

Taming Judicial Activism: Judge Robert Bork's *Coercing Virtue*

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INTRODUCTION

According to urban legend, the Yale Law School once considered Frank Easterbrook, then at the University of Chicago, for an appointment. The proposal failed, it is said, because some professors believed that appointing Easterbrook would “unbalance” the faculty. Apparently, the faculty had its hands full arguing with the only other conservative at the school. That man, of course, was Robert Bork.

More than a decade after he had left, the Yale Law faculty was still arguing with Judge Bork. A young student at the time might be forgiven for expecting Judge Bork to show up to respond. But after his unjust Supreme Court confirmation hearings, he decided to join the American Enterprise Institute (AEI) rather than return to the courts or to law teaching. As a scholar at AEI, he reached far more minds than he could arguing inside Yale's cold gothic halls. It was as a student that I read his *The Tempting of America*,¹ and then his classic *The Antitrust Paradox*.² By the time I had joined the Berkeley faculty, he had published his *Slouching towards Gomorrah*.³ While Judge Bork's claim of American moral and cultural decline did not ring true to me, I enjoyed his provocative suggestion that Congress could override Supreme Court decisions by simple majority vote.⁴

So it was with great excitement that I received a call from Judge Robert Bork's secretary. I had never met the judge before,

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¹ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press 1990).

² Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1993).

³ Robert H. Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline* (ReganBooks 1996).

⁴ See id at 117.

though he was a living legend. His office was spacious, but clouds of cigarette smoke obscured its outer reaches. I waited for the Delphic oracle to appear and prophesy through the haze. Judge Bork was without ceremony and got right down to business. He wanted to talk about international law and the US courts. He believed that the Alien Tort Statute⁵ (ATS) had tempted judges to conjure new rights from the mists of international law and import them directly into American law.⁶ For a scholar who had literally written the book on judicial activism, the lower courts' embrace of the ATS assumed the latest front in the struggle between originalism and liberalism. But activism was no longer a uniquely American disease. It had spread to other nations, such as Canada and Israel.⁷ His thoughts became *Coercing Virtue*, and it was my privilege to help Judge Bork by reading in draft form his early articles and then the book itself.

I. COERCING VIRTUE, WORLDWIDE

Coercing Virtue is a slim volume that takes on a big problem. International affairs have taken on an increasingly legal cast. International law once governed only the relations between nation-states.⁸ But as Professor Julian Ku and I observe, globalization of communications and transportation has made national borders more permeable than ever before.⁹ Opportunities and problems that once rested purely in the territory of a nation now stretch across multiple borders, requiring international cooperation to solve them. Law has followed. Matters that once fell solely within the domestic jurisdiction of individual nations, such as the environment and human rights, have become subject to international rules.¹⁰

Judge Bork describes that as law crosses borders, judicial activism spreads with it.¹¹ He sees both phenomena as two sides of the coin, where the legalization of global affairs encourages

⁵ Judiciary Act of 1789 § 9, ch 20, 1 Stat 73, 76–77, codified as amended at 28 USC § 1350.

⁶ See Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* 25–27 (AEI 2003).

⁷ See *id.* at 16. See also *id.* at 85–134.

⁸ See Julian Ku and John Yoo, *Taming Globalization: International Law, the US Constitution, and the New World Order* 22–23 (Oxford 2012).

⁹ See *id.* at 21.

¹⁰ See *id.* at 37.

¹¹ See Bork, *Coercing Virtue* at 15–17 (cited in note 6).

judges to impose their own policy preferences.¹² Extending a theme that runs consistently through his work on antitrust and constitutional law, Bork argues that judges possess neither democratic legitimacy nor special expertise to incorporate international norms.¹³ Anyone who cares about democratic accountability should pay attention when unaccountable judges use judicial review to advance policy goals that would never survive at the ballot box.¹⁴ Naturally, Bork does all this in his characteristically acerbic style.

Coercing Virtue is noteworthy for challenging internationalists—those who favor automatic American adoption of international law—on their own turf. Judge Bork does not only rely on the intentions of the Framers of the Constitution. He also looks at jurisprudence abroad to evaluate judicial decisions at home. *Coercing Virtue* is a comparative study that examines the convergence of judicial activism in the United States, Canada, and Israel.¹⁵ It shows that a dialogue among legal elites in these countries has led to both the import and export of judicial activism.¹⁶ Judicial activism, indeed, has gone global.

