionality of special prosecutors, congressional standing to sue, the extent of the President's removal power, the application of the fourteenth amendment to ethnic discrimination, and the line between permissible and impermissible intrusions by states on sexual freedom. See Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 123-25, 224, 231, 242, 254-57, 319-20, 338, 415 (1987) [hereinafter Hearings]. In one particularly notable episode, Senator Leahy asked Judge Bork: "Would you agree or disagree with this proposition: that the cases establishing a constitutional right to privacy in these matters have become part of our law, and that whatever theoretical challenges may be available to them, it is too late for the Supreme Court to tear them up?" Hearings, supra, at 752.

58 R. Bork, supra note 1, at 301. Bork's point is that a pervasive role by the Senate in the confirmation process threatens the independence of the judiciary. Senator Roth explained:

I am very troubled that the questioning of the nominee was too specific and too detailed. In effect, committee members were extracting
Throughout a trying process, Judge Bork maintained his integrity and refused to make any "campaign promises" to the Senate Committee. I have a favorite anecdote illustrating his devotion to principle. As the hearings wore on, some advisers pled with Judge Bork to tailor his legal message to suit a political audience. These advisers counseled emotional speeches in favor of individual rights and a few moving and memorable lines for nightly newscasts. These sirens did not seduce Judge Bork. He responded kindly but firmly: "I am a judge, not a politician." In short, Judge Bork would not campaign for office. As perhaps the ablest legal mind of our generation, he qualified for appointment. The turbulent publicity, promotion, and puffery did not disrupt his compass.

Unfortunately, the Bork confirmation not only focused on the likely voting pattern of a "Justice Bork" but did so in a distorted, incorrect fashion. The proceedings and publicity distorted Judge Bork's public record regarding the civil rights of racial minorities and women, the treatment of big business vis-à-vis labor and consumers, and the protection of free speech. The entire Nation campaign promises from the nominee who gave them under oath. In doing this the Senate is seeking to control the result of Supreme Court deliberations. In my opinion, this compromises the independence of the judiciary and infringes on the separation of powers.


59 R. Bork, supra note 1, at 326-31. The Minority Views section in the Senate Report accurately summarizes Judge Bork's civil rights record:

Judge Bork has an excellent record in civil rights cases, he has consistently and forcefully defended the civil rights of the parties appearing before him. As a judge, he has ruled for the minority or female plaintiff in seven of eight cases involving substantive civil rights issues. This includes cases such as Emory v. Secretary of the Navy, 819 F.2d 291 (D.C. Cir. 1987), where Judge Bork reversed a district court's decision dismissing a claim of racial discrimination against the United States Navy. His record includes Laffey v. Northwest Airlines, 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985), where Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its women employees. It includes Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987), and Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983), where Judge Bork voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system. It also includes County Council of Sumter County, South Carolina v. United States, 555 F. Supp. 694 (D.D.C. 1983), 696 F. Supp. 35 (D.D.C. 1984) (per curiam), where he held that the local county had failed to prove that its new voting system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote." These decisions held (among other important rulings) that inferences of intentional discrimination can be made based solely on statistical evidence, that Title VII's statutory limitations should be liberally construed, and that female stewardesses may not be paid less than male purgers in the job that are only nominally different.


60 R. Bork, supra note 1, at 331-33.
should lament that the Senate did not decide Judge Bork's fate on the merits but on brute political realities. Again, this vindicates Judge Bork's warning.\(^6^2\)

Judge Bork's fate highlights the frailties and dangers of political, rather than legal, decisions concerning judicial nominees. Within weeks of Judge Bork's defeat, the Senate overwhelmingly approved Judge Anthony Kennedy to serve on the Supreme Court as it had overwhelmingly approved Judge Scalia before. Judge Scalia and Judge Bork had practically identical records on the U.S. Court of Appeals for the District of Columbia Circuit. Supreme Court scholars have detected few instances in which Justice Kennedy has departed from the votes a "Justice Bork" would have been likely to cast. Yet Judge Bork, and not the others, suffered political defeat. This illustrates the unpredictability, arbitrariness, and transience of political decisions.

If law as a whole slips into the political arena, the results could threaten order and liberty. If court decisions reflect only the political whims of judges, eventually Americans will lose all confidence that the Constitution and laws compel certain judicial results. If law is solely politics in another cloak, Americans may have less reason to feel that the judiciary's pronouncements have any greater moral force or lasting quality than a temporary policy judgment. At some point, respect for the law will wane. This waning, in turn, will engender a lack of respect for the freedom and safety of others.

\(6^1\) \textit{id.} at 333-36. The Minority Views section in the Senate Report similarly documents Judge Bork's record:

Judge Bork has a record as a strong advocate of the right to free speech. Judge Bork has written such important opinions as \textit{Ollman v. Evans}, 750 F.2d 970 (D.C. Cir. 1984) (en banc), \textit{Lebron v. Washington Metropolitan Transit Authority}, 749 F.2d 893 (D.C. Cir. 1984), \textit{F.T.C. v. Brown & Williamson}, 778 F.2d 35 (D.C. Cir. 1985), and \textit{Reuber v. United States}, 750 F.2d 1039 (D.C. Cir. 1984). In \textit{Ollman}, Judge Bork relied on the changing realities of libel litigation to conclude that it was necessary to have greater first amendment protections for the press in that context. In \textit{Lebron}, Judge Bork held that an administrative agency had violated an artist's rights by refusing to let him display a poster extremely critical of President Reagan in space leased for advertisements on the inside of subways. In \textit{Brown & Williamson}, Judge Bork demonstrated his concern about any form of censorship and vacated an injunction restricting a cigarette company's ability to engage in certain kinds of advertising without prior FTC approval, and remanded to the district court to enter a less restrictive injunction. And in \textit{Reuber}, Judge Bork sought to protect an employee of a private firm who had spoken critically of the government, arguing that an employee ought to be able to sue his employer if the employer was an agent of the government.

V

ORIGINAL MEANING JURISPRUDENCE

_The Tempting_ presents the most compelling defense of original meaning jurisprudence written in the modern era. The Constitution itself, contends Bork, compels judicial reliance on the law as written. Original meaning jurisprudence derives its force directly from the language of the Constitution. The supremacy clause of article VI makes "[t]his Constitution . . . the supreme Law of the Land . . . ."63 The language of this provision announces that the Constitution is "Law." As law, the Constitution as written binds judges as well as legislators and other government officers. Moreover, the Framers reduced their agreements to writing for a reason—to ensure that the terms of that writing have a fixed meaning over time.64

Original meaning jurisprudence also preserves the bedrock American principle of self-government. The Constitution defines in writing the bounds of the majority's authority to govern. Beyond those limits, the majority may not trample minority rights. Short of those limits, society may freely set policy to benefit its members. The Constitution wisely defines those bounds to prevent either the majority or a minority from abridging the vital rights of others.

The Constitution charges the courts with the duty of policing those bounds. In performing this duty, however, the courts must neutrally apply the principles in the Constitution itself. Absent neutrality in the selection of principles, the Court could define the respective spheres of majority authority and individual liberty "as it sees fit,"65 manipulating the breadth of principles to "make things come out the way it wishes on grounds that are not contained in the principle it purports to apply."66 By maintaining the Court's neutrality in the use of constitutionally determined principles, original understanding prevents life-tenured, unelected judges from choosing among principles to reach favored political outcomes.

Judge Bork makes a significant contribution to the original meaning debate. He shows that original understanding supplies "neutrality . . . in deriving, defining, and applying principle."67 Original meaning eliminates the problem of neutral derivation of principle because "[t]he judge accepts the ratifiers' definition of the appropriate ranges of majority and minority freedom."68 The lan-

63 U.S. CONST. art. VI, cl. 2.
64 The Supreme Court's decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), reflects this rationale.
65 R. Bork, supra note 1, at 146.
66 _Id._
67 _Id._
68 _Id._
guage of the Constitution limits the judge’s range of choices.

No other modern theory of constitutional interpretation secures the judicial neutrality necessary for the preservation of self-government. After exhaustive analysis and critique, Judge Bork concludes that “every theory not based on the original understanding . . . requires the judge to make a major moral decision.”69 None of these other theories shows how judges can have “legitimate authority to impose their moral philosophy upon a citizenry that disagrees.”70 Their lack of legitimacy is their downfall.

Various theorists have attacked the tenets of original meaning jurisprudence. Judge Bork parries each of these thrusts. Judge Bork flatly rejects the proposition that we cannot know the original understanding of 100 or 200 years ago. Revisionists misrepresent the focus of original understanding by asserting that we cannot know the Founders' views as to particular contemporary questions. This formulation, however, misstates the judicial task. The judge need not discern the Framers' subjective intent but rather the meaning of the written word. Moreover, “the text, structure, and history of the Constitution provide [the judge] not with a conclusion but with a major premise.”71 The judge must apply that premise to the problems of our time. Thus, a judge may apply the fourth amendment ban on unreasonable searches to wiretaps without speculating about the Framers' hypothetical views of electronic surveillance.72

Judge Bork similarly refutes the revisionists' argument that original understanding, like any other theory, requires the judge to make political choices. Although the use of original jurisprudence will result in the application of certain political decisions, “the political content of that choice is not made by the judge; it was made long ago by those who designed and enacted the Constitution.”73

Judge Bork further addresses the claim that the Constitution is a document which must adapt to changes in society. He shows that original understanding permits the Constitution to adapt to situations not present at the time of its founding. Judges may apply existing values to new circumstances but may not create new values.74 Thus, “[i]t is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know.”75 Moreover, the Constitution itself accommodates societal change in numerous ways. Article V permits

69 Id. at 251-52.
70 Id. at 252.
71 Id. at 162.
72 See id. at 169.
73 Id. at 177.
74 See id. at 170.
75 Id. at 167-68.
each generation to incorporate new social values directly into our basic charter.\textsuperscript{76} Article I permits Congress to change laws to meet changing needs.\textsuperscript{77}

Ours is a living Constitution. It lives because the genius of its enduring principles continues to apply today as our fundamental law. Those who reject the Constitution as written treat it as dead. For them, enlightened judges must set aside the dusty language of by-gone generations. These skeptics forget that the living Constitution has protected American liberties for more than two centuries.

\section*{VI \hfill BORK AS MAINSTREAM CONSTITUTIONALIST}

Constitutional revisionists branded Judge Bork as out of the mainstream of reasonable legal discourse. The heyday of this invective was the 1987 confirmation process. These hearings characterized Judge Bork as an "extremist . . . who will . . . advance a far right radical judicial agenda."\textsuperscript{78} This commentary, however, demonstrates more about Judge Bork's opponents' position on the scale of legal reasonability than anything about Judge Bork's views.

The honorable author of \textit{The Tempting} has not invented a new doctrine. Rather, he merely has revived an authoritative, but recently unpopular, doctrine. Judge Bork is not the first to attack vague modes of constitutional interpretation, unfixed principles, and boundless judicial discretion as threats to American self-govern-ment. Nor is he the first to suggest that the state can regulate moral behavior. Indeed, Judge Bork's concerns mirror the views of many of this Nation's preeminent legal scholars.

