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Bork and Beethoven

Richard A. Posner*

Commentary magazine is distinguished for the lucidity and forthrightness of its articles and for its singleminded advocacy of a “neoconservative” philosophy built around the related themes of conservative social and cultural values, aggressive anti-Communism, and determined opposition to the egalitarian programs espoused by liberal Democrats and university radicals. I have been a faithful reader of the magazine for many years and my strong impression is that it does not knowingly publish articles that deviate from this party line. Yet the February 1990 issue contains two articles that take opposite positions on the issue of “originalism”—that is, interpretive fidelity to a text’s understanding by its authors. The tension between the articles is masked by the fact that one is about Robert Bork and the other is about musical performance and by the further fact that both embrace the neoconservative creed. Nevertheless there is a deep and illuminating fissure between them.

Bork Revisited, by Terry Eastland,¹ public relations director of the Department of Justice for most of the Reagan era, including the period of Bork’s unsuccessful run for the Supreme Court, discusses three books about the Bork debacle, including Bork’s own.² Eastland’s main purposes are to show that there really was an unprecedented as well as unsavory left-wing campaign against Bork’s confirmation, and that the Justice Department should not be blamed for Bork’s defeat, since the handling of the confirmation process had been assigned to the White House staff rather than to the Department. The latter point, while important to Eastland’s *amour propre*, is of no general interest, not least because Bork would have been defeated (it is clear in hindsight) even if his campaign had been handled more adroitly, which the Department of Justice might or might not have done. It is a fact that Bork was the target of a scurrilous scare campaign orchestrated by left-wingers, but Eastland is wrong to suppose that this is something new. Notably vicious political battles over Supreme Court nominees took place at the

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. The excellent comments of Dennis Black, Frank Easterbrook, Thomas Grey, Lawrence Lessig, and Cass Sunstein on a previous draft are gratefully acknowledged—but none of these gentlemen is to be deemed complicit in my argument or conclusions.

1. COMMENTARY, Feb. 1990, at 39.

2. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1989).

very outset of our constitutional history.³ This should matter to an originalist, and therefore to Eastland. He describes Bork's book as "the best single volume we have on the great constitutional issues that now divide the nation,"⁴ and applauds it for its effort "to rescue the integrity and independence of the law from those who would politicize it."⁵ The project of this book he loves is the defense of originalism; in Eastland's paraphrase of Bork, the "recovery of the once dominant view of constitutional law, which is that courts should apply the Constitution according to the principles intended by those who ratified the document."⁶

One might expect reinforcement of the originalist approach from "Cutting Beethoven Down to Size," by *Commentary's* music critic, Samuel Lipman.⁷ For it is an article about the authentic-performance movement, which is to musical interpretation what originalism is to legal interpretation. The movement involves "the required employment of original instruments—instruments resembling as closely as possible those on which the music was to be played at the time of its composition"; "reliance on what remains of the composer's original text, freed of all inadvertent error in transmission and publication, and of all subsequent editorial emendation"; and "the use of original performance styles—the complete observance of the composer's explicit indications, and an untiring attempt to recover all that can be known of the unwritten, customary, and taken-for-granted methods of deciphering and implementing his written notation."⁸ Thus, "[i]n authentic performances the sought-after styles, including details of rhythmic execution, instrumental techniques, and concert pitch, are those contemporaneous with the composer—the exact way a composer might have heard his works when they were first rendered, at the time of their composition or shortly thereafter, by the best and most representative executants of the day."⁹

This sounds much like Bork's originalism, yet it soon becomes apparent that Lipman hates the authentic-performance movement. "Whereas the new approach is based on the use of scholarship to recapture a lost material reality of physically existing instruments, written texts, and definable styles, the best that has gone on over the past century and more in concert halls and opera houses has stressed spiritual

3. "The rejection of John Rutledge for the Supreme Court in 1795 supports the view that politically motivated votes [on confirmation of Supreme Court nominees] are legitimate, if not desirable, under our system of divided appointment power." James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 365 (1989) (student author).

4. Eastland, *supra* note 1, at 39.

5. *Id.* at 42.

6. *Id.* at 43 (paraphrasing R. BORK, *supra* note 2, at 143). Unless otherwise indicated, page references are to Bork's book.

7. COMMENTARY, Feb. 1990, at 53.

8. *Id.*

9. *Id.* at 54.

insight—the empathic projection of the minds and talents of performers into the creative souls of great composers.”¹⁰ Lipman’s particular *bête noire* is the English conductor Roger Norrington, whose performances of Beethoven’s symphonies

are short-winded, the music does not breathe. Because the music does not breathe, this quintessentially passionate music conveys no passion. . . . These performances are, in short, consistently bad—and what is bad about them is precisely the result of the fleshing-out of all the absurd musico-intellectual pretensions of the authentic performance movement.

. . . .

