1987

The First Amendment Jurisprudence of Judge Robert H. Bork

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Since discussion of Judge Robert H. Bork's judicial philosophy is usually couched in terms of "judicial restraint," it is important to make clear what the label of "restraint" properly means. It does not mean that the government always wins; it is therefore not synonymous with pure majoritarianism. Nor, however, does it mean that judges are empowered to countermand the decisions of our representative institutions on the basis of the judge's own social, political, or economic philosophy. Rather, the term "judicial restraint" refers to an attitude toward judicial review as a means for protecting the fundamental values and principles expressed in the Constitution.

Civil liberties in this country have not been the product of the imaginations of high-minded judges, but of careful, consistent, legitimate enforcement of the Bill of Rights, the fourteenth amendment, and other provisions of the Constitution. The philosophy of "judicial restraint," in Judge Bork's words, means that the judge's responsibility "is to discern how the framers' values, defined in the context of the world they knew, apply in the world we know."[1] Judicial restraint thus entails vigorous enforcement of constitutional limits on governmental power (meaning limits that can emerge from a fair reading of the text, structure, history, and purposes of the document), coupled with a rigorous refusal to interfere with democratic government when no limits can honestly be found in the Constitution.

The first amendment provides an ideal illustration of how Judge Bork's philosophy of judicial restraint protects our civil liberties at the same time that it preserves the balance between representative government and judicial review.

Ollman v. Evans[2] contains the fullest statement of Judge Bork's approach to interpreting the Bill of Rights. The case involved a defamation action filed against two newspaper columnists. As seen by most of his colleagues, the key issue was whether statements in the column were "fact" or "opinion"—if "fact" the statements were libelous, if "opinion" they were protected. The trouble is that the

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[1] Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), cert. denied, 471 U.S. 1127 (1985).

[2] 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985).

distinction between "fact" and "opinion" is so uncertain that even a distinguished panel of judges could reach nothing resembling a consensus on the question. The deeper trouble is that a newspaper columnist, faced with such an uncertain test and a potential penalty of one million dollars in compensatory damages and five million dollars more in punitive damages if he guesses wrong, writes at his peril. And as Judge Bork commented, libel actions under such circumstances "may threaten the public and constitutional interest in free, and frequently rough, discussion."[3]

Judge Bork's solution was to turn to the "judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment."[4] In simpler terms, Judge Bork expanded the protections for freedom of the press beyond those yet recognized by the Supreme Court. In Judge Bork's view, certain instances of "rhetorical hyperbole," even if technically the statement of fact, must be protected as well as obvious statements of opinion. This "extraordinar[y]" degree of press freedom is not extended, Judge Bork says, because the press is "free of inaccuracy, oversimplification, and bias, but because the alternative to that freedom is worse than those failings."[5]

While this demonstrates that Judge Bork's protection of civil liberties can be aggressive,[6] how does it square with his posture of judicial *restraint*? To answer this question, we must observe what Judge Bork did *not* do. His *Ollman* opinion exemplifies Judge Bork's jurisprudence in its rejection of two common, but ultimately unsatisfactory, ways of reading the Constitution.

First, Judge Bork did not engage in extra-constitutional creation

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[3] Id. at 993. See also McBride v. Merrell Dow & Pharmaceuticals Inc., 717 F.2d 1460, 1466-67 (D.C. Cir. 1983) (opinion by Judge Bork warning that "[e]ven if many [libel] actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship," and recommending liberal use of summary judgment procedures to weed out meritless claims).

[4] *Ollman*, 750 F.2d at 995.

[5] Id. For another decision in which Judge Bork voted for the defendant in a defamation suit, see Roland v. d'Arazien, 685 F.2d 653 (D.C. Cir. 1982).