A thoughtful examiner must look back to the founding of the Republic to find the origins of Judge Bork's concerns about the preservation of self-government. In \textit{The Federalist No. 78}, Alexander Hamilton remarked that "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive."\textsuperscript{79} Judge Bork similarly echoes the immortal counsel of Chief Justice John Marshall, who stated in \textit{Marbury v. Madison} that "the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath

\footnotesize
\begin{itemize}
\item \textsuperscript{76} U.S. Const. art. V.
\item \textsuperscript{77} U.S. Const. art. I.
\item \textsuperscript{78} \textit{Hearings, supra} note 57, at 78.
\item \textsuperscript{79} \textit{The Federalist Papers} 227 (Roy P. Fairfield ed. 1966).
\end{itemize}
to support it?"\(^{80}\)

In fact, whenever the Court has departed from the Constitution to make political choices, an array of respected justices have sounded alarms. Among the ardent foes of political law are Justices Holmes, Frankfurter, and Black. In *Truax v. Corrigan*,\(^{81}\) for example, Justice Holmes dissented:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me.\(^{82}\)

Like Justice Holmes, Justice Frankfurter frequently warned the Court that an expansive judicial role threatens American self-governance. In *Dennis v. United States*,\(^{83}\) where the Court upheld the conviction of Communist Party leaders under the Smith Act, Justice Frankfurter concurred separately:

> [T]he Framers of the Constitution chose to keep the judiciary dissociated from direct participation in the legislative process. . . . [T]he extent to which the exercise of this power [of judicial review] would interpenetrate matters of policy could hardly have been foreseen by the most prescient. The distinction which the Founders drew between the Court's duty to pass on the power of Congress and its complementary duty not to enter directly the domain of policy is fundamental. . . . Our duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is deemed unwise and even dangerous.\(^{84}\)

In the West Virginia flag salute case, Justice Frankfurter similarly described the proper role of a judge:

> As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.

> . . .

Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the

\(^{80}\) *Marbury*, 5 U.S. (1 Cranch) at 179-80 (emphasis in original).

\(^{81}\) 257 U.S. 312 (1921).

\(^{82}\) Id. at 344.

\(^{83}\) 341 U.S. 494 (1951).

\(^{84}\) Id. at 552.
challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked.\textsuperscript{85}

Justice Frankfurter observed that the Court's invalidation of legislation under "the spirit of the Constitution" amounts to an "undefined destructive power . . . not conferred on this Court by the Constitution."\textsuperscript{86} The Tempting merely resurrects these once respected concerns.

Justice Black's remarks also frequently addressed the proper judicial role. In \textit{Ferguson v. Skrupa},\textsuperscript{87} he remarked for the majority:

The doctrine that prevailed in [several cases]—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.\textsuperscript{88}

Of course, Justice Black had not anticipated the later resurrection of substantive due process.

Surely no sincere student of the Constitution would brand these three Justices as extreme or accuse them of expressing a particular political agenda in their opinions. Yet Judge Bork has been exiled from the mainstream of legal thought for identical views. Bork contends that the revisionists' constitutional sophistry threatens the very institutions that preserve self-government. He warns that "[a]s we move away from the historically rooted Constitution to one created by abstract, universalistic styles of constitutional reasoning, we invite . . . disrespect for the actual institutions of the American nation."\textsuperscript{89} As a consequence, "[t]he attempt to define individual liberties by abstract moral philosophy, though it is said to broaden our liberties, is actually likely to make them more vulnerable."\textsuperscript{90}

One of the most interesting aspects of \textit{The Tempting} is that Judge Bork occasionally steps back from doctrinal discussion of the law to express his horror at the everyday ramifications of adopting

\textsuperscript{86} Barnette, 319 U.S. at 666; see also concurring Justice Jackson's observation in \textit{Brown v. Allen}, 344 U.S. 443, 535 (1953):

Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.

\textsuperscript{87} 372 U.S. 726 (1963).
\textsuperscript{88} \textit{Id.} at 730.
\textsuperscript{89} R. Bork, \textit{supra} note 1, at 352.
\textsuperscript{90} \textit{Id.} at 353.
today's revisionist philosophy. Judge Bork particularly ridicules the suggestion that the state cannot regulate moral behavior. Judge Bork asserts that "[m]oral outrage is a sufficient ground for prohibitory legislation."\(^9\)

This principle draws support from nearly all judicial writers. In *Griswold*, concurring Justices Goldberg, Warren, and Brennan readily admitted that the Court's ruling "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."\(^9\) Justice Brennan similarly observed in *Eisenstadt* that the state properly could regulate "the problems of extramarital and premarital sexual relations . . . ."\(^93\) Both Justices Douglas and Brennan even left some room for the states to regulate pornography because of its danger to juveniles and its offensiveness to unconsenting adults.\(^94\) Surely no one would consider these Justices extreme for espousing constitutional doctrine which recognizes a role for the state in regulating moral behavior.

In sum, then, *The Tempting* espouses a mainstream and historically prevalent theory of constitutional interpretation. The theory finds its origins in the Constitution itself. Leading jurists in this Nation's history have relied on the same theory to explain their decisions. Contrary to some of Judge Bork's critics, Judge Bork's approach is neither radical nor a mask to hide a conservative political agenda.

**CONCLUSION**

Today's revisionist literature is not about interpretation but about obtaining political power through the judiciary. The terms of the revisionists' rhetoric cloak this purpose well, but one need only scratch the surface of their arguments to see how a departure from original meaning would threaten freedom and democracy.

Still, the lure of political results tempts judges to abandon the written laws. Judge Bork shows that original meaning jurisprudence can arrest this politicization of the law by resolving disputes with an appeal to the text and context of the Constitution. Judges need not consult their own personal morality or philosophy. Moreover, this judicial process preserves individual rights, self-government, diversity, and self-determination. Judge Bork's loss in the Senate underscored his warnings against judges who prefer to follow their own predilections. *The Tempting* adds an emphatic exclamation point.

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\(^9\) *Id.* at 124.


INTERPRETING BORK

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW.

Michael J. Gerhardt†

INTRODUCTION

Robert Bork is back. And he is mad.

In a new book, The Tempting of America: The Political Seduction of the Law, Bork mounts a full-scale response to the Senate's rejection of his nomination as an Associate Justice by the largest margin of any Supreme Court nominee in American history. His assault makes clear, once and for all, that when it comes to constitutional interpretation, Bork would not agree with Oscar Wilde's statement that "the only way to get rid of a temptation is to yield to it." For Bork, the temptation in question is judges' reading their own personal values or policy preferences into the Constitution under the guise of interpretation. To succumb to this temptation imposes, in Bork's words, "heavy costs for the legal system, heavy costs for our liberty to govern ourselves . . . . Then there is no law; there are only the moral imperatives and self-righteousness of the hour." Bork's prescription for resisting this temptation is a rigid commitment to the theory of original understanding. This theory requires judges to confine themselves to discovering, and consequently respecting, what each constitutional provision objectively meant to its framers and ratifiers—leaving to the majoritarian legislative processes any

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5 R. BORK, supra note 2, at 132.
matter on which the Constitution, or the original understanding of its framers and ratifiers, is silent or ambiguous.

This Book Review Essay argues that Bork’s theory of original understanding cannot coherently and consistently overcome certain problems endemic to the interpretation of the written constitutional text, the search for objective historiography, and the reconsideration of precedents not based on original understanding. This Essay suggests further that the inherent difficulties in Bork’s crafting a sensible and politically acceptable articulation of original understanding have led Bork in his confirmation hearings and in his book to take contradictory positions on many issues.

Part I offers a brief synopsis of *The Tempting of America* and identifies the two objectives that pervade it. First, Bork provides his most comprehensive defense yet of his theory of original understanding. Second, he provides for the first time in print his own perspective on his confirmation proceedings. This Part suggests that Bork has aligned himself against so much constitutional doctrine and theory that he can claim a place in the mainstream of constitutional commentary only by excluding almost everyone else from it.

Part II identifies the limitations of Bork’s theory of constitutional interpretation. This Part uses a variety of examples from Bork’s book to illustrate his problems with (1) finding the meaning of the written constitutional text, (2) the search for original historiography, and (3) nonoriginalist precedents. These problems cumulatively demonstrate that Bork’s theory lacks coherence and fails to achieve its stated goal: to consistently restrain judicial tyranny.

Part III critiques Bork’s condemnation of his confirmation proceedings. This Part suggests that the primary reason for the Senate’s rejection of Bork’s nomination is that Bork deconstructed himself. As Bork’s testimony exposed various contradictions buried in his work, the Senate lost confidence in Bork’s claim that his theory of constitutional interpretation would restrain the judiciary on a basis more principled than any ever previously followed by the Court. The Senate, faithful to its own constitutional duties, also took note of the fact that when Bork faced the temptation of moderating his own views in order to secure a seat on the Supreme Court, he quickly yielded.

**I**

**THE WORLD ACCORDING TO BORK**

*The Tempting of America* is vintage Bork—it is written in clipped sentences, laced with biting humor, mercilessly blunt, and brimming with self-confidence (if not self-righteousness). The book’s most
significant stylistic characteristic is its pervasive religious imagery. For example, the title is a subtle reference to the temptations of Adam and Samson; and Bork refers to, inter alia, the "creation" of the Constitution, the "fall" of the American judiciary as the result of the first taste of the irresistible "apple" of judicial activism, original understanding as constitutional "orthodoxy," the "heresy" of rejecting original understanding, and the Constitution as a "sacred text" and a kind of "civil religion." Bork's use of religious imagery underscores his conviction in his theory of original understanding, but it also creates a tone more appropriate for a brief than the dispassionate constitutional treatise this book purports to be.

In the first part of the book, Bork relates the history of how the Court came to see itself as the national conscience. Bork uses this history to critique the Court's development of an extraordinarily wide range of liberal constitutional doctrine. Bork denounces, for example, the Court's decisions to uphold virtually all New Deal legislation. He also criticizes the Court's construction of the equal

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7 R. Bork, supra note 2, at 19.
8 Id.
9 Id. at 153, 216; see also id. at 6, 7.
10 Id. at 6, 7, 11. However, Bork later says that the liberals may have sacrificed him as a "heretic" rather than as an "infidel." Id. at 343.
11 Id. at 351.
12 Id. at 153. The book is also divided, like the Trinity, into three parts. The book's parts are entitled "The Supreme Court and the Temptation of Politics," id. at 15, "The Theorists," id. at 133, and "The Bloody Crossroads," id. at 267.
13 Out of concern that my tone in describing and/or critiquing Bork's book may occasionally seem strident, I hasten at this juncture to emphasize that my reaction to Bork's book may be similar to the late Arthur Leff's reaction to Richard Posner's law and economics theory: "There is no doubt that the mind at work in this book is supple, strong, and even (in a sense) sensitive .... [Admittedly,] I [do] have an ax to grind, and more than enough fury to turn the wheel. But let no one be misled; it is the high intellectual quality of the book which enrages me, not its incompetence." Arthur A. Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451, 462 (1974).
14 See R. Bork, supra note 2, at 51-57. Although Bork critiques the rise of substantive due process in cases involving private economic interests, such as Lochner v. New York, 198 U.S. 45 (1905), he also critiques the demise of Lochner as an evisceration of federalism. R. Bork, supra note 2, at 44-46, 57-58. Bork approves of the Court's abandonment of substantive due process protection for private economic interests. Yet he believes that the cases that upheld components of the New Deal, including, for example, Wickard v. Filburn, 317 U.S. 111 (1942), undermine federalism by expanding federal governmental power at the expense of rightful state autonomy. R. Bork, supra note 2, at 58. In particular, he finds three faults with the decisions upholding the New Deal:

The first is that [they] throw[] the Court's considerable prestige behind a political decision and endorse[] a line of economic argument, which ... happen[s] to be quite wrong .... The second is that the concept of substantive due process was kept alive because the Court purported to examine the conditions that made the so-called liberty of contract inapplicable. Thus, an extraconstitutional idea was left to do damage in the future. Third, the performance lent itself to disingenuousness in the future. The Court purported to apply the constitutional doctrine of sub-
protection clause of the fourteenth amendment as requiring the government to condition or distribute certain unenumerated fundamental interests on equal terms, and as supporting special judicial protection for groups other than blacks. Furthermore, he rejects the Court's application of the Bill of Rights to the states through the process of incorporation, reading of the fourteenth amendment due process clause to protect any aspect of individual privacy (including abortion), and approval of "group entitlements" for substantive due process to economic regulation, but in fact the Court abolished the doctrine, because from then on every such regulation of economic activity was upheld.