Coercing Virtue influenced my work. In *Taming Globalization*, Professor Ku and I build on Judge Bork's legacy by examining globalization's effects on American constitutional law.¹⁷ We argue that globalization has placed pressure on federalism and separations of powers.¹⁸ Like Judge Bork, we find several recent Supreme Court cases in the field wanting, particularly those relying on international and foreign legal sources as authority.¹⁹ To preserve the American bedrock principle of popular sovereignty, we argue for rejuvenating non-self-executing treaties and limiting *Missouri v Holland*.²⁰ These foreign-affairs doctrines would limit judicial discretion and place the authority to adopt international law in the elected branches of government. Where

¹² See *id.* at 16.

¹³ See *id.* at 10–11.

¹⁴ See *id.* at 5–6.

¹⁵ See Bork, *Coercing Virtue* at 52–134 (cited in note 6).

¹⁶ See *id.* at 15–16.

¹⁷ See Ku and Yoo, *Taming Globalization* at 1–18 (cited in note 8). For specific examples of how this impact has been felt, see *id.* at 177–226.

¹⁸ See *id.* at 70–86.

¹⁹ See *id.* at 177–78, 227–32.

²⁰ 252 US 416 (1920) (upholding Congress's power to make treaties as supreme over the interests of the states). See Ku and Yoo, *Taming Globalization* at 89–90 (cited in note 8).

Coercing Virtue diagnosed the problem, we hoped to identify solutions for the American constitutional and political system.

II. THE ANTIDEMOCRATIC NEW CLASS

Coercing Virtue goes beyond the analysis of doctrine to seek the political underpinnings of the movement toward judicial activism on a global scale. Judge Bork takes issue with the cultural left, which he believes has commandeered the courts to advance its policy agenda.²¹ Members of the New Class, as Judge Bork calls it, “traffic, at wholesale or retail, in ideas, words, or images and have at best meager practical experience of the subjects on which they expound.”²² According to Judge Bork, the New Class possesses an “impulse toward socialism” that manifests itself in both economic and cultural aspects of life.²³ Because the New Class often operates as a political minority in individual countries, it must find ways to circumvent the results of elections.²⁴ The judiciary makes for an ideal weapon because it allows a minority to win policies that cannot command majorities of the electorate.²⁵

If confined to the ivory tower, socialist programs would pose little danger. But, Judge Bork argues, activist judges have taken up the New Class’s agenda.²⁶ Without any authority to make political choices, the courts must invent constitutional meaning to advance the cause of the New Class.²⁷ Activist judges, he explains, “decide cases in ways that have no plausible connection to the law they purport to be applying, or [] stretch or even contradict the meaning of that law.”²⁸ “They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law.”²⁹

The critical question for conservatives is, why do judges adopt the New Class’s agenda in the first place? Even if judges have discretion to choose between adopting an international law norm or not, they could always choose to defer to the political branches. It is here that Judge Bork’s foray into political science

²¹ See Bork, *Coercing Virtue* at 2 (cited in note 6).

²² *Id.*

²³ *Id.* at 6.

²⁴ See *id.* at 5.

²⁵ See Bork, *Coercing Virtue* at 5–6 (cited in note 6).

²⁶ See *id.* at 2.

²⁷ See *id.* at 8–9.

²⁸ *Id.* at 8.

²⁹ Bork, *Coercing Virtue* at 8 (cited in note 6).

and sociology becomes necessary. Lawyers and judges, he believes, have fallen sway to the siren song of the professoriate.³⁰ Indeed, judges are “certified members of the intelligentsia,” having passed through its training grounds of colleges and law schools.³¹ “The prestige of a judge depends on being thought well of in universities, law schools, and the media, all bastions of the New Class.”³² Professors may think up destructive socialist ideas, and pundits may popularize them, but without the judges they would remain the fodder of debate societies.³³ Judges are the sharp end of the intellectuals’ spear.