[6] It is a sign of the partisan lengths to which the controversy over Judge Bork's nomination has gone that one oft-cited study of his judicial record disparages the *Ollman* opinion's importance to civil liberties on the ground that in libel cases "the party advocating a broad view of the First Amendment is most likely to be a business." Public Citizen Litigation Group, The Judicial Record of Judge Robert H. Bork 43 (1987) [hereinafter Public Citizen Report], reprinted in 9 Cardozo L. Rev. 297, 343 (1987). So much for press freedom. Compare id. at 11, 9 Cardozo L. Rev at 310, where the Public Citizen Report counts Judge Bork's vote in favor of a labor union as "pro-business" on the ground that a labor union engages in the " 'business' of representing workers.") The same study, while purporting to find that Judge Bork invariably votes against assertions of constitutional liberties in split decisions, conveniently leaves *Ollman* out of its scorecard.

of rights. As he puts it: "There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case."[7] This, he has stated elsewhere, would be judicial "fiat," and "not law in any acceptable sense of the word."[8] What distinguishes legitimate constitutional interpretation, according to Judge Bork, is the " 'insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution.' "[9] In *Ollman*, there was no doubt that the first amendment's freedoms of speech and press protect what the Supreme Court has called "uninhibited, robust, and wide-open" debate on public issues.[10] The issue in *Ollman* was not imposition of the judge's values, but how the core principles are to be protected.

Secondly, Judge Bork rejected the notion that the Constitution is frozen in time, and that it carries no meaning other than the specific applications that its framers envisioned for it.[11] "The fourth amendment," he observed, "was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of privacy."[12] His description of the judicial function is one of the most powerful statements ever made on the subject:

> The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances.[13]

Judicial restraint, for Judge Bork, can therefore be summed up as giving a "full, fair and reasonable" interpretation to "established constitutional values."[14] Innovation and social change are the task of the

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[7] *Ollman*, 750 F.2d at 995.

[8] Bork, Foreword to G. McDowell, The Constitution and Contemporary Constitutional Theory at ix (1985) [hereinafter Foreword].

[9] Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 826 (1986) (quoting J. Ely, Democracy and Distrust 1-2 (1980)).

[10] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[11] This has been a consistent theme in Judge Bork's writings. See, e.g., Bork, supra note 9, at 826 ("[I]ntentionalism . . . is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the framers. In so narrow a form the philosophy is useless."). See also Foreword, supra note 8, at x.

[12] *Ollman*, 750 F.2d at 995.

[13] Id. at 996.

[14] Id.

legislator, but aggressive, effective enforcement of our constitutional civil liberties is the duty of the judge.

Similar to *Ollman* is Judge Bork's concurring opinion in *Reuber v. United States*.[15] There, the District of Columbia Circuit was called upon to determine appropriate remedies for a free speech claim in "novel circumstances"[16] in which the actual violation was by a private company, at the instigation of federal officials. Declaring that the speech in question was "precisely the kind of speech the first amendment was designed to protect,"[17] Judge Bork voted to allow a suit for damages, despite the lack of a statute authorizing the suit or any direct precedent compelling it.[18] Judge Kenneth Starr dissented.[19]

Not every case requires the level of jurisprudential explanation found in *Ollman*. More typical, perhaps, is Judge Bork's nonpartisan, straightforward protection of free-speech rights in cases like *Lebron v. Washington Metropolitan Area Transit Authority*.[20] In *Lebron*, an artist opposed to the Reagan Administration sought space from the Washington, D.C. Transit Authority to display a poster that, according to the Authority and the trial court, made the President and his colleagues appear to be laughing at a group of ordinary people. The transit officials declined to sell space to the artist on the ground that the poster was "deceptive." Judge Bork made short work of that argument: "[C]ourts ought not to restrain speech where the message is political and is 'sufficiently ambiguous to allow a discerning viewer' (or reader) to recognize it as" what it is.[21] Judges Bork and Scalia would have gone on to hold that "a scheme that empowers agencies of a political branch of government to impose prior restraint upon a political message because of its falsity is unconstitutional."[22]

As both legal scholars and the Supreme Court recognize, even

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15 750 F.2d 1039 (1985). It should be noted that although this was a split decision in which Judge Bork voted to uphold an individual's first amendment challenge to executive action, it is not included in the Public Citizen Report's calculus. See supra note 6.