Id. Bork believes that the distribution of power between the federal and state governments is the only "neutral" protection of individual liberty in the original Constitution. This belief is the common thread running throughout his critique of the New Deal Court. Id. at 53.

15 The fourteenth amendment provides in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

16 See R. Bork, supra note 2, at 61-67. Bork critiques the Court's use of the equal protection clause to provide substantive (or special) protection to fundamental interests that the framers and ratifiers never considered as such. For example, he critiques the Court's first such use of the clause in Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that a state statute providing for the sterilization of habitual criminals violated a fundamental right to procreate derived from the equal protection clause). Bork's comprehensive critique of the Court's equal protection doctrine includes his disagreement with the Court's decision to strike down state poll taxes in Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). R. Bork, supra note 2, at 90-91.

17 R. Bork, supra note 2, at 58-61. Bork maintains that the Court, beginning in United States v. Carolene Products Co., 304 U.S. 144 (1938), has flagrantly deviated from the original understanding of equal protection as a guarantee of racial equality only for the newly freed slaves and their descendants.

18 R. Bork, supra note 2, at 93-95. To Bork, the process of making the Bill of Rights applicable to the states through the due process clause "enormously expanded the Court's power . . . [and did] much to alter the moral tone of communities across the country." Id. at 94-95. What Bork neglects to mention is the historical evidence supporting the view that the framers of the fourteenth amendment intended to make the first eight amendments of the Bill of Rights applicable to the states through the privileges or immunities clause. See Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 937-38 (1986). In its decisions selectively incorporating the Bill of Rights through the due process clause, beginning in 1897 and continuing through the Burger Court years, the Court relied on this history as much as it did on expanding notions of the substantive content of the liberty component of the due process clause.

19 R. Bork, supra note 2, at 95-100, 110-26. For Bork, the most illegitimate cases are those recognizing any general constitutional right of privacy, including Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), Roe v. Wade, 410 U.S. 113, rel'd denied, 410 U.S. 959 (1973), Moore v. City of East Cleveland, 431 U.S. 494 (1977), and Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989). These decisions are illegitimate because they ignore the fact that the framers and ratifiers intended to protect only those aspects of privacy that had been expressly delineated in the Bill of Rights. R. Bork, supra note 2, at 114. To go beyond the framers' designated areas of constitutional protection for privacy is, in Bork's mind, judicial
blacks. For Bork, the mistake unifying all of this as well as the rest of the Court’s liberal constitutional doctrine is its repeated failure to remain faithful to the original understanding of the particular constitutional provisions being interpreted. Consequently, the Court has also failed to respect the majority’s “liberty” to treat subjects on which the Constitution is silent or ambiguous. It is true, as Bork argues, that some scholars endorse his methodology and a larger number critique some of the same decisions. Even so, no one else shares the size and range of Bork’s cumulative critique of over two centuries of constitutional decisionmaking.

In the second part of his book, Bork justifies his theory and denounces liberal critiques of, and alternative theories to, original understanding. While the book’s fulcrum is Bork’s authority for strict judicial fidelity to original understanding, Bork curiously waits until almost the middle of the book to explain briefly (in only two pages) that the bases for this theory are: (1) implications from the structure of the Constitution; (2) some of the framers’ selected comments

“fiat.” Id. Such judicial “fiat” creates a “loose canon in the law.” Id. at 97. To Bork, Roe v. Wade itself is “the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century.” Id. at 116.


21 Bork also criticizes Chief Justice Marshall’s activism under the commerce clause to expand congressional power, R. Bork, supra note 2, at 21-25; the Court’s use of substantive due process to protect slave-holding, id. at 31; the rise in the late nineteenth and early twentieth centuries of substantive due process protecting private property rights and a realm of privacy within which parents could make decisions about their children’s education, id. at 40-49; any judicial interference with states’ powers to reapportion themselves, id. at 84-87; the Court’s upholding Congress’s power to interpret, as opposed only to enforce, fourteenth amendment guarantees as defined by the Court, id. at 92; and the Court’s construction of the first amendment as protecting any verbal expression, other than purely political speech, not directed at overthrowing the government. Id. at 126-28, 333-36.

22 Id. at 53, 139, 352-53.

23 Bork identifies only four contemporary constitutional scholars—Raoul Berger, Michael McConnell, Lino Graglia, and Joseph Grano—who share his “traditional position that the original understanding controls.” Id. at 223-24.

24 Id. at 152, 324, 330, 332.

made at the constitutional convention and during the ratification campaign; and (3) the need, in the absence of any historical justification for the theory, to create the theory in order to preserve the Constitution itself. Bork insists that strict judicial fidelity to original understanding is the most effective resolution of the "Madisonian dilemma," which is his label for the problem created by unprincipled judicial interference with legitimate majoritarian decisionmaking.

After defending original understanding, Bork critiques constitutional theorists. He castigates liberal revisionists, conservative revisionists, and the entire Rehnquist Court (called "left-liberal") for recognizing or relying on values that cannot be reconciled with original understanding.

In the third part of his book, Bork condemns his confirmation proceedings. Bork regards his defeat as having been masterminded by the liberal elite, which he describes as frustrated refugees from the 1960s who are urging the federal courts to adopt the liberal policies they could never get legislatures to endorse. Not only does Bork believe that these people have infiltrated academia, government, media, and public interest groups, but that they targeted him specifically because of his lifelong commitment to exposing their intellectual dishonesty. Bork links his defeat to the

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26 R. Bork, supra note 2, at 154-55.
27 Id. at 139-40. Bork explains that the "central problem" facing judges trying to interpret the Constitution is the "Madisonian dilemma," which involves the "never ending search for the correct balance" between two constitutional principles:

The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty.

29 For Bork, the conservative revisionists are Bernard Siegan, Richard Epstein, and Justice John Marshall Harlan. See id. at 224-35.
30 Id. at 126.
32 Bork describes his hearings as the "bloody crossroads where politics and law meet." See id. at 269.
33 Id. at 338.
34 Id. at 9, 279, 338-39, 343.
liberal elite's distortion of his record and to their intimidation of liberal senators. Yet, throughout this discussion, Bork never appreciates the irony that his stated commitment to majoritarian power (even when it acts precipitously), as the central principle underlying the Constitution, belies his deep-seated resentment over the failure of the majoritarian process to treat him fairly.

In his conclusion, Bork reemphasizes judicial fidelity to original understanding as the most effective means for resolving the "Madisonian dilemma." He suggests that "self-government" is the most important "liberty" that Americans possess and predicts that judges' disregard for this "liberty" will increase "disrespect for the actual institutions of the American nation," decrease the ability of the popularly elected branches to reach compromise and to dilute absolutism on divisive political issues, and weaken "the freedoms from government guaranteed by the Bill of Rights and the post-Civil War amendments." Returning to the religious imagery he has used throughout the book, Bork concludes that "[c]onstitutional doctrine that rests upon a parochial and class-bound version of morality, one not shared by the general American public, is certain to be resented and is unlikely to prove much of a safeguard when crisis comes."

II
Bork's Original Sins

A. The Textual Problems

There are four problems with Bork's treatment of the text of the Constitution. First, he assumes that one can discern a clear meaning from the written constitutional text. Second, he substitutes other historical texts in place of the Constitution when he believes that these other texts more accurately reflect the original understanding of the Constitution. Third, Bork wrongly assumes that original understanding provides a stable source of constitutional meaning. Fourth, Bork frequently avoids and/or distorts tensions and contradictions in the Constitution. Sometimes he sees contradictions where there are none; at other times, he ignores contradictions in the text that undermine his interpretive theory; and, at still other times, he uses his interpretive theory to rewrite contradic-

35 Id. at 323-36.
36 Id. at 352.
37 Id. at 352-53.
38 Id. at 354.
39 See infra notes 43-48 and accompanying text.
40 See infra notes 49-52 and accompanying text.
41 See infra notes 53-55 and accompanying text.
In the following section, I take these criticisms in order.

1. Bork Assumes that the Written Constitution Has a Clear Meaning

Bork assumes that the written constitutional text has a clear meaning in spite of considerable scholarship that emphasizes the virtual impossibility of written texts (even political ones) to have clear, indisputable meanings. For example, such scholarship posits that nothing in the nature of a text constrains a reader to construe it solely in accordance with authorial meaning. Bork responds to this criticism by arguing that if we do not choose the authors' (or, in the setting of constitutional interpretation, the framers' and ratifiers') meaning, then we have no norm of interpretation and we risk opening the Constitution to the floodgates of critical anarchy. Bork distinguishes the Constitution from other, non-legal texts on the sensible basis that the people ratified the Constitution as the supreme law of the land. In order for the Constitution to fulfill its unique purpose, Bork argues, we must choose only one source—original understanding—for its meaning.

Acknowledging the Constitution as the supreme law of the land does not in any way necessitate or require strict fidelity to original understanding as the sole source of constitutional meaning. The

42 See infra notes 56-86 and accompanying text.
43 See, e.g., Paul De Man, Allegories of Reading 246-77 (1979) (discussing Rousseau's writings); Jacques Derrida, Of Grammatology 295-302 (Gayatri C. Spivak trans. 1976) (discussing Rousseau's writings); Alvin W. Gouldner, The Two Marxisms (1980) (discussing Marx's writings); Jacques Derrida, Declarations of Independence, New Political Science 7 (Summer 1986). Recent work in literary theory emphasizes the role that interpretive communities play in determining the authoritative meaning of texts, and some of that work questions the basis from which an interpretive community gains its authority. See Christopher Butler, Interpretation, Deconstruction, and Ideology: An Introduction to Some Current Issues in Literary Theory (1984); Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1980); The Politics of Interpretation (William Mitchell ed. 1983); see also Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 60-69 (1988) (discussing the flaws with textualism in constitutional theory); Paul Brest, Interpretation and Interest, 34 Stan. L. Rev. 765, 770-71 (1982) (offering a brief sociology of the coercive creation of interpretive communities); David Luban, Fish v. Fish or, Some Realism about Idealism, 7 Cardozo L. Rev. 693 (1986) (discussing some of the ambiguities in Fish's work).
44 Interestingly, Bork's theory of constitutional interpretation parallels the theory of literary interpretation of the American hermeneuticist E.D. Hirsch. See E.D. Hirsch, Jr., Validity in Interpretation (1967) (arguing that authors put meanings into texts and readers assign significance). Hirsch's theory has been criticized for three reasons. First, it is premised upon the choice of an arbitrary anchor of meaning; second, it assumes authorial meanings are discoverable and immune to the passage of time; third, it assumes further that authorial meanings do not require the same kind of interpretation as the texts they purportedly explain. See Frank Lentricchia, After the New Criticism 257-80 (1980).
45 R. Bork, supra note 2, at 2, 155.
46 Id. at 172-76.
supremacy clause\textsuperscript{47} tells us that the Constitution—whatever the meaning of its internal language and structure—has superior status to other human laws. The clause does not say anything about (nor express preference for) any particular methodologies of interpreting the Constitution. In other words, the Constitution is the supreme law of the land, but we must still decide how to construe such a supreme legal document. Moreover, in spite of the Constitution's purpose, the document makes use of language, and, therefore, cannot elude the obscuring of meaning that any use of language (even within a political context) entails.\textsuperscript{48} Regardless of any contrary intent of their creators, written texts are not transparent media through which meanings leap out to their readers. This is even true of documents, such as the Constitution, that were the product of compromise and consist of (quite often purposefully) broad language. The nature of language is such that whenever readers actively engage in the interpretation of a text, their construction depends on what those readers bring to the text as well as on what they think they find in it. In short, the process of reading a written text necessarily involves the reader's values.