Judge Bork believes that judges became the engine room for the New Class. When activist judges take hold in a country, they shift its culture faster to the left.³⁴ And when activist judges begin to copy similar examples from other countries, they accelerate the process even faster. The defects of judicial activism, he explains, will only become magnified, including the loss of democratic self-rule, the imposition of cultural values held by a minority, and the politicization of law.³⁵ International law in the hands of such judges will be used to outmaneuver the US democratic process.³⁶ Judge Bork suspects that a kind of “sinister element” may exist in international law because the New Class may hope to have their views adopted abroad and then imposed here in the United States.³⁷

III. THE PROBLEM OF FOREIGN LAW

Coercing Virtue was one of the first works to pinpoint these developments in the reliance on foreign law by the US Supreme Court. There is little doubt that the justices have flirted with the idea that US courts should take into account foreign views in their deliberations. In *Thompson v Oklahoma*,³⁸ the Court found that capital punishment for a crime committed by a fifteen-year-old constitutes cruel and unusual punishment.³⁹ Writing for a divided Court, Justice John Paul Stevens claimed support in the

³⁰ See *id.* at 9–10.

³¹ *Id.* at 9.

³² *Id.*

³³ See Bork, *Coercing Virtue* at 5–6 (cited in note 6).

³⁴ See *id.* at 9–10.

³⁵ See *id.* at 16.

³⁶ See *id.*

³⁷ Bork, *Coercing Virtue* at 16 (cited in note 6).

³⁸ 487 US 815 (1988).

³⁹ *Id.* at 838.

views of other nations, including leading members of Western Europe, and human rights treaties that had not been ratified by the United States.⁴⁰ In his dissent in *Printz v United States*,⁴¹ Justice Stephen Breyer claimed that foreign views of federalism supported the federal commandeering of state agencies.⁴² Since *Coercing Virtue*, the Court has kept up the practice by citing foreign law in cases further narrowing the death penalty and protecting gay rights.⁴³

There are a number of reasons to question the look abroad. Most obviously, in these cases foreign judiciaries' decisions are not even interpreting the Constitution of the United States, but their own governing documents. Judge Bork argues that some of these foreign views come from foreign legislatures, not even judicial decisions, and are entirely irrelevant for judicial interpretation of the Constitution.⁴⁴ Professor Ku and I have also argued that relying on foreign law violates the original understanding of the Constitution, which rejected foreign governing concepts (except those of Great Britain).⁴⁵ Nevertheless, Judge Bork finds the practice is “not surprising, given liberalism’s tendency to search for the universal and to denigrate the particular.”⁴⁶

Judge Bork also finds a second avenue for activist judges—cheered on by an appreciative community of advocates and academics—in the 1789 Alien Tort Statute.⁴⁷ Of mysterious origins, the statute sat largely unused for nearly two hundred years.⁴⁸ It provides jurisdiction in federal court for torts “committed in violation of the law of nations.”⁴⁹ Judge Bork criticizes the modern interpretation of the ATS to allow US courts to create claims with no connection to the United States, contrary to any contemporaneous understanding of a violation of the law of nations

⁴⁰ See *id.* at 830–31 & n 34.

⁴¹ 521 US 898 (1997).

⁴² See *id.* at 976 (Breyer dissenting).

⁴³ See *Roper v Simmons*, 543 US 551, 575–78 (2005) (considering the practices of other countries and the guidance of the United Nations in support of the Court’s holding that it is “cruel and unusual” to execute offenders under eighteen years old); *Lawrence v Texas*, 539 US 558, 573 (2003) (discussing the relevance of a European Court of Human Rights decision holding an Irish antisodomy law invalid under the European Convention on Human Rights).

⁴⁴ See Bork, *Coercing Virtue* at 23 (cited in note 6).

⁴⁵ See Ku and Yoo, *Taming Globalization* at 241–42 (cited in note 8).

⁴⁶ Bork, *Coercing Virtue* at 22 (cited in note 6).

⁴⁷ ATS, 1 Stat at 76–77.

⁴⁸ See Bork, *Coercing Virtue* at 25 (cited in note 6).