16 Id. at 1063.

17 Id. at 1065.

18 Id.

19 Id. at 1059 (Starr, J., dissenting).

20 749 F.2d 893 (D.C. Cir. 1984). Again, it should be noted that this decision in favor of an individual's constitutional claim against executive action was not counted in the Public Citizen Report's scorecard. See supra note 6. The Public Citizen Report's claim that libel is "the one First Amendment area in which Judge Bork has voted on the 'free speech side,' " Public Citizen Report, supra note 6, at 43, 9 Cardozo L. Rev. at 343, is transparently false. The same can be said of its claim that "where anybody but a business interest challenged executive action, Judge Bork exercised judicial restraint either by refusing to decide the case or by deferring to the executive on the merits." Id. at 5, 9 Cardozo L. Rev. at 305.

21 *Lebron*, 749 F.2d at 898.

22 Id.

first amendment rights are not absolute. Judge Bork has participated in decisions rejecting free speech claims, both where the government's countervailing interest was sufficiently strong and where the speech crossed over into conduct that could be regulated on a content-neutral basis. While in some of these cases a different balance might have been struck, in each, Judge Bork's position was supported by established precedent and joined either by his more liberal colleagues or by a majority of the Supreme Court.

Probably the most difficult case was *Finzer v. Barry*.[23] In *Finzer*, members of the Young Conservative Alliance of America sought to picket the Nicaraguan and Soviet embassies to protest their oppressive policies. Longstanding federal law, however, prohibits hostile demonstrations within 500 feet of embassies in Washington. Uncontradicted declarations by State Department security officials in the case stated that enforcement of this provision is necessary to fulfill American obligations under international law and to receive protection for American diplomats in foreign countries. In a divided opinion, Judge Bork declined to hold the statute unconstitutional. Based on a scholarly analysis of the history of international law and the understanding at the time of the Constitution's framing of the relation between international law and the Constitution, as well as the alternative avenues for protest available to the plaintiffs, Judge Bork concluded that the federal statute gives "first amendment freedoms the widest scope possible consistent with the law of nations."[24] Given the unfortunate experience with embassy security in recent years, it is difficult to fault a judge, even in a free-speech case, for refusing to go against the combined judgment of the Congress and the officials charged with security precautions that a contrary decision "would endanger American diplomatic personnel who live and work in other countries."[25]

Finzer and *Lebron* also illustrate the admirable nonpartisanship of Judge Bork's first amendment jurisprudence. In *Finzer*, Judge Bork declined to grant constitutional protection to anti-Soviet and anti-Sandinista speech, with which he presumably agrees, while in *Lebron*, Judge Bork voted to protect a rather malicious anti-Reagan poster, with which he presumably disagrees. Whether one concurs with the specific decisions or not, one cannot help but be reassured that Judge Bork decides such cases without regard to his own opinions on the content of the speech.

In accord with current constitutional doctrine, Judge Bork has

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23 798 F.2d 1450 (D.C. Cir. 1986), cert. granted, 107 S.Ct. 1282 (1987).

24 Id. at 1463.

25 Id. at 1453.

generally voted to uphold reasonable, content-neutral regulation of the use of public property, even when there is an incidental effect on speech. In *Juluke v. Hodel*,[26] Judge Bork joined an opinion by Judge Harry Edwards upholding regulations governing the size and construction materials of placards and the placement of parcels on the sidewalk in front of the White House. And in *Community for Creative Non-Violence v. Watt*,[27] Judge Bork voted to uphold National Park Service regulations prohibiting camping in Lafayette Square (in the center of Washington, D.C., across from the White House), in a challenge by people who wished to sleep in the park during a demonstration against homelessness. While Judge Bork was in the minority, his position was vindicated by the Supreme Court, which reversed the Court of Appeals.[28]

Several specific first amendment issues warrant further discussion: (1) free speech and press rights of broadcasters, (2) nonpolitical speech, and (3) religion. In each of these areas, Judge Bork is either as protective or more protective of civil liberties than current Supreme Court doctrine. In a sense, this is not surprising. The first amendment is one of the most explicit and most basic of the constitutional provisions safeguarding individual liberty. In keeping with Judge Bork's commitment to constitutionalism, protection of first amendment principles is one of the most vital of a judge's responsibilities.