2. Bork Substitutes Other Historical Texts in Place of the Constitution

Bork ignores the constitutional text in order to substitute in its place other historical texts that he believes more accurately reflect its original understanding. For example, Justice Black read the free speech clause of the first amendment\textsuperscript{49} as meaning that Congress could pass "no law abridging freedom of speech," and he understood "speech" to consist of at least any verbal expression.\textsuperscript{50} He found support for his broad reading in the plain meaning of the amendment's words and because no other amendment spoke in such absolutely prohibitive terms. Surely this is not the only reading of the free speech clause, but it is a plausible one. Yet Bork

\textsuperscript{47} The supremacy clause provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land . . . ." U.S. Const., art. VI, § 2.

\textsuperscript{48} Bork himself acknowledges this problem, R. Bork, \textit{supra} note 2, at 147, but fails to fully comprehend that political texts are written to reflect a "voice of union," even though "the appearance of union may be deceptive." John Leubsdorf, \textit{Deconstructing the Constitution}, 40 Stan. L. Rev. 181, 182 (1987). See also \textit{supra} note 44.

\textsuperscript{49} The first amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

rushes past this reading to search for a consensus among the framers and ratifiers on what the clause really "means." Similarly, Bork argues that the equal protection clause should be limited to claims of racial minorities, even though the text of that clause contains no such limitation. Ironically, Bork fails to recognize that he has ignored the "sacred text" of these and other provisions of the Constitution in order to interpret them on the basis of other arguably more revealing "texts."

Moreover, Bork's reliance on the framers' and ratifiers' objective understanding—as discovered in these other texts—as the sole source of meaning of the constitutional text has no direct link to the text itself. Original understanding is an arbitrary anchor of meaning because it is no more authoritative, defensible, or sensible than any number of other choices, including, for example, the understanding of only the ratifiers whose votes actually counted in forming the original number necessary for ratification, the understanding of past and contemporary constitutional scholars and historians, or the Court's account of what the plain language means to it at any given moment in time.

3. Bork Assumes that Original Understanding Provides a Stable Source of Constitutional Meaning

Bork is mistaken in assuming that what he has substituted for the text, original understanding, is a stable source of constitutional meaning. Meanings are the products of language, which "always has something slippery about it." Therefore, the meaning for which Bork searches is not as stable, pure, or solid as he thinks. Bork assumes that the constitutional text has an absolute, immutable meaning that is wholly resistant to historical change. To secure the meaning of the Constitution for all time, rescuing it from the ravages of history, Bork argues that interpretation must monitor its potentially anarchic details by hemming them back with original understanding. Bork's stance toward the text is authoritarian and juridical—anything that cannot be herded inside the enclosure of original meaning is brusquely expelled, and everything remaining within that enclosure is strictly subordinated to this single governing intention.

51 See R. Bork, supra note 2, at 37, 328-29.
54 See, e.g., R. Bork, supra note 2, at 329 (arguing that the broad language of the equal protection clause, which applies by its own terms to any "person," must be restricted to the scope of its original understanding, which was, according to Bork, to provide special protection only to racial minorities).
Bork’s belief in the existence of an objective understanding of a textual provision as representing its sole meaning is, however, misplaced. It is impossible to make a complete or neat distinction between “what the text means,” “what the text meant to the framers,” “what the text meant to the ratifiers,” and “what the text means to Bork.” Any such notion of absolute objectivity is an illusion. Bork fails to realize that his reconstruction of the constitutional text’s meaning can only occur within his own historically conditioned frame of meaning and perception at the expense of rejecting other individuals’ equally defensible readings.

Bork’s quest for rules to guide constitutional interpretation not only distances him from the text but also forces him to exchange the interpretive problems with the text for interpretive problems stemming from his particular interpretive rule. The original understanding for which Bork searches is itself a complex “text,” which can be debated and can give rise to various interpretations, just as any other text (including the Constitution itself). Bork is on a hopeless quest not so much for the Constitution’s meaning, but for certainty.

4. Bork Uses His Interpretive Theory to Rewrite the Contradictions in the Constitution

a. Bork Ignores Certain Contradictions in the Text

Bork frequently fails to confront certain tensions and contradictions that permeate the Constitution; he uses his interpretive theory to avoid them. This problem is common to the interpretation of all written texts: readers tend to emphasize or seek out the values, ideas, or themes in a particular text that reinforce their own particular agenda, and discount or even ignore conflicts in the text. Readings of written texts (even by legal scholars) are necessarily selective, and to a significant degree depend on the choices of facts, trends, meanings, and values that the reader imputes to the text.

For example, Bork takes inconsistent positions with respect to whether Congress or the federal judiciary should protect federalism. With respect to the commerce clause, he first praises Chief Justice

57 The commerce clause provides that the Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” U.S. Const. art. I, § 8, cl. 3.
Marshall for recognizing plenary congressional power under it, and refers approvingly to his own arguments as Solicitor General in *National League of Cities v. Usery* that Congress could regulate substantial state activity under it. Bork then switches gears, arguing that the Court erroneously sacrificed rightful state authority under the tenth amendment in order to uphold New Deal legislation under the commerce clause. Bork also hints that the Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*, which essentially adopted the position he urged in *National League of Cities*, was wrongly decided because the Court did not adequately respect the states’ tenth amendment powers. The problem is that either the Congress has plenary authority under the commerce clause, which would extend to regulating even the states, or Congress does not; or the states have powers protected by the tenth amendment that the federal courts may identify and apply to restrict Congress’s commerce powers, or the states do not. Bork, however, tries to have it both ways with respect to congressional and state powers over interstate commerce, without ever trying to fully identify and resolve the conflict.

Similarly, Bork is inconsistent in his analysis of Congress’s power to enforce the Reconstruction Amendments. On the one hand, Bork acknowledges that as Solicitor General he had argued that Congress has the power to pass legislation that regulates private racial discrimination. On the other hand, in the book he ar-

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58 R. Bork, supra note 2, at 21, 27-28.
61 The tenth amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.
62 R. Bork, supra note 2, at 51-58.
64 R. Bork, supra note 2, at 156, 158.
65 The Reconstruction (or post-Civil War) Amendments are the thirteenth, fourteenth, and fifteenth amendments.
66 In a confusing passage, Bork suggests that rather than accept the Court’s misinterpretation of the fourteenth amendment’s equal protection clause in *Shelley v. Kraemer*, 334 U.S. 1 (1948), as prohibiting racially restrictive covenants between private individuals, Congress could have outlawed such covenants as Bork briefed, and the Court approved, in *Runyon v. McCrary*, 427 U.S. 160 (1976) (upholding the constitutionality of applying 42 U.S.C. § 1981 to prohibit private schools from excluding black children solely on racial grounds). See R. Bork, supra note 2, at 153. Bork never acknowledges or explains, however, that *Runyon* involved an interpretation of Congressional power to enforce not the fourteenth but rather the thirteenth amendment. Bork never explains how congressional power exercised to enforce one amendment can be used to remedy an act that seemingly violates another.
gues that Congress only has the power to enforce constitutional guarantees as defined by the Court, which in his view has wrongly construed the equal protection clause as prohibiting racial discrimination by private individuals.\(^6^7\)

Bork's contradictions result from sources he never acknowledges: tensions and conflicts in the constitutional text and inconsistencies between his theory and his service as Solicitor General. In regard to the Constitution, Bork seems to forget that the constitutional text was frequently the product of compromise and that its words contain no underlying singular meaning.\(^6^8\) The framers and ratifiers rarely, if ever, were united on the meaning of particular parts of the document; they left tensions within the document, including, for example, its original stances toward slavery and federal-state relations.\(^6^9\) To the extent that any objective understanding exists with respect to the document's internal tensions, it is that the framers reached no consensus as to their proper resolution. To go beyond that acknowledgment in the name of original understanding is to disingenuously cloak one's personal views with historical legitimacy.

In regard to personal politics, Bork's readings of the commerce

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\(^6^7\) R. Bork, supra note 2, at 91-93, 147, 152-53, 324. For example, Bork insists at one point, id. at 91-93, that Congress only has the power to remedy violations of the Constitution (which, for Bork, can only occur through state action), but he later insists that Congress may make the "political" judgment to prohibit racially restrictive covenants. Id. at 152-53. Bork also has a problem in explaining his current approval of the Civil Rights Act of 1964. Bork acknowledges that he originally opposed the Act because it attempted to regulate the racial relations between private individuals. Id. at 80. Bork then suggests that the Act could be sustained on the basis that it does "more good than harm." Id. However, Bork argues later that "because the Constitution addresses only governmental action, the Court could not address the question of private discrimination. Congress did address it in the Civil Rights Act of 1964 and in subsequent legislation, enlarging minority freedoms beyond those mandated by the Constitution." Id. at 147. Taken together with his earlier statement that Congress may only remedy constitutional violations as defined by the Court, this latter statement clearly implies that Bork thinks the 1964 Act is unconstitutional. Needless to say, Bork never resolves the conflicts in his statements or his reasoning. Bork also never reconciles the basis on which he would justify the 1964 Civil Rights Act and his theory of original understanding. Moreover, he never acknowledges that the 1964 Act was primarily based not on any of the Reconstruction Amendments, but rather on the commerce clause.


\(^6^9\) Bork glosses over the fact that the framers reached compromises on these delicate and divisive issues. For example, the framers purposely avoided resolving the slavery question in the Constitution but left its resolution for the future. Recourse to original understanding for resolving the slavery issue is therefore futile. See Leubsdorf, supra note 48, at 183. Similarly, the framers left a tension in the document between Congressional powers under the commerce clause and the states' tenth amendment powers. Since the framers and ratifiers agreed to include these potentially conflicting provisions in the original document, Bork's use of the intent of those framers and ratifiers to resolve the conflicts misreads both the document and its history. See id.
clause and the enforcement provisions of the Reconstruction Amendments depend largely on the context within which he reads them. As Solicitor General, Bork urged the Court to infer broad congressional power from those provisions, but in his book he never identifies the original understanding of those provisions. If he did, he might find that the theory conflicts with the interpretation preferred by the far Right, particularly the Reagan administration. Indeed, if Bork were to apply his theory rigidly to the commerce clause and to the enforcement provisions of the Reconstruction Amendments, he would risk either condemning his own actions as Solicitor General or the far Right. Accordingly, Bork chooses to condemn the outcomes of a series of decisions without clearly identifying exactly where those decisions went wrong. He fails to fully discuss the complex conflict between his public life, his theory of constitutional interpretation, and his blindness to the conflicts inherent in the Constitution itself.

b. Bork's Focus on a Conflict Between Judicial Review and Democracy Is Misguided

Perhaps the major flaw in Bork’s book is his major premise: that democracy means majority rule and that judicial review is in conflict with the essence of the democratic system. Bork’s theory is misguided because it is designed to weaken the judiciary for the sake of majority rule, which Bork mistakenly identifies as the central aim of the Constitution. But judicial review need not and should not be subordinated to majority rule either as a theoretical or structural matter, because the framers themselves deeply distrusted “self-goverment” or majority rule as reflected in their implementation of numerous countermajoritarian measures (including judicial review) in the original Constitution and in the Bill of Rights. Bork either ignores or discounts all of these measures. In the original Constitution, the framers limited majoritarian power at the federal level through such measures as prohibitions on Congress passing...
any bills of attainder or ex post facto laws,74 indirect election of senators and the President,75 a bicameral legislature with the decisions of the directly elected half subject to review by the indirectly elected half,76 dedication of the important legislative duties to the indirectly elected house of the legislature,77 and appointment to federal courts of life-tenured judges78 empowered to enforce against the federal government, inter alia, certain unenumerated fundamental rights guaranteed through the natural law (or unwritten constitution) that the framers never intended to displace.79 The framers checked majoritarian power at the state level through prohibitions against bills of attainder, ex post facto laws, and laws impairing contracts,80 the privileges and immunities clause of Article IV,81 and the republican guarantee clause.82 In addition, the framers designed the Bill of Rights "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."83

74 Article I provides in pertinent part that "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3.
75 Art. II, § 1. The Constitution also originally provided that "[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years." U.S. CONST. art. I, § 3, cl. I. The seventeenth amendment changed the process of electing senators: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years." U.S. CONST. amend. XVII, § 1.

