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BORK: THE TRANSFORMATION OF A CONSERVATIVE CONSTITUTIONALIST

*Philip B. Kurland**

For Republican Party stalwarts, Robert Bork's appointment to the Supreme Court represents President Reagan's last chance to put the Reagan social program into effect. So they have said. The President failed early on to persuade the court to retract its position on such things as abortion, privacy, prayers in school and fiscal assistance to religion, and affirmative action. He failed to persuade Congress to effect his programs by legislation and constitutional amendment.

Now, having appointed two new Justices and elevated William Rehnquist to Chief Justice, Reagan proposes another appointment, which he expects to effect the rewriting of the Constitution to his liking. That is the basis on which he is selling his nominee to the right-wing constituencies.

On the other hand, some Washington lawyers and their cabal—mostly holdovers from Democratic administrations who have since been executive branch tools, whichever party is in power—are seeking to sell Bork to the moderates as one devoted only to judicial restraint, one who is truly the model of Felix Frankfurter, of Robert Jackson, of John Marshall Harlan. Nobody, of course, is offering Bork as a swinging liberal in the tradition of William Douglas or Frank Murphy.

Organized constituencies such as the Eagle Forum, the anti-abortionists, and the Dolphin Society know where Bork stands: with them. Other organized constituencies, like the National Organization for Women and various civil liberties and civil rights organizations also know where Bork stands: against them. These constituencies on both sides are in agreement about the meaning of a Bork appointment.

For myself, the proper class into which Bork would fall as a Supreme Court Justice is that of Pierce Butler, George Sutherland, Willis Van Devanter, and James C. McReynolds. And I don't think the nation can afford to be thrown back to the days when four such as these maintained the critical mass in determining the meaning of the Constitution.

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But a Supreme Court nominee should not be approved simply because he bears the imprimatur of the right wing of the Republican Party or the *nihil obstat* of some holdovers from the New Deal. Nor should he be rejected simply because of the worthiness of the opposition. The Senate's decision should be based on Judge Bork's record, and his record is nothing if not clear, as he has gone from podium to podium since becoming a judge electioneering to become a justice.

What is startling about the record is the violent change from the "conservative" positions he took as an academic to the "conservative" positions he has taken on the hustings. Bork became a different constitutionalist after he wrote "Why I Am For Nixon" in *The New Republic* magazine in 1968¹ and found himself rewarded with the post of Solicitor General.

Whatever he may have said or thought earlier, since 1969 Bork has paid fealty to the Nixon administration's "strict construction" thesis and the Reagan administration's "original intent." Like "strict construction," "original intent," of course, is not a formula or a theory but only a slogan pursuant to which old decisions can be replaced by new ones.

Immediately before he joined the Nixon administration and before the cry of original intent was heard in the land, Bork, the constitutional scholar, pointed to the deficiencies of attempting to rely on the so-called "intent" of the framers as determinative of the meaning of the Constitution today:

The text of the Constitution, as anyone experienced with words might expect, is least precise where it is most important. Like the Ten Commandments, the Constitution enshrines profound values but necessarily omits the minor premises required to apply them. The First Amendment is a prime example. . . . To apply the amendment, a judge must bring to the text principles, judgments, and intuitions not to be found in the bare words.

When we turn to the equal-protection clause of the Fourteenth Amendment . . . we know the clause was meant to be important, [but] the words tell the judge very little. . . .

History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted, and ratified the great clauses. The record is incomplete, the men involved often had vague or even conflicting intentions, and no one foresaw, or could have foreseen, the disputes that changing social conditions and outlooks would bring before the Court. . . .²

¹ Bork, *Why I Am For Nixon*, *The New Republic*, June 1, 1968, at 19.

² Bork, *The Supreme Court Needs a New Philosophy*, *Fortune*, Dec. 1968, at 138, 140.

Today's Bork, however, iterates and reiterates the formula of "original intention." For him, constitutional decisions can be based on, and only on, the words of the text and the context in which they were promulgated. A judge should not even feel bound by a precedent of his own court. Thus, in the hearings on his nomination to the Court of Appeals, he said that "if a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court."³ A bit later he was a little more cautious: "I think the value of precedent and of certainty and continuity in the law is so high that I think a judge ought not to overturn prior decisions unless he is absolutely clear that that prior decision was wrong and perhaps pernicious."⁴ But he boldly pronounced that the only way to "cure" erroneous constitutional decisions was through "the appointment process."⁵ That proposition doesn't require much interpretation.

The problem is that, for Bork, there are a very large number of Supreme Court cases that are "wrong and perhaps pernicious."⁶ In testifying on the Human Life Bill, he said: "[N]obody believes the Constitution allows, much less demands, the decision in *Roe v. Wade* [the abortion case] or in dozens of other cases in recent years."⁷

In an interview in the *District Lawyer* in 1985, he was asked: "Can you identify any Supreme Court doctrines that you regard as particularly worthy of reconsideration in the 1980s?" He responded: "Yes, I can. But I won't."⁸

A quick currying of just some of his writings, however, reveals a long list of cases damned by Bork as wanting support in the constitutional text or its original context. These include, with varying terms of acerbity or damnation, the abortion cases;⁹ the contraception cases;¹⁰ the reapportionment cases;¹¹ *Shelley v. Kraemer*,¹² making ra-

³ The Selection and Confirmation of Federal Judges: Hearings Before the Comm. on the Judiciary, 97th Cong., 2d Sess. 13 (1982).