Broadcast Speech

Judge Bork has been in the forefront of extension of free speech and press rights to broadcasters. It has long been an oddity that newspapers and other print media (and derivatively their readers) enjoy full editorial freedom under the first amendment, while radio, television, and other broadcast media (and their listeners) are subject to editorial second-guessing by the Federal Communications Commission. The Supreme Court approved of this double standard in 1969[29] on the theory that there is a "scarcity" of airwaves that justifies regulation of the content of broadcasting. While this theory has been much criticized by first amendment advocates,[30] its empirical validity

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[26] 811 F.2d 1553 (D.C. Cir. 1987). To similar effect is White House Vigil v. Watt, 717 F.2d 568 (D.C. Cir. 1983).

[27] 703 F.2d 586 (D.C. Cir. 1983) (en banc).

[28] Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

[29] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[30] See, e.g., Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213; Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 49 (1975); Krattenmaker & Powe, The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream, 1985 Duke L.J. 151. Justice William O. Douglas, a noted first amend-

has been weakened by the proliferation of broadcast and cable stations, and the comparative paucity of major newspapers. The Supreme Court has thus suggested, more recently, that Congress or the FCC might "signal . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[31]

In the meantime, Judge Bork has voted, with Judge J. Skelly Wright, that the scarcity rationale for regulation does not apply to cable television.[32] He also authored an opinion for the court affirming the FCC's decision not to apply content-based regulations to a new broadcast medium, called "teletext."[33] In the course of that opinion, Judge Bork held that the FCC's "fairness doctrine" was a creature of administrative rule and not mandated by statute,[34] a holding which has stimulated efforts by congressional defenders of the fairness doctrine to amend the law.

Judge Bork's opinion also points out weaknesses in the Supreme Court's scarcity rationale for broadcast regulation, and suggests: "Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media, . . . or announce a constitutional distinction that is more usable than the present one."[35] Presumably this is a hint that Judge Bork will join the majority of the Supreme Court in responding to recent "signals" from the FCC that the fairness doctrine has been overtaken by technological change. If so, such a decision is likely to be highly controversial. It would pit two divergent views of free speech and press against one another. Under one view, free speech and press are guaranteed by the government leaving them alone; under the other, free speech and press are enhanced by government intervention to en-

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ment proponent, opposed the Supreme Court's approval of FCC regulation of broadcast content and stated that the "Fairness Doctrine has no place in our First Amendment regime." CBS Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 154 (1973) (Douglas, J., concurring).

31 FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984).

32 Quincy Cable TV v. FCC, 768 F.2d 1434 (1985), cert. denied, 106 S.Ct. 2889 (1986). This decision gains additional support from the Supreme Court's subsequent decision in City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

33 Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 107 S.Ct. 3196 (1987). The court held that the FCC's "fairness doctrine" need not be extended to teletext, even though certain related provisions of the Communications Act apply.

34 Id. at 517-18.

35 Id. at 509. Compare Judge Bork's *Telecommunications Research* opinion with Bollinger, Freedom of the Press and Public Access, 75 Mich. L. Rev. 1, 10-12 (1976) (criticizing the scarcity rationale, while defending the results of the Supreme Court's decisions on other grounds).

sure that powerful speakers do not dominate the process. While each view has its supporters, it is fair to say that the former is the predominant view, both historically and among first amendment scholars. Judge Bork thus reflects the predominant civil libertarian strain of thought on this contentious issue.

Nonpolitical Speech

In one of the most important and often-cited articles in legal scholarship, Judge Bork, then a professor at the Yale Law School, defended the proposition that constitutional protection should be accorded only to speech that is explicitly political. "There is no basis for judicial intervention," he argued, "to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[36] Since that article in 1971, Judge Bork says, "I have eaten my words time and time again."[37] More specifically, he has stated:

> I do not think . . . that the First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative and based on an attempt to apply Prof. Herbert Wechsler's concept of neutral principles.[38] As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection.[39]

Judge Bork's decisions on the District of Columbia Circuit demonstrate conclusively how far he has come. In *FTC v. Brown & Williamson Tobacco Corp.*,[40] for example, Judge Bork wrote an opinion for the court protecting commercial advertising from an overbroad prohibition. Judge Bork noted that "[b]oth consumers and society have a strong interest 'in the free flow of commercial information.' "[41] In *McBride v. Merrell Dow and Pharmaceuticals Inc.*,[42]

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

37 R. Bork, Remarks at Panel Discussion on the Political Process and the First Amendment, Stanford Law School (Mar. 7, 1986).