76 For the procedure originally provided by the Constitution for the nonpopular selection of the President, see U.S. CONST., art. II, § 1, cls. 2, 3. This procedure was modified by the twelfth amendment, but not in a way that increased the likelihood of presidential election through a pure majoritarian selection. See id. amend. XII.

77 The framers viewed the House as more subject to rule by factions and more prone to hasty and intemperate action than the Senate. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 387, at 274 (Ronald D. Rotunda & John E. Nowak eds. 1987); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 557-58 (1969).

78 Article III provides that "[t]he judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour." U.S. CONST. art. III, § 1.
80 Article I provides in pertinent part that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1.

81 In pertinent part, Article IV guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.
82 In pertinent part, Article IV provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4.
Judicial review under the original Constitution and the Bill of Rights is a critical, indispensable element in the constitutional allocation of power rather than some deviation or aberration that needs to be (at least substantially) eliminated. In fact, no part of the Constitution ever uses the term "liberty" in the sense in which Bork has used it.\textsuperscript{84} Indeed, whenever the term "liberty" appears in the Constitution, it limits rather than expands governmental power. In short, judicial review as an indispensable protection for the liberties that the Constitution protects is no less important an element of the constitutional design than majority rule.

c. Bork Uses His Interpretive Theory to Restructure Constitutional Allocation of Power

To the extent that a conflict between judicial review and majority rule either exists or matters, Bork mistakenly tries to resolve the "Madisonian dilemma" through constitutional theory. Nothing in the structure or history of the Constitution suggests that we should impose on that structure some theory designed to resolve this dilemma. For example, James Madison perceived that the virtue of the constitutional structure was that it pitted "ambition against ambition," that it placed one branch's powers against another's, producing stalemates.\textsuperscript{85} To the extent that we try to resolve or loosen the blockages that the structure permits (and the framers anticipated), we undermine that strcture. In trying to resolve the dilemma, Bork therefore not only must rewrite constitutional structure through theory, but he must also take a decidedly non-conservative stance by arguing that we must err on the side of expanding (rather than restricting) governmental power. The way in which Bork resolves this dilemma says more about Bork's values than it does about the values enshrined in the Constitution itself. The Constitution has said all it is going to say about the Madisonian dilemma by making it possible in the first place.\textsuperscript{86}

B. Problems with Bork's Historiography

Assuming that Bork can somehow transcend the textual problems he has discounted or assumed away, his theory nevertheless cannot overcome five historiographical problems. First, Bork's theory has no coherent answer to the problem that the historical


\textsuperscript{85} THE FEDERALiST No. 51, at 322 (James Madison) (Clinton L. Rossiter ed. 1961).

\textsuperscript{86} An additional problem with Bork's theoretical resolution of the Madisonian dilemma is that it discounts, if not ignores, the fourteenth amendment's impact on federalism. See infra notes 94, 130 and accompanying text.
record is filled with ambiguities, gaps, and contradictions. Second, it is difficult, if not impossible, for people in the twentieth century to recreate the framers' world. Third, it may be necessary to abandon original intent to deal with problems unimagined or unaddressed by the framers. Fourth, institutions may mean something different to us today than they did to the framers; therefore, originalism may be ineffective in governing our understanding of those institutions' limitations. Finally, the framers and ratifiers did not construct the Constitution with an interpretive theory of original understanding in mind.

1. The Historical Record is Filled with Ambiguities, Gaps, and Contradictions for Which Bork's Theory Has No Answer

Bork's theory has no systematic, consistent, or coherent answer to the ambiguities, gaps, and contradictions that fill the historical record. Since he has not modified his theory to take such problems into account, he is compelled to take inconsistent positions. For example, Bork urges that courts should nullify the privileges or immunities clause of the fourteenth amendment because there is no clear evidence that the framers and ratifiers shared an objective understanding as to its meaning. Bork ignores the facts that (1) although the framers and ratifiers may not have reached an objective accord on the meaning of this clause, they did reach an objective understanding to make it part of the text of the Constitution and that (2) the clause was the focal point of the fourteenth amendment debates that reflected an agreement on at least a range of possible meanings of the clause. In the fourteenth amendment context, Bork reinforces his vision of a weak judiciary by ignoring the part of the constitutional text (and history) that gives possible constitutional protection to unenumerated rights.

In contrast, when confronted with the fact that the framers of the first amendment "had no coherent theory of free speech,"
Bork suggests that rather than nullify the free speech clause, courts should narrow its guarantee to cover only political expression that does not include subversive advocacy. Bork does not derive authority for narrowing the broad language of the first amendment from original understanding, but from his judgment as to which of the first amendment theories once announced by Justice Brandeis comes closest to a restrained reading of the amendment’s broad language.

Bork also abandons his theory of original understanding in his discussion of Texas v. Johnson. In that case, the Court held that flag-burning which expresses political protest is protected speech under the first amendment. Bork has a surprisingly feeble explanation of why courts could protect someone who burns the Constitution, but not someone who burns the American flag: “Marines did not fight their way up Mount Suribachi on Iwo Jima to raise a copy of the Constitution on a length of pipe. Nor did forty-eight states and the United States enact laws to protect th[is] symbol[] from desecration.” Bork’s appeal to popular sentiment masks the fact that in defending the dissent’s arguments in Texas v. Johnson, he never relies on, nor even refers to, original understanding.

Even where history may be relatively clear, Bork is not prepared to embrace it. This is best illustrated by Bork’s willingness to endorse the Warren Court’s holding in Brown v. Board of Education that state-mandated segregation of races in public schools violates the equal protection clause of the fourteenth amendment. Interestingly, Bork maintains that his own originalist approach best explains Brown. The critical problem for Bork is that, as he concedes, the framers of the fourteenth amendment supported segregated schools

\textit{supra} note 2, at 333. Yet Bork also argues in the book that political speech (which he never defines) not directed at the overthrow of government is the principal, if not only, category of speech the first amendment actually protects. Id. at 301-05, 333-36.

97 See R. Bork, \textit{supra} note 2, at 333-36; see also Bork, \textit{supra} note 96, at 20, 29-34.


101 R. Bork, \textit{supra} note 2, at 128. Interestingly, Bork never relies on an even stronger argument against first amendment protection of flag-burning—that flag-burning is unprotected conduct as opposed to protected speech. As Bork argued in his earlier article, one could claim that the first amendment only protects the use of words to express political ideas, and does not protect physical action, since the amendment speaks only in terms of protected “freedom of speech.” Bork, \textit{supra} note 96, at 28. The closest Bork comes to acknowledging this argument in his book is his reference to some of the justices who have in the past also opposed first amendment protection of flag-burning. R. Bork, \textit{supra} note 2, at 128.


before, during, and after drafting of the fourteenth amendment. Nevertheless, Bork argues that the critical question in constitutional interpretation is always the level of generality the judge chooses to state the intent of the framers and ratifiers. He argues that the equal protection clause embodies a broad principle of racial equality. Segregation produced racial inequality, so segregation violates the equal protection clause.

As long as Bork is saying that one may ignore the actual, specific opinions of the framers and ratifiers, and instead rely on general principles, the choice of a general principle depends on the interpreter’s or theorist’s construction of a fiction. There is no way Bork can ever distinguish (or prove the difference) between what he claims is really the objective original understanding or his own subjective distillation or interpretation of different historical evidence. The framers and ratifiers certainly did exist but, as Bork himself concedes, never in the configuration in which Bork claims to have found them. In this sense, the problem with original understanding is that, as Professor Ronald Dworkin has aptly observed, “there is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented.” What is guiding Bork throughout his search for constitutional meaning is not so much the proverbial light at the end of the tunnel—objective original understanding—but the light Bork holds in his own hand, the size, quality, and direction of which depend almost entirely on Bork’s own historically and socially conditioned choices, needs, and perceptions. Moreover, as a deviation from the specific views of framers and ratifiers, Bork’s choice of a


105 Id. at 147.

106 R. Bork, supra note 2, at 149.

107 Id. at 144; see also infra note 123.

108 Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 477 (1981). Interestingly, Bork’s choice or designation of and emphasis on the framers and ratifiers parallels a problem with interpreting literary texts. In particular, as Michel Foucault observed, an “author” is in part what we take him to be—not an unchanging, stable entity, but a fiction that we construct out of our reading and interpretation. Michel Foucault, What Is an Author?, Language, Counter-Memory, Practice: Selected Essays and Interviews 113-38 (Donald F. Bouchard ed. 1977) Similarly, Bork’s choices to elevate certain historical figures to the status of framers and ratifiers and to infer from their statements a level of intent that they never actually had or approved is part of the fictional construct that Bork has made the guiding principle of constitutional interpretation.
general principle is no more defensible than any number of other choices that also deviate from those views.\textsuperscript{109}

Interestingly, despite Bork’s efforts to justify \textit{Brown} in originalist terms, hard-core originalism requires rejecting the holding in \textit{Brown}.\textsuperscript{110} Nor would that result have been indefensible in terms of principled constitutional interpretation. The Court could have taken the position occasionally urged by the NAACP that the equal protection clause commanded rigorous application of “separate but equal” principles such that each state was required to provide separate facilities for the races that were fully equal to each other.\textsuperscript{111} Such a position might have forced the states to eventually abandon segregation as economically and politically unworkable.\textsuperscript{112}

2. \textit{It is Difficult, if not Impossible, to Recreate the Framers’ World}

A second problem undermining the search for objective historiography is that it is difficult, if not impossible, for people in the twentieth century to recreate the framers’ world.\textsuperscript{113} We inevitably use the vantage point of our present values and social and political situation to understand the past.\textsuperscript{114} Our inability to accurately recreate the past requires us to acknowledge that when writing history, we understand better those past values or traditions that are similar to or reinforce our present purposes, conditions, or goals.