⁴⁹ 28 USC § 1350.

cognizable by an individual in a private right of action (which in 1789 was limited to the protection of diplomatic officers and similar rights).⁵⁰ Instead, as Judge Bork notes, the law of nations in 1789 “bears almost no resemblance to the law of nations being applied by U.S. courts today.”⁵¹ As Professor Ku and I have also argued, there is little support for the theory that the ATS provides a substantive cause of action based on its text, structure, or history.⁵² While Judge Bork did not convince the Court to adopt his views on foreign law, he no doubt had an effect in reining in the expansive application of the ATS, which finally occurred last term in *Kiobel v Royal Dutch Petroleum Co.*⁵³

A third area in which activist judges undermine democratic accountability is on the question of universal criminal jurisdiction. It goes without saying, of course, that criminals should be brought to justice. But proper jurisdiction, Judge Bork believes, is required for judicial legitimacy and to preserve the rule of law and democratic self-government.⁵⁴ Judge Bork points to several examples of universal criminal jurisdiction, though none from the United States. The Belgian Supreme Court ruled that Israeli prime minister Ariel Sharon could be tried for alleged war crimes after he left office.⁵⁵ The second example involved Chile’s former government head, General Augusto Pinochet.⁵⁶ While in a London hospital, Pinochet was arrested because a Spanish judge had issued an international warrant for his arrest, and a UK judge then issued a warrant for his extradition.⁵⁷ Jurisdiction was claimed over Chile’s objections, which had its own settlement with Pinochet.⁵⁸ Ultimately the UK home secretary allowed him to return to Chile.⁵⁹ A third was the example of Slobodan Milosevic, who was deported from Yugoslavia to be tried in front of the International Criminal Tribunal at The Hague.⁶⁰ Bork argues that the Serbian government, against the wishes of its constitutional court, extradited Milosevic because of

⁵⁰ See Bork, *Coercing Virtue* at 26–27 (cited in note 6).

⁵¹ *Id.* at 27.

⁵² See Ku and Yoo, *Taming Globalization* at 179–88 (cited in note 8).

⁵³ 133 S Ct 1659, 1665 (2013).

⁵⁴ See Bork, *Coercing Virtue* at 29 (cited in note 6).

⁵⁵ See *id.* at 28.

⁵⁶ See *id.* at 28–29.

⁵⁷ See *id.*

⁵⁸ See Bork, *Coercing Virtue* at 29 (cited in note 6).

⁵⁹ *Id.*

⁶⁰ See *id.* at 29–30.

a US threat to withhold reconstruction aid.⁶¹ While Judge Bork agrees that most “wanted Milosevic to pay for his crimes, his punishment did not vindicate international law. Other men with blood on their hands walk free. All that was proved is that the United States, like other nations, can manipulate other governments and justify it as a dedication to international justice.”⁶²

A final arena for international law is the use of force. Judge Bork argues that the left has largely used international law as a vehicle to further its views on international morality.⁶³ A prime example is *Nicaragua v United States of America*,⁶⁴ in which the International Court of Justice (ICJ) declared illegal US assistance to rebels against the Sandinista dictatorship in Nicaragua.⁶⁵ Despite supporting rebels attacking El Salvador, the ICJ found, Nicaragua had not engaged in an armed attack.⁶⁶ The ICJ heard only Nicaragua and refused El Salvador’s petition to intervene. The ICJ also rejected the United States’s claim that it was exercising the “well-established right of collective self-defense.”⁶⁷ The ICJ, Judge Bork observes, is comprised of judges elected by the UN General Assembly and Security Council in a highly political process.⁶⁸ While it is true that the United States chose not to honor the judgment of the ICJ by paying damages to Nicaragua, it still suffered political harm from the judgment.⁶⁹

Judge Bork extends his criticism of Nicaragua to Grenada. The United States used force in Grenada to provide stability after a 1979 coup by a Soviet Union–backed revolutionary party.⁷⁰ While the ICJ was not involved, the UN General Assembly condemned the action as a violation of international law.⁷¹ Judge Bork argues that criticism of the US intervention was based on moral and political considerations—not law.⁷² Perversely, he notes, this moral calculus was incomplete: in Grenada, the government was a violent minority government that threatened

⁶¹ See *id.* at 30.

⁶² Bork, *Coercing Virtue* at 30 (cited in note 6).

⁶³ See *id.* at 39.

⁶⁴ Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), 1986 ICJ 14.

⁶⁵ *Id.* at 123 ¶ 238. See also Bork, *Coercing Virtue* at 39–41 (cited in note 6).