38 In the article itself, Professor Bork characterized his views as "ranging shots, an attempt to establish the necessity for theory and take the argument of how constitutional doctrine should be evolved by courts a step or two farther." Bork, Neutral Principles, supra note 33, at 1.

39 Bork, Judge Bork Replies, 70 A.B.A. J. 132, 132 (1984).

40 778 F.2d 35 (D.C. Cir. 1985).

41 Id. at 43 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976)).

42 717 F.2d 1460 (D.C. Cir. 1983).

Judge Bork wrote an opinion for the court extending constitutional protection against defamation suits to a scientific dispute over drug research.[43] His support for first amendment protections for broadcasters, already discussed, perforce applies beyond the area of political speech. It is fair to say that Judge Bork's commitment to freedom of speech, even outside the political arena, now extends as far or farther than current constitutional doctrine.

This is not to say that Judge Bork has repudiated the underlying intellectual construct of his *Neutral Principles* article. On the contrary, both the constitutional theory and the crux of the first amendment analysis remain important to his thought today. His statement of constitutional theory stands as one of the most influential in modern constitutional theory, stating, as it does, a comprehensive theoretical challenge to the noninterpretivist jurisprudence of the Warren Court era. Indeed, many of the ideas expressed in that article have become part of the new accepted wisdom in constitutional interpretation, whether as points of departure or as stimuli to critical reexamination. Similarly, the crux of Judge Bork's first amendment analysis—that the most fundamental aspect of free speech is its relevance to political discourse and hence to democratic governance—is a continuing theme of first amendment scholarship. Judge Bork's change of mind since 1971 has been to recognize that the protections of the first amendment extend well beyond its political core.

Nor is this to say that all forms of expression are now constitutionally protected in Judge Bork's view. He remains persuaded, for example, that the government has the authority to regulate pornography. While this position is highly controversial in some circles, it commands wide acceptance on the Supreme Court and around the country. Moreover, recent research into the effects of violent and degrading portrayals of women and children in pornography has sparked increased efforts, on the part of feminists and traditionalists alike, to control pornography within constitutional bounds. It can be predicted that Judge Bork's philosophy of judicial restraint will not interfere with this effort.

Religion

One of the most confused and unsatisfactory areas of modern constitutional doctrine is related to the problems of religion and government. Scholars, lower court judges, and even many of the current

[43] *McBride* is a good illustration of why Judge Bork was moved to expand free speech protections beyond explicitly political speech: the dispute in *McBride*, while scientific, had obvious ramifications for public policy.

Supreme Court Justices have complained that the Court's doctrine is indeterminate and often inconsistent, and that it often ill serves the underlying constitutional purposes of religious freedom. Judge Bork could be any one of dozens of scholars—right, left, or center—when he observes, quoting Justice Antonin Scalia, that the law in the religion area is in "a state of utter chaos and unpredictable change."[44]

Judge Bork has not participated in any significant case raising issues under the free exercise or establishment clauses of the first amendment. Judge Bork joined a unanimous per curiam judgment in *Murray v. Buchanan*,[45] which simply followed controlling Supreme Court precedent. He voted against rehearing en banc in *Goldman v. Weinberger*,[46] along with Judges Robinson, Wright, Tamm, Wilkey, Wald, Mikva, and Edwards. The Supreme Court ultimately affirmed by a vote of five to four, with Justices Powell, Stevens, White, Rehnquist, and Chief Justice Burger in the majority.[47] It is impossible to know whether or not Judge Bork's vote reflected his views on the merits of the case.