Bork unwittingly encounters this problem both when critiquing \textit{Dred Scott v. Sanford}\textsuperscript{115} and when defending the historical and structural bases of original understanding. To Bork, \textit{Dred Scott} is the first instance in which the Court used substantive due process to provide absolute protection to an interest—slavery—that the framers and

\begin{footnotesize}
\begin{enumerate}
\item[109] Among these choices are: the protection of only the newly freed slaves and their descendants from racial discrimination; the prohibition of discrimination based on any immutable group trait, including gender as well as race; and the banning of discrimination against any class of people in positions analogous to nineteenth century blacks, perhaps again including gender (or even sexual preference) as well as race. \textit{See} Paul Brest, \textit{The Misconceived Quest for the Original Understanding}, 60 B.U.L. Rev. 204, 223-24 (1980); Dworkin, \textit{supra} note 108, at 488-97.
\item[110] \textit{See supra} note 104 and accompanying text.
\item[112] Interestingly, William O. Douglas, one of Bork’s favorite targets on the Court, wrote in his autobiography that had the Court decided \textit{Brown} when it was first argued in 1952-53, the decision would have been 5-4 to uphold Plessy v. Ferguson, 163 U.S. 537 (1896). William O. Douglas, \textit{The Court Years 1939-1975: The Autobiography of William O. Douglas} 113 (1980).
\item[113] \textit{See} M. Tushnet, \textit{supra} note 43, at 34-35; Brest, \textit{supra} note 109, at 218-19.
\item[115] 60 U.S. (19 How.) 393 (1856).
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ratifiers never endorsed. Bork's aim is rhetorical—he wants to defame substantive due process by demonstrating its potential for producing both good and evil results. Bork is surely correct that the power that allows judges to read present values (such as abortion) into the due process clause also allows judges to protect the property classes, as in *Lochner v. New York*, or the slave-owners, as in *Dred Scott*.

Bork's problem is that originalism requires a similar degree of selective reading as substantive due process. For example, contrary to Bork's characterization, Chief Justice Taney's opinion in *Dred Scott* was an unmistakable exercise in originalist interpretation. To Taney, the issue was whether, at the time of the framing, blacks could have been "citizens of different States" for purposes of establishing their right to invoke the power of the federal courts. Taney devoted ten pages of his opinion to a historical survey of colonial legislation, the circumstances of the Declaration of Independence, and legislation in non-slaveholding states. He emphasized that phrases like "all men are created equal" could be reconciled with the continuing acceptance of slavery only if people in the framers' era did not regard blacks as men. Taney's self-described methodology sounds not like substantive due process, as Bork disingenuously argues, but disturbingly like Bork's version of original understanding.

There is other evidence, however, that blurs the clarity of origi-

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116 R. BORK, supra note 2, at 28-34, 301.
117 198 U.S. 45 (1905).
118 60 U.S. (19 How.) at 402.
119 Id. at 410.
120 Although Bork chafes at any suggestion that *Dred Scott* was an originalist decision, R. BORK, supra note 2, at 301, it is important to listen to Taney's own description of his methodology:

No one . . . supposes that any change in public opinion or feeling, in relation to this unfortunate race . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the [g]overnment, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

60 U.S. (19 How.) at 426. It is possible that original understanding could be used to reach a result different than Taney's. What is important is not the result of the analysis,
nal understanding on the slavery question. The framers in 1789 had more conflicts over slavery and the status of free blacks than Taney or Bork has admitted. Bork ignores this evidence in arguing that the Court could have followed original understanding to endorse both blacks as citizens of the United States and the use of federal power to abolish slavery in the new territories. Bork fails to understand that when all the evidence is assembled, what we make of [original understanding] will depend on the past that we choose to identify . . . . Originalism attributes our choices to people in the past and so displaces our responsibility for constructing our society on the basis of the continuities we choose to make with our past.

In addition, Bork selects out of history the values and traditions he wants to perpetuate when defending his fidelity to original understanding. Bork seems incapable of fully understanding the framers' conception of the federal judiciary—he can only recreate the framers' world with his particular agenda in mind. For example, in defense of his use of original understanding to restrain judicial tyranny, Bork cites scattered comments from some of the framers that the judiciary was intended to be the weakest branch. But Bork infers far too much from these statements. In fact, the framers and ratifiers saw the courts as critical protectors of the people against the most dangerous branch, the Congress, as well as against the executive (about whom they had ambivalent feelings in light of their unpleasant experiences with the King of England). They gave federal judges life tenure to secure the judiciary as a

but rather that Bork disingenuously tries to disassociate his and Taney's methodologies. In fact, the methodologies are the same in principle, but different in practice.

Bork suggests that Justice Curtis's dissent in Dred Scott correctly read original understanding to reach a diametrically opposite result from the one reached by Taney. R. Bork, supra note 2, at 33-34. However, Bork never acknowledges that both Taney and Curtis tried to find the original understanding on the slavery question, which was less clear and more complex than either of the justices admitted. See L. Levy, supra note 68, at 277-78.

R. Bork, supra note 2, at 33-34.

Bork explains that original understanding does not consist of the "subjective intentions" of particular framers but of what the public understood . . . . All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like. Almost no one would deny this; in fact almost everyone would find it obvious to the point of thinking it fatuous to state the matter—except in the case of the Constitution."

R. Bork, supra note 2, at 144.

See The Federalist No. 78, at 464-72 (Alexander Hamilton) (Clinton L. Rossiter ed. 1961); see also Gerhardt, supra note 77, at 66-67.
countermajoritarian institution; they sought to offset the colonial era practice by which the King simply replaced judges who disagreed with him. Independent judicial review was important to the framers, and they accepted its inherent dangers in light of what it was designed to prevent.

Bork engages in a remarkably disingenuous reading of history to infer from the framers' occasional references to the judiciary as weak that the framers preferred self-government. He first suggests that if the framers had anticipated that the courts would become so powerful, they would have argued more about the judiciary's role. In a flight of fancy, rather than an application of original understanding, Bork is imagining himself as the "reasonable" framer. One could, however, read the relevant history in the opposite way: the framers' relative silence about the judiciary reflects a general consensus on the benign check the judiciary would perform.

Second, Bork reads the structure of the Constitution as making the judiciary weaker than either the presidency or the Congress. The problem is that the Constitution says nothing about judicial fidelity to original understanding. In fact, the structure suggests that the three branches should operate as checks and balances against each other, with the judiciary's main tool in this process being judicial review. While judicial review may produce the Madisonian dilemma, the structure of the Constitution suggests no answer to the dilemma, except perhaps to allow blockages to occur until such time as the parties can work out a solution.

Bork's third justification for original understanding is that we have to invent an interpretive theory restraining the judiciary to save the constitutional design. Bork's third justification is the weakest; it presumes an understanding of the design and imposes a value on constitutional interpretation that Bork has conceded could not be derived from original understanding. Bork's argument about constitutional design is simply a restatement of his argument from structure: either the judiciary is the weakest branch as a matter of design (in which case the theory flows from the design), or the judiciary is not as weak as Bork wishes.

Bork's defense of original understanding also discounts historical studies that demonstrate that the fourteenth amendment was designed to alter federal power—legislative and judicial—with re-

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126 See sources cited supra note 125.
127 R. BORK, supra note 2, at 154. Bork engages in this same disingenuous reading of history when he discusses the privileges or immunities clause of the fourteenth amendment. See id. at 180-82.
128 See generally CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 73-98 (1969) (inferring judicial review from constitutional structure).
129 See supra notes 85-86 and accompanying text.
Bork is able to dismiss or discount such studies by extracting from the historical record only those facts and values that reinforce his present agenda.

3. **It May Be Necessary to Abandon Original Intent to Deal With Problems Unforeseen by the Framers**

Another historiographical problem with original understanding is that it may be necessary to abandon original intent to deal with problems unimagined or unaddressed by the framers. Bork concedes this when he praises Chief Justice Marshall for abandoning original understanding in his early commerce clause decisions in order to keep the Union together. Rather than acknowledge this as a general exception to his theory, Bork criticizes the Court for abandoning (an undisclosed) original intent to endorse New Deal legislation. Yet one could also argue that the Depression offered the Court another opportunity to abandon original understanding to save the national economy. No doubt, the exception could swallow the rule, but the very need for the exception suggests a serious weakness in the rule.

4. **Institutions May Mean Something Different to Us Today Than They Did to the Framers**

A fourth historiographical problem with Bork's theory is that institutions may mean something different to us today than they did to the framers. If so, originalism can no longer govern our understanding or interpretation of those institutions' limitations. For example, Bork ignores the fact that the modern presidency is far more powerful than the framers (or the ratifiers) intended or desired. The framers and ratifiers relied upon certain values in consenting to a weak executive. The stronger presidency that has developed over time is structured differently than the framers anticipated, and is derived from values and needs different than those of

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133 Id. at 51-57. Although Bork criticizes the Court for abandoning original understanding, Bork fails to disclose the relevant original understanding. See id.


135 Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 736-39 (1988); see also Bittker, supra note 52, at 274-80.
concern to the framers. Because the modern presidency cannot be squared with originalism, it makes little sense to use original values in analyzing the modern presidency.

5. The Framers and Ratifiers Rejected an Interpretive Theory of Original Understanding

A final historiographical problem with Bork's theory of original understanding is that the framers and ratifiers did not construct the Constitution with an interpretive theory of original understanding in mind or they at least intended certain constitutional provisions to be open-ended. In a glaring omission, Bork never discusses the framers' original understanding that original understanding be the guide to constitutional interpretation. A significant reason for this omission is that the framers exhibited no such original understanding. Indeed, originalism commands adherence to the framers' views, but, to the extent they spoke to this issue, the framers did not want their views to be controlling. For example, in an important article completely ignored by Bork, Professor H. Jefferson Powell demonstrates that there is no evidence that the framers favored using original understanding in constitutional interpretation.

The framers also purposefully crafted several open-textured provisions, including the ninth amendment. The ninth amendment has haunted Bork throughout his professional life because it conceivably protects unenumerated fundamental rights, judicial enforcement of which would seriously diminish the "liberty" of the majority to do as it pleases. Early in his career, Bork argued that the ninth amendment provided natural textual protection for unenumerated rights. During his campaign for the Court, he argued it should be nullified. In his book, he argues it could be

138 See Powell, supra note 136, passim.
139 The ninth amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.
interpreted, when read with the tenth amendment, as leaving to the people of each state the authority to protect or regulate matters state constitutions or common law protected prior to ratification.\footnote{R. Bork, supra note 2, at 183-85. Bork also argues rather disingenuously that if James Madison had intended the ninth amendment to authorize the courts to protect unenumerated rights, he could have done so in no uncertain terms. \textit{Id.} at 183. As he had done with the original role of the federal courts, Bork is again imagining himself as the reasonable framer. The problem is that nowhere in the Bill of Rights did Madison (or any of the other framers) feel the need to say in so many words that the courts should have the power of enforcement. For example, I assume Bork would not dispute that courts have the power to enforce the first amendment even though it does not specify authorize the courts to do so. The ninth amendment tracks this practice when it says, in relatively plain terms, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The term "rights" in the amendment is an unambiguous reference to those guaranteed in the Bill of Rights, including, for example, free speech. The remainder of the amendment is a relatively unambiguous admonishment that "the people" retain "other[ ]" "rights" not enumerated. Throughout the Bill of Rights, the framers used the term "the people" to refer to the people of the United States at large rather than to the states; for example, in the tenth amendment, the framers referred to "the States . . . or . . . the people." The framers also used the term "rights" only to denote individual guarantees against governmental power; they never used the term "rights" to refer to the power of self-government. Moreover, perhaps Bork may have forgotten that James Madison himself had no problems with the meaning of the ninth amendment. \textit{See 1 Annals of Cong.} 439 (J. Gales ed. 1789) (statement of James Madison), \textit{reprinted in 5 The Founders' Constitution} 399 (Phillip B. Kurland & Ralph Lerner eds. 1987).} In short, Bork's personal politics have continually dictated his interpretation of the open-ended text.