⁶⁶ *Nicaragua v United States of America*, 1986 ICJ at 119 at ¶ 230.

⁶⁷ Bork, *Coercing Virtue* at 40 (cited in note 6).

⁶⁸ See *id.* at 41.

⁶⁹ See *id.* at 40–41, 42.

⁷⁰ See *id.* at 42–43.

⁷¹ See Bork, *Coercing Virtue* at 43 (cited in note 6).

⁷² See *id.* at 44.

democracy in the region.⁷³ Grenadians “were ecstatic at being relieved of their government.”⁷⁴ Yet, that did not play into the calculus for the nations in the UN General Assembly.⁷⁵ “International law serves, both internationally and domestically, as a basis for a rhetoric of recrimination directed at the United States and other free nations. It provides an opportunity to transform disputes from debate over substantive matters of right and wrong into an academic discussion of imprecise legalities.”⁷⁶

IV. COMPARATIVE JUDICIAL ACTIVISM

Coercing Virtue criticizes both the politicization of international law and the spread of judicial activism in other countries. Judge Bork’s criticism of the courts in the United States is well known and does not need repeating. For the American reader, equally fascinating is Judge Bork’s treatment of Canada and Israel, where the courts have not just been influenced by the United States, but in some cases have exceeded it. While Canada’s Supreme Court is more sensible on speech and religion than the US, Judge Bork argues, it has become equally if not more activist in the areas of abortion and substantive due process.⁷⁷ Like the US, the Canadian courts have interpreted the Canadian Charter’s “right to life” language to confer a right to abortion.⁷⁸ Judge Bork suggests that the Supreme Court of Canada adopted the US Supreme Court’s reasoning in *Roe v Wade*⁷⁹ implicitly, having utilized remarkably similar language to link the right to human dignity.⁸⁰

Israel’s Supreme Court, in Judge Bork’s reading, emerges as the most activist court of all. It is becoming the “dominant institution in the nation.”⁸¹ The Supreme Court of Israel has found all behavior, government or personal, reviewable by the court.⁸² It possesses the authority to, among other things, review nearly every government action and decision as “unreasonable,”

⁷³ See *id.* at 46.

⁷⁴ *Id.*

⁷⁵ See Bork, *Coercing Virtue* at 43–46 (cited in note 6).

⁷⁶ *Id.* at 47.

⁷⁷ See *id.* at 92–110.

⁷⁸ *Id.* at 98–100.

⁷⁹ 410 US 113 (1973).

⁸⁰ See Bork, *Coercing Virtue* at 99–100 (cited in note 6).

⁸¹ *Id.* at 111.

⁸² See *id.* at 114.

something akin to US substantive due process.⁸³ In the area of national security, especially important to Israel, the court has shown a willingness to intervene far beyond the US Supreme Court. Judge Bork argues that the Supreme Court of Israel has redefined values such that Jewishness and democratic values matter less and less.⁸⁴ This means, according to Judge Bork, that the Knesset is reluctant to pass laws that the Supreme Court of Israel will overturn, resulting in a “far-reaching judicial preemption.”⁸⁵ As Judge Bork observes: “The sad irony is that the Supreme Court, operating with a Basic Law that specifies Israel’s values are both Jewish and democratic, is gradually producing an Israel that is neither Jewish nor democratic.”⁸⁶

CONCLUSION

In *Coercing Virtue*, Judge Bork brings together two seemingly unconnected legal developments: the rise of international law in domestic legal systems and the growing power of constitutional courts in foreign countries. In both phenomena, Judge Bork sees the same ills that have beset the American constitutional system. Judges might use their power of judicial review to impose their policy preferences, rather than interpret the law. Efforts to read international law directly into US law, through either citation of foreign law or the Alien Tort Statute, expanded these possibilities because of international law’s broad expanse and political nature. The same temptation, Judge Bork observes, is at work in the activism of constitutional courts too. Rather than assume the agenda of an elite class of intellectuals, judges should respect the democratic process and approach their role in a constitutional system with more modesty and humility.

⁸³ Id at 121–22.

⁸⁴ See Bork, *Coercing Virtue* at 130–34 (cited in note 6).

⁸⁵ Id at 132.

⁸⁶ Id at 134.