⁴ *Id.* at 14.

⁵ *Id.* at 7.

⁶ *Id.* at 14.

⁷ Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 97th Cong., 1st Sess. 310, 315 (1981).

⁸ Lacovara, A Talk With Judge Robert H. Bork, 9 *Dist. Law.* 29, 32 (May-June 1985).

⁹ E.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰ E.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹¹ E.g., *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

¹² 334 U.S. 1 (1948).

cially restrictive covenants unenforceable; *Katzenbach v. Morgan*,¹³ suggesting a congressional power to add to the rights protected by the fourteenth amendment; *Skinner v. Oklahoma*,¹⁴ striking down a law providing for involuntary sterilization of criminals; *Engel v. Vitale*,¹⁵ banning the use of a state-created prayer in public grammar schools; *Aguilar v. Felton*,¹⁶ banning the use of federal funds to support parochial schools; and *University of California Board of Regents v. Bakke*,¹⁷ allowing race to be taken into account in admitting university students (affirmative action). There are lots more.

The principal difficulty with the thrust of Attorney General Edwin Meese's "original intent" thesis—and it is Meese's thesis that Bork seems to have borrowed—is that its main target of application is the Bill of Rights. Meese properly asserts that the Bill of Rights originally was not to be applied to the states. The logical conclusion—ignoring the fourteenth amendment—is to remove the restraints of the national Constitution from state action ranging from violation of the establishment clause in the first amendment to restraints that have been placed on the use of capital punishment, partly based on the eighth amendment.

Bork's entire current constitutional jurisprudential theory is essentially directed to a diminution of minority and individual rights. In his recent Boyer Lecture to the American Enterprise Institute, he condemned the view that "moral harms are not to be counted because to do so would interfere with the autonomy of the individual. . . . The result of discounting moral harm is the privatization of morality, which requires the law of the community to practice moral relativism. [Horror of horrors!] It is thought that individuals are entitled to their moral beliefs . . . in law."¹⁸ He said later in the same speech: "One of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality."¹⁹ I trust he was not talking about the public morality, proffered at the Watergate and Iranscam hearings, that the end justifies the means.

But listen to the views of Professor Bork, rather than Judge Bork, who wrote in 1968: "[M]oral disapproval alone cannot be accepted as a sufficient rationale for any coercion. If it were there would be no limit to the reach of the majority's power, and that contradicts

¹³ 384 U.S. 641 (1966).

¹⁴ 316 U.S. 535 (1942).

¹⁵ 370 U.S. 421 (1962).

¹⁶ 473 U.S. 402 (1985).

¹⁷ 438 U.S. 265 (1978).

¹⁸ R. Bork, *Tradition and Morality in Constitutional Law* 1, 3 (1984).

¹⁹ *Id.* at 9.

the basic postulate of a Madisonian system.”²⁰ The fact is that Bork invokes constitutional history often in support of his current positions, but seldom cites chapter and verse. This time he happened to be right in his history, although usually he has been less than accurate.

In a much-cited article in the *Indiana Law Journal* in 1971, now “recanted,” though to what extent we know not, Bork contended that the protection of speech and press should be limited to cover only political speech.²¹ (On the bench, Bork seems to have been convinced that the Constitution did not mean for juries to fix punitive damages in libel suits, at least against Evans and Novak. If the purpose of the development at the time of the founding has any historical significance, it was to enhance, not diminish, the role of juries in libel cases.) But, again, when he was still an academic, in 1968, Bork endorsed the Brandeisian notion of an extensive reading of the first amendment’s protected speech, certainly far more extensive than Bork is now prepared to defend:

Yet nonpolitical speech too, of course, is entitled to some degree of constitutional protection. Brandeis cited other values of speech that are not unique to the political variety. For both speaker and hearer, speech may be a source of enjoyment, of self-fulfillment, of personal development. It is often mundane or vulgar or self-serving, but it may be exalted, inspired by the highest motives.²²

One strain of consistency runs through Bork’s jurisprudence from his law school days through yesterday. Strangely, however, it patently fails his notion of adhering to the original intent of the legislature enacting the law. I speak of his commitment to the notion that the Sherman Antitrust Act bars only anticompetitive devices resulting in economic inefficiency. This he learned as a schoolboy at the University of Chicago. For Bork, it would seem that the only natural law required to be given effect by the Supreme Court is that of supply and demand, unrestrained by moral considerations, public or private.

The Constitution created powers in the national government. Bork would read these as unlimited, so long as they receive a majority vote of the legislature and do not fall directly afoul of a specifically worded constitutional limitation. Bork’s view of history here, as of most of the history on which he would rely, is myopic.