C. Bork's Problems with Stare Decisis

A final flaw in Bork's theory is neither strictly textual nor historiographical in character: Bork's theory precludes any coherent or consistent approach to the Court's nonoriginalist decisions. According to Professor Henry Monaghan, so much Supreme Court precedent has been based on a rejection of original understanding that a true believer in original understanding has only two choices. The first choice is to strive to overrule the better part of constitutional doctrine and thereby thrust the world of constitutional law into turmoil; the second is to abandon original understanding in numerous substantive areas in order to provide constitutional law with continuity and stability.\footnote{Monaghan, supra note 135, at 723-24.}

This dilemma is of considerable magnitude, as demonstrated by Bork's failure to cite any case in which the Court followed a theory of constitutional interpretation similar to the one he has advanced. To the extent that the Court has ever followed an originalist theory of constitutional interpretation, its brand of originalism has not resembled what Bork regards as the "constitutional orthodoxy." For example, even though Bork refers approvingly to Chief Justice Mar-
shall's originalism, Chief Justice Marshall construed the Constitution in light of its "great outlines" and "important objects" rather than the specific understanding of its drafters or supporters.\(^{145}\) The electoral victories of Thomas Jefferson and his Republican Party in 1800 did signal the rise in popularity of an originalist theory of constitutional interpretation; however, this theory turned largely not on the objective understanding of the framers and the ratifiers but rather on the importance and primacy of states' rights as inferred from the structure of the Constitution.\(^{146}\) Moreover, this originalist theory never dominated the Court (except perhaps on the eve of the Civil War). Throughout the remainder of its history, the Court only rarely has exhibited institutional fidelity to an unchanging original meaning of the Constitution.\(^{147}\)

Bork acknowledges that he must reconcile his interpretive theory with nonoriginalist precedents, but then suggests a theory of stare decisis so riddled with exceptions as to be a meaningless restraint on judicial activism. In particular, Bork proposes three guidelines for judicial review of precedent: (1) lower courts should respect precedent more rigorously than the Court itself, (2) the Court should never overrule any decision unless the Court finds that it was wrongly decided, and (3) the Court should not overrule prior, erroneous decisions when that would seriously disrupt well-established government structures or practices.\(^{148}\)

None of these so-called principles of stare decisis produces any meaningful deference to nonoriginalist precedent. First, Bork's focus is on the Supreme Court rather than lower courts, so his admonition to lower courts is purely hortatory and glosses over the complex ways in which lower courts may bypass, tamper with, or even challenge Supreme Court precedent. Nor did Bork's admonition count for much when Bork himself served as a federal appellate judge.\(^{149}\) Second, Bork has demonstrated that requiring a decision to be wrongly decided before it is overturned is hardly a barrier, since Bork has devoted almost 200 pages of his book to exposing wrongly decided cases.\(^{150}\) Third, Bork argues that the only examples of nonoriginalist decisions that have become so entrenched that

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\(^{146}\) See Powell, supra note 136, at 887-88, 931, 933, 937-41.

\(^{147}\) See L. Levy, supra note 68, at 324-28.

\(^{148}\) R. Bork, supra note 2, at 156-69.

\(^{149}\) See E. Bronner, supra note 70, at 89-90 (describing Bork's attitude toward Supreme Court precedent as a lower court judge).

\(^{150}\) The first part of the book is explicitly devoted to Bork's critique of the Court's constitutional doctrine. R. Bork, supra note 2, at 19-132. The remainder of the book intersperses critique of particular decisions with Bork's views of proper constitutional interpretation. Id. at 133-266, 323-36.
they should not be overturned are the Court's nineteenth century
decision upholding paper money as constitutional,\(^1\) and "certain
[unspecified] New Deal and Great Society programs pursuant to the
Congressional powers over commerce, taxation, and spending."\(^1\)
Everything else seems to be fair game for reversal, particularly those
decisions recognizing a realm of privacy for sexually related activity,
including abortion.\(^1\) Moreover, Bork emphasizes that because
federalism lies at the heart of the Constitution, justices should and
must be free to reconsider any constitutional issue in order to pro-
tect federalism.\(^1\) Since it is hard to imagine a constitutional deci-
sion not involving federalism, Bork's theory of stare decisis amounts
to nothing more than a device allowing him to do as he pleases.

\(^{151}\) R. Bork, supra note 2, at 158 (explaining that overturning The Legal Tender
Cases, 79 U.S. (12 Wall.) 457 (1871), would "overturn most of modern government and
plunge us into chaos.").

\(^{152}\) Id. However, only Bork knows to what he is referring when he says "certain"
New Deal and Great Society programs. Presumably, he is referring to those programs
that were based on an expansive notion of congressional power under the commerce
clause, which Bork criticizes at various points in the book. See id. at 27-28, 51-58, 158-
59, 184-85.

\(^{153}\) According to Bork:
It was never too late to overrule the line of cases represented by _Lochner_,
because they were unjustifiable restrictions on governmental power, and
allowing additional regulation of economic matters did not produce any
great disruption of institutional arrangements. Similarly, it will probably
never be too late to overrule the right of privacy cases, including _Roe v.
Wade_, because they remain unaccepted and unacceptable to large seg-
ments of the body politic, and judicial regulation could at once be re-
placed by restored legislative regulation of the subject.

_Id_. at 158. Bork's notion that unacceptability to the "body politic" is a critical basis for
reversal is problematic. While I would agree that widespread dissent to an opinion in-
dicates its potential lack of legitimacy, it may also represent the thoroughly predictable
outcome of the Court's enforcement of constitutional guarantees against majoritarian
preferences. For example, both Brown v. Board of Education, 347 U.S. 483 (1954), and
Texas v. Johnson, 109 S. Ct. 2533 (1989), have generated widespread dissent. Indeed, it
took the Court almost 17 years to take affirmative steps to enforce _Brown_, and even then
to uphold such aggressive enforcement measures as busing produced per-
haps even more widespread dissent. _See_ R. Kluger, _supra_ note 104, at 750-54, 765-69.
The Court's decision in Texas v. Johnson created a firestorm, prompting the President
to propose a constitutional amendment to overrule it, numerous national representa-
tives to condemn it, and seemingly widespread public disapproval. Although Bork de-
fends _Brown_ and criticizes _Johnson_, they are almost indistinguishable in terms of the
controversy they generated, except perhaps _Brown_ may have generated more widespread
opposition. Bork tends to forget that, as a counter-majoritarian institution, the Court
frequently courts disfavor when it protects the rights of some minority whose prefer-
ences are frustrated in majoritarian decision making. To point to the majority's negative
reactions as a sign of a decision's illegitimacy is indeterminative at best and disingenu-
ous at worst.

\(^{154}\) R. Bork, _supra_ note 2, at 159.
None of the recent commentaries on Bork's confirmation hearings, including Bork's own, adequately emphasize the four reasons his defeat was significant. First, Bork deconstructed himself during the hearings. As Bork was pressed to explain his philosophy of judicial review, he exposed the inconsistencies and contradictions underlying his philosophy. No theory that attempts to organize or explain constitutional law in terms of some overarching principle or set of principles is immune from inconsistencies or contradictions. But Bork made himself a relatively easy target precisely because he claimed to have a single theory of constitutional interpretation that restrained the judiciary consistently and without contradiction. Bork's testimony undermined the Senate's confidence in his credibility because it was filled with abandonments or modifications of prior positions as well as of original understanding itself.

Second, the episode confirmed the Senate's broad power to advise and consent to the President's judicial nominations. In his book, Bork demands that the Senate confirm only adherents to original understanding, even though Bork cites no original understanding to support such a practice. In making this demand, Bork ignores the text and even the original understanding of the Constitution as read by most commentators as clearly indicating that the Senate has the power to take even politics into account in evaluating a nominee. Bork never acknowledges that the framers entrusted

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155 Professor Chemerinsky has made a similar observation. See Erwin Chemerinsky, The Constitution Is Not "Hard Law": The Bork Rejection and the Future of Constitutional Jurisprudence, 6 CONST. COMMENT. 29 (1989). Professor Chemerinsky argues that Bork faced an inescapable dilemma: he could adhere to his earlier view that the Constitution was limited to the framers' specific intent, making his positions politically unacceptable, or he could shift to a more abstract version of originalism, making him prey to the charges of a confirmation conversion and forfeiting the constraint on the courts he had espoused. Professor Chemerinsky maintains further that the dilemma that confronted Bork in the hearings is also a central problem with originalism: either the theory is limited to the framers' specific intent, in which case it leads to silly results, or it is based on the framers' abstract intentions, in which case it fails to genuinely constrain the Court.

156 See E. Bronner, supra note 70, at 241-60 (describing in detail Bork's confirmation conversion).

157 For an extensive criticism of such "grand" theories of constitutional interpretation, see M. Tushnet, supra note 43, at 21-146.

158 See E. Bronner, supra note 70, at 241-60.

159 Id. at 245-48, 251, 254, 259-60, 262 (describing the alarm and surprise of several Senators, including Leahy, Heflin, Metzenbaum, Humphrey, Specter, and Kennedy, at Bork's moderation of his views).

160 R. Bork, supra note 2, at 9.

the Senate with special powers, including advice and consent, because they envisioned the Senate as uniquely capable of deliberating cautiously but wisely on important issues, including the propriety of the President’s judicial appointments.\textsuperscript{162} Indeed, the framers’ vesting of judicial confirmation power in the Senate is a critical structural safeguard against the so-called Madisonian dilemma.

Bork also seems oblivious to the historical fact that his rejection was not the first time the Senate had evaluated someone’s judicial philosophy in determining whether to confirm a nominee. Previous examples in this century include (but are not limited to): John Parker, whom the Senate rejected in 1930 for following Supreme Court precedent to uphold contracts that conditioned employment on not joining a labor union;\textsuperscript{163} Louis Brandeis, who was confirmed in 1916, but not before he had to wait through four months of Senate debate marred by anti-semitism and accusations of his being radical, anti-establishment, and anti-big-business;\textsuperscript{164} and Thurgood Marshall, whom the Senate confirmed in 1967 in spite of strong objections on philosophical and racist grounds.\textsuperscript{165}

Another significant factor in Bork’s defeat was the Voting Rights Act of 1965, which resulted in the substantial enfranchise-

\textsuperscript{163} See L. Tribe, supra note 161, at 34, 90-91, 135; H. Abraham, supra note 161, at 42-43, 200.
\textsuperscript{164} See L. Tribe, supra note 161, at 110; H. Abraham, supra note 161, at 178-81.
\textsuperscript{165} See L. Tribe, supra note 161, at 133; H. Abraham, supra note 161, at 288-91.
ment of blacks, particularly in the South. In purely political terms, Bork would not have been defeated without the opposition of Southern Democrats. Although the generally conservative views of such senators made their opposition to Bork unlikely, civil rights leaders made clear that the vote on Bork would be a litmus test in the next election. A number of Southern Democrats owed their seats to black voters' support, which could not be counted on in the event a Senator voted for Bork. Thus, the voting power of Southern blacks explains to a significant degree the Senate's political opposition to Bork and his ultimate defeat.