Nonetheless, in several public appearances Judge Bork has offered comments on the religion clauses that, if adopted, might well bring greater coherence to this doctrinal area and better protect religious liberties. He has not proposed a specific alternative doctrine. Indeed, he has warned that "we ought to be [wary] of formulating clear rules for every conceivable interaction of religion and government."[48] Instead, he relies principally on a "relaxation of current rigidly secularist doctrine."[49] This, he says, would "permit some sensible things to be done."[50]

Judge Bork cites the example of *Aguilar v. Felton*.[51] *Aguilar* involved one of the cornerstone programs of the Great Society: Title I remedial education assistance for deprived children in inner-city neighborhoods. In passing the program, Congress specifically determined that remedial help was needed, and should be provided, to eligible poor children whether they attend public or nonpublic school. This was in recognition of the large number of needy children who, for reasons of religious choice or educational opportunity, decide to

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44 Address by Judge Robert H. Bork, Religion and the Law, University of Chicago (Nov. 13, 1984), at 2 (available at the Cardozo Law Review) [hereinafter Religion and the Law].

45 720 F.2d 689 (D.C. Cir. 1983) (per curiam).

46 739 F.2d 657 (D.C. Cir. 1984).

47 Goldman v. Weinberger, 475 U.S. 503 (1986).

48 Address by Judge Robert H. Bork, Brookings Institute (Sept. 12, 1985), at 11 (available at the Cardozo Law Review).

49 Id. at 10.

50 Id.

51 473 U.S. 402 (1985).

attend inner-city parochial schools. The program allowed full-time public school remedial education specialists to travel from school to school, public and nonpublic alike, to provide special training in English, math, and related areas to eligible children on the premises of their own schools. When challenged under the establishment clause as an aid to religion, Judge Henry J. Friendly commented that the program had "done so much good and little, if any, detectable harm."[52] By a five to four vote, the Supreme Court held the program unconstitutional.

As Judge Bork commented, *Aguilar* illustrates the "power of the three-part test[53] to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy."[54] In his critique of establishment clause doctrine, Judge Bork relies heavily on the work of Jesse Choper, Dean of the Law School at the University of California at Berkeley, as well as historical researchers suggesting that modern doctrine is at odds with the original purposes of the religion clauses. If renewed emphasis were placed on protecting religious choice, instead of the mechanistic three-part test, then programs like that in *Aguilar* would be permissible and even desirable. This jurisprudence would protect religious minorities, including those with no religious faith; but it would do so by accommodation of differences rather than by an artificial secularization of society.[55]

Much of the constitutional problem, Judge Bork has suggested, stems from the "extra-constitutional intellectual tradition" that asserts that government has the power to act only to prevent physical harm to others.[56] In this, he joins an emerging majority of the Supreme Court, which in recent cases has rejected claims that laws are unconstitutional because they reflect the moral and religious beliefs of the community.[57] It is a mistake to attempt to separate moral beliefs from law, according to Judge Bork, since so much of what we value in the American legal tradition—not least its libertarian im-

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52 Felton v. Secretary of Educ., 739 F.2d 48, 72 (2d Cir. 1984), aff'd sub nom. Aguilar v. Felton, 473 U.S. 402 (1985).

53 This is a reference to the Supreme Court's three-part test for an establishment of religion: a statute must have a "secular purpose," must have an effect that "neither advances nor inhibits religion," and must not entail "excessive entanglement" between church and state. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

54 Bork, Religion and the Law, supra note 44, at 4.

55 Some commentators have asserted that Judge Bork would permit restoration of spoken prayer in public schools. However, nothing in his record supports this assertion and, given his theoretical premises, the claim is implausible.

56 Bork, Religion and the Law, supra note 44, at 11.

57 See Bowers v. Hardwick, 106 S. Ct. 2841 (1986); Harris v. McRae, 448 U.S. 297, 319-20 (1980).

pulse—is a product of moral tradition. "Our constitutional liberties arose out of historical experience and out of political, moral and religious sentiment," he has stated.

> They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning.[58]

In these brief remarks, Judge Bork shows the essential unity of three great themes in American constitutionalism: individual liberties, moral community, and democratic governance. Whether one agrees with his specific conclusions or not, it is impossible not to recognize the major contribution that Judge Bork has made to contemporary legal discourse.

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[58] Bork, Tradition and Morality in Constitutional Law, in The Francis Boyer Lectures on Public Policy, American Enterprise Institute for Public Policy Research, at 8 (1984).