It was expected by the founders that, in light of one of the princi-

²⁰ Bork, *supra* note 2, at 171.

²¹ Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 20 (1971).

²² Bork, *supra* note 2, at 170.

pal objectives of the Constitution—indeed the one that worried them most, the preservation of individual liberties—the powers of government would be narrowly construed. In a further effort to confine the national government, however, some individual rights were specifically guaranteed in the Constitution, such as the ban on limiting habeas corpus, the ban on bills of attainder, the ban on ex post facto laws. An additional list of rights guaranteed to the people were added in the first eight amendments.

From the beginning, though, the dangers of listing only some of the protected individual rights was seen in the common law maxim *inclusio unius, exclusio alterius* (including one excludes another). Hamilton and Madison both originally opposed a Bill of Rights for that reason. And when Madison brought in a Bill of Rights for promulgation by the first Congress, carefully included were the provisions of what is now the ninth amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²³

The contemporary Bork’s constitutional canons would confine individual rights to those safeguarded in terms in the Constitution, despite his pronounced position that the words of the Constitution taken in their historical context are the only proper guide to its meaning. At one time, when he was still a scholar, however, Bork extolled the ninth amendment as a source of rights. He wrote in 1968:

A desire for some legitimate form of judicial activism is inherent in a tradition . . . that can be called “Madisonian.” We continue to believe there are some things no majority should be allowed to do to us, no matter how democratically it may decide to do them. A Madisonian system assumes that in wide areas of life a legislative majority is entitled to rule for no better reason than that it is a majority. But it also assumes there are some aspects of life a majority should not control, that coercion in such matters is tyranny, a violation of the individual’s natural rights. Clearly the definition of natural rights cannot be left to either the majority or the minority. In the popular understanding upon which the power of the Supreme Court rests, it is precisely the function of the Court to resolve this dilemma by giving content to the concept of natural rights in case-by-case interpretation of the Constitution. This requires the Court to have, and demonstrate the validity of, a theory of natural rights. . . .

Legitimate activism requires, first of all, a warrant for the Court to move beyond the limited range of substantive rights that can be derived from traditional sources of constitutional law. The

²³ U.S. Const., amend. IX.

case for locating this warrant in the long-ignored Ninth Amendment was persuasively argued by Justice Arthur J. Goldberg in a concurring opinion in *Griswold vs. Connecticut* ^[24] [the decision invalidating Connecticut's anticontraception law on grounds of the right to privacy]. . . . This seems to mean that the Bill of Rights is an incomplete, open-ended document, and that the work of completion is, at least in major part, a task for the Supreme Court. There is some historical evidence that this is substantially what Madison intended.

. . . .
. . . The construction of new rights can start from existing constitutional guarantees, particularly the first eight amendments, which may be taken as specific examples of the general set of natural rights contemplated by the Madisonian system and the Ninth Amendment.²⁵

Bork, although frequently prating about the Constitution and original intent as he has taken to the hustings around the country, has woefully missed what he should have learned from the Constitutional Convention of 1787 and the events surrounding it.

The watchword of the people and the constitutional and ratifying conventions was "liberty." They were intent on framing a government to guarantee liberty to the individuals within the new nation's domain. The liberty of which they spoke was not Bork's liberty of a parliamentary majority to impose its will on everyone with regard to everything. No such elaborate structure as that which emerged would have been necessary for that.

The liberty of which they spoke and wrote and for which they fought was the liberty of the individual, in "substance," as Judge Learned Hand once put it, "the possibility of the individual expression of life on the terms of him who has to live it."²⁶ Judge Hand added:

Would we hold liberty, we must have charity—charity to others, charity to ourselves, crawling up from the moist ovens of a steaming world, still carrying the passional equipment of our ferocious ancestors, emerging from black superstition amid carnage and atrocity to our perilous present. What shall it profit us, who come so by our possessions, if we have not charity?²⁷

Is it too much to ask of a member of the high court that he be more than a technically well-equipped lawyer, that he also display the

²⁴ 381 U.S. 479 (1965).

²⁵ Bork, *supra* note 2, at 168-170, col. 1.

²⁶ L. Hand, Sources of Tolerance, in *The Spirit of Liberty* 66, 82 (1952).

²⁷ *Id.* at 83.

qualities of humility and compassion and understanding—of statesmanship? Aren't these the qualities that distinguished a Stone, a Frankfurter, a Jackson, and a Harlan, conservatives all, from a Butler, a McReynolds, a Van Devanter, a Sutherland?

Almost any adult lawyer can parse the words of the Constitution. If that is all that is wanted, we could probably leave it to a computer. Let us have a judge, if a judge it must be, like a Learned Hand or a Henry Friendly, who were clearly committed to judicial restraint, but who understood the frailties of men and women, judges and judged alike.*

* Reprinted with permission from Kurland, Bork, *The Transformation of a Conservative Constitutionalist*, *Chi. Trib.*, August 18, 1987, § 1.