Lastly, the hearings did not represent an affirmation of any particular judicial philosophy. The Court itself has, with Anthony Kennedy occupying the seat originally slated for Bork, issued numerous decisions undermining any such belief. A conservative majority now dominates the Court, even if it cannot agree on the particulars of its philosophy. In addition, the opposition to Bork represented a patchwork of interest groups and commentators from a variety of political outlooks. The opposition to Bork was more united in counteracting an extreme (and extremely flawed) view of constitutional interpretation than in endorsing any particular inter-

166 See E. Bronner, supra note 70, at 285-92 (describing the importance of the black opposition to Bork in the South to the Southern Democrats).

167 The testimony of several prominent black politicians, including Andrew Young, Barbara Jordan, and William Coleman, as well as of the prominent black historian John Hope Franklin, indicated to the Senate a consensus among blacks that transcended political parties. Particularly devastating to Bork was the opposition of William Coleman, who had been Secretary of Transportation under President Gerald Ford and who, in testifying against Bork, opposed his own party's President. Coleman's opposition to Bork was both powerful and unassailable: Bork had to give an accounting and pay the price for his repeated opposition to the progressive majoritarian decisions of the 1960s that favored minorities. Coleman argued that Bork was disingenuous for continually insisting that majorities should be allowed to make their own policy decisions, except, it seemed to Coleman, when those decisions favored minorities. See E. Bronner, supra note 70, at 277-83 (describing Coleman's testimony).

168 But see E. Bronner, supra note 70, at 344 (claiming Bork's "rejection... served as a kind of constitutional amendment on the questions of civil and personal rights."); see also Chemerinsky, supra note 155, 35-37 (describing Bork's rejection as a significant "constitutional moment" in which the public both rejected originalism and endorsed the notion of a living Constitution); Morton J. Horwitz, The Meaning of the Bork Nomination in American Constitutional History, 50 U. Pa. L. Rev. 655, 664 (1989); Morton J. Horwitz, The Bork Nomination and American Constitutional History, 39 Syracuse L. Rev. 1029, 1036 (1988) (referring to Bork's rejection as "the functional equivalent of a national referendum on constitutional direction").

169 See generally Chemerinsky, supra note 56, at 45, 48-49.

170 E. Bronner, supra note 70, at 185-87, 300-01, 348-49 (describing the pluralist character of Bork's opposition); see also Michael Pertschuk & Wendy Schaezkel, The People Rising: The Campaign Against the Bork Nomination (1989) (describing Bork's opposition as a rare coalition of interest groups, including those who favor abortion and civil rights, feminists, labor groups, environmentalists, and senior citizens).
pretive theory.\textsuperscript{171}

Although deception both in favor of and in opposition to Bork tainted the hearings,\textsuperscript{172} the Senate ultimately read Bork correctly.

\textsuperscript{171} To the extent that Bork's defeat can be characterized as a kind of "constitutional moment" or event that shaped future views of the Constitution, the "moment" was short-lived and not focused in any particular constitutional direction (with the possible exception of the rejection of Bork's extreme and sometimes inconsistently stated views). See Bruce Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013 (1984). It is clear that as soon as Anthony Kennedy arrived on the Court, the Court had a working conservative majority. This conservative Court has not hesitated to question and limit numerous cases or trends Bork himself had vigorously condemned. See Chemerinsky, supra note 56, at 45, 48-49, 52, 54-55, 57, 69-70, 73-74. Moreover, George Bush's election in 1988 and nomination of David Souter as an Associate Justice in 1990 have guaranteed that the Court's direction will remain rightward and, therefore more toward Bork's world-view than toward competing notions of substantial judicial discretion or of a living Constitution.

Such as it was, the "constitutional moment" of Bork's defeat can be described most accurately as affirmation of the Senate's power in a confirmation proceeding to consider even the judicial philosophy of a nominee. It is, of course, more likely that the Senate will be disposed to exercise this power when the Senate does not share the nominee's judicial philosophy and perceives that the confirmed nominee would have a measurable impact on the Court's direction. Bork's defeat does seem to have underscored in the public's mind the importance of the Court's role in our constitutional scheme and of the Senate's role in monitoring the composition of the Court.

However, Bork's ongoing criticism of the Court and his suggestions that he would, if given the chance, like to turn back the clock on a number of settled issues, made him an easy target for those opposed to any of his beliefs or conclusions. Interestingly, when faced with another nominee—Anthony Kennedy—who might reach a number of the same conclusions as Bork would have, neither Bork's opposition nor the Senate could stop him. Indeed, Bork suggests in his book that he would have frequently voted the same as Kennedy with two notable exceptions: first, he would have voted in Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), to overrule Roe v. Wade, 410 U.S. 113 (1973); second, in Texas v. Johnson, 109 S. Ct. 2533 (1989), he would have voted to uphold state laws forbidding flag burning. R. BORK, supra note 2, at 116-17, 127-28. These exceptions suggest that the difference between Bork and Kennedy (and, therefore, between Bork's rejection and Kennedy's confirmation) is one of degree rather than of kind: Bork would have tried to shift the Court further and faster to the right than will Kennedy. Viewed in this light, the "constitutional moment" was, at most, modest in scope. Kennedy's firm position as part of the Court's conservative majority and Bush's election and nomination of David Souter foretell that the Court will continue on a path that is in almost no way consistent with the outright rejection of originalism or endorsement of substantial judicial discretion or of a living Constitution. As long as the Court continues on its current path, it will be difficult to characterize Bork's defeat as anything but a personal defeat and a victory for those who developed dislike for Bork and his ideas.

\textsuperscript{172} See E. BRONNER, supra note 70, at 99 (noting how Senator Kennedy greeted Bork's nomination with a speech distorting Bork's views); id. at 150-51 (discussing problems with the study of Bork's record prepared by Ralph Nader's Public Citizen Litigation Group); id. at 151-52 (describing the weighted questions used in polls conducted by the press); id. at 160, 177-79 (discussing the distortion People for the American Way made of a unanimous administrative law decision in which Bork participated on the United States Court of Appeals for the District of Columbia); id. at 179-80 (discussing other misleading ads used by anti-Bork forces); id. at 191-93, 196-98 (describing the White House's decision to downplay Bork's association with the hard Right and to draft a book making Bork look more like Justice Powell than he, in fact, may have been); id. at 241-60 (describing how Bork himself tried in his testimony to moderate his views to
The hearings provided the forum at which Bork finally accounted for the political choices and positions he had undertaken over the years (and at the hearings) to help his own career. Consequently, Bork was hoisted by his own petard: he used politics to get the nomination and then politics blocked it. Further, Bork’s intolerance for an open and honest debate of his constitutional philosophy and of contrary views made him an unattractive candidate for the Court. If the Court’s members are “inevitably teachers in a vital national seminar” on the meaning of the Constitution, Bork forfeited his chance to lead the seminar. His disdain for contrary views, coupled with his lack of self-awareness about his inconsistencies, made him incapable of perpetuating the dialectic process of appear less radical); id. at 294-95 (noting Senator Heflin’s focus on irrelevant personal data, including Bork’s religion); id. at 350 (concluding that “[t]he dispute over Bork can be summed up as substantive debate with some slander.”). Interestingly, Bork’s book never mentions the White House’s strategy to portray Bork as a moderate, including the book it prepared to make Bork resemble Justice Powell. See The White House Report: Information on Judge Bork’s Qualifications, Judicial Record & Related Subjects, reprinted in The Bork Nomination: Essays and Reports, 9 CARDOZO L. REV. 1, 187-217 (1987).

173 E. BRONNER, supra note 70, at 347.

174 For example, Bork recounts in his book an exchange with Senator Specter as typical of both Specter’s ignorance of the Constitution and the Senate’s lack of interest in Bork’s real views. R. BORK, supra note 2, at 301-05. Ironically, the exchange actually reflects Bork’s own inability to engage in an open dialogue about the Constitution. In particular, it shows that Bork wanted to talk about the Court’s obligation to allow only regulation of pornography and not of political speech, while Senator Specter tried to ascertain whether or not Bork agreed with Chief Justice Rehnquist’s conception that some forms of pornography are entitled to first amendment protection. Bork never gave Specter a direct answer but complains in his book that Specter did not understand Bork’s response. The exchange reflects both Bork’s disdain for opposing views and his reluctance to engage in a full disclosure of the substance of and reasons for his own positions.


176 Two examples illustrate Bork’s tendency to speak out of both sides of his mouth. First, Bork maintains that during his hearings his critics wrongly accused him of favoring the kind of poll taxes that the Court struck down in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); he protests, “I have never said a word in favor of poll taxes.” R. BORK, supra note 2, at 324. Yet earlier in the book, in critiquing Harper, Bork refers to Justice Black’s dissent in Harper explaining and defending the state policies on which racially nondiscriminatory poll taxes could be based. Id. at 91. I am at a loss to understand why Bork refers at some length to Justice Black’s dissent (without a word of criticism) unless Bork thinks there is no problem with it. Throughout his career, Bork has shown little disposition to avoid critiquing things he considers to be wrongly decided or poorly reasoned and his failure to call Justice Black to task for his dissent can only be construed as tacit approval. Letting Justice Black speak “in favor of poll taxes” hardly established that Bork himself has “never said a word in favor of poll taxes.”

Second, Bork complains that during his hearings his critics wrongly accused him of voting against the grandmother in Moore v. City of East Cleveland, 431 U.S. 494 (1977). Bork is absolutely correct that this was a distortion because Bork never participated in the case. But Bork cannot stop there. He adds, “I have never written about it or even discussed it.” R. BORK, supra note 2, at 289. Yet earlier in the book Bork groups Moore with the privacy decisions that he urges the Court to reverse, and he criticizes Moore
conventional decisionmaking.

IV

CONCLUSION: WORLD WITHOUT BORK

Both Bork and Senator Joseph Biden use the same scene from Robert Bolt's play *A Man for All Seasons* to make diametrically opposite points about the significance of Bork's defeat. Bork uses the scene to dramatize that liberals tear down the law in order to judicially enact the policies they prefer, while Senator Biden uses the scene to illustrate that Bork has torn down constitutional guarantees in order to promote his conservative social agenda.

These disparate interpretations of Robert Bolt's play say a great deal about the process of interpreting written texts, including the Constitution—what one gets out of it depends a great deal on what one brings to it. My guess is that both Bork and Biden make legitimate use of the scene from Bolt's play in the same way that they each use different techniques to interpret the Constitution. We should not ignore or should not and cannot completely protect against the dynamic interaction readers have with written texts—even the Constitution—that permits different readings at different times in different contexts. This dynamic interaction, or dialogue, between reader and text as well as between generations of readers is the essence of constitutional interpretation.
Bork lowers, rather than elevates, constitutional dialogue because he wants to end the dialectical process of constitutional interpretation. Bork's intolerance for, and inability to participate in, an open dialogue on the meaning of the Constitution is well illustrated through Bork's use of another story. In the book, Bork relates an anecdote in which Justice Oliver Wendell Holmes admonished Judge Learned Hand that Holmes's job was not to do justice but rather to interpret the law. Early in the book, Bork praises Holmes for this admonition, but later reprints with pride his own letter of resignation to President Reagan in which he says he has achieved satisfaction as a judge by "[t]rying . . . to do justice." Bork is blind to his tendency to care more about tailoring his message to his audience than about defining the essence of a judge's job. Nor can Bork see the irony of his claim that a justice of the United States Supreme Court should not strive in some way to do justice. It is because of these and other blindnesses that the Senate condemned Bork to return to the academy from whence he came. There, free from the power available to federal judges, Bork may wrestle with the demons tormenting him in order to find his own true constitutional faith.

179 R. BORK, supra note 2, at 6.
180 Id. at 319.