. . . It is no defense . . . to adduce Beethoven’s metronome markings as justification for these musical crimes. Any musician with experience in playing music by living composers knows that of all their performance directions, metronome markings are the least viable, consistent, and trustworthy.¹¹

The reasons for the unreliability of living composers’ metronome markings, reasons that Lipman thinks equally applicable to Beethoven,

include distance in time from the work’s actual composition, inexperience with the requirements of performance, a frequent disdain for the very fact of performance, and above all the composer’s preexisting and complete knowledge of the content and structure of the music, a knowledge which no audience—and few performers either—can be expected to possess.¹²

A striking feature of Lipman’s essay—redeeming it for *Commentary* orthodoxy—is his attributing the authentic-performance movement not, as one might expect, to cultural conservatism but instead to cultural radicalism, aesthetic relativism, and the egalitarian obsessions of intellectuals. Norrington’s “all-out attack on the foundations of Beethoven’s greatness” is part of “the postmodern effort to humble once-mighty artists, thinkers, and values.”¹³

I do not want to be understood as endorsing Lipman’s criticism of the authentic-performance movement. I am not competent to offer an evaluation.¹⁴ Nor do I believe that if one is an originalist in one domain of interpretation one must be an originalist in all.¹⁵ Another possibility, moreover, is that the originalist and nonoriginalist approaches to musical interpretation are equally valid; if so, they can coexist happily, and there is no need to choose between them, whereas if judges cannot agree on how to interpret statutes and the Constitution, laws

10. *Id.*

11. *Id.* at 56, 57.

12. *Id.* at 57.

13. *Id.* at 56.

14. For a (nonoriginalist) defense of the movement, see Peter Rabinowitz’s review of the Norrington recordings of Beethoven’s symphonies in *FANFARE*, Mar./Apr. 1990, at 134–37.

15. See generally RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 209–68 (1988).

will lack uniformity and predictability and the society will be in trouble. What I do contend is that originalism cannot be thought either the natural or the inevitable method of interpreting a given body of texts, or even the method of interpretation natural or inevitable for conservatives to follow.

It is time to confront directly Bork's arguments on behalf of originalism in constitutional interpretation. Those arguments form the core of *The Tempting of America*. What follows is not a book review, but lest the critical tenor of my remarks be misunderstood, let me emphasize not only that I have the highest personal and professional regard for the author but also that *The Tempting of America* is a fine book which deserves its best-sellerdom. It is beautifully written. It manages the nigh-impossible feat of presenting a scholarly thesis in a form accessible to the lay reader. It offers powerful criticisms of particular constitutional theories, doctrines, and decisions. It is free of rancor, even in the discussion (comprising the last quarter of the book) of the vicious and dishonest campaign that the American left waged against Bork's confirmation. And it makes as ringing a defense of originalism—the approach which teaches that to a judge interpreting the Constitution “all that counts is how the words used in the Constitution would have been understood at the time [of enactment]”¹⁶—as we are likely to hear. The question I want to consider is whether it is a successful defense.

I think not. Bork fails to produce convincing *reasons* why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases. At times, indeed, he seems to want to place the issue outside the boundaries of rational debate. How else to explain the religious imagery that permeates his discussion of originalism and its enemies? It begins with the title of the book—*The Tempting of America*. Any doubt that the reference is to *the* temptation is dispelled by the title of chapter one—“Creation and Fall”—which begins, “The Constitution was barely in place when one Justice of the Supreme Court cast covetous glances at the apple that would eventually cause the fall.”¹⁷ (This must have been the original constitutional sin.) Bork embraces the idea that the Constitution is “our civil religion,”¹⁸ and, he never tires of repeating, originalism is its “orthodoxy.”¹⁹ Naturally, then, Bork's opponents are guilty of “heresy,” a term he elucidates with quotations from the Catholic apologist Hilaire Belloc.²⁰ Since it is heresy, “it is crucial . . . to root it out,”²¹ and therefore “no person should be nominated or confirmed [for the Supreme Court] who does not dis-

16. P. 144. Equivalently, “[i]f the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended.” *Id.* at 145.

17. P. 19.

18. P. 153.

19. *E.g.*, p. 6.

20. *E.g.*, pp. 4, 11.

21. P. 11.

play both a grasp of and devotion to the philosophy of original understanding."²² Bork adjures the Supreme Court to "'go and sin no more,'"²³ calls Cardinal Newman and St. Thomas More to his aid along with Belloc,²⁴ and in a surprising twist compares *himself* to the heretic: "If the philosophy of political judging is a heresy in the American system of government, it is the orthodoxy of the law schools and of the left-liberal culture. I would have done well to remember that in the old days nobody burned infidels, but they did burn heretics."²⁵

A summons to holy war is not an *argument* for originalism, and law's commitment to reason precedes, both logically and temporally, its commitment to originalism. Bork's militance and dogmatism will buck up his followers and sweep along some doubters but will not persuade the rational intellect. One especially wants a better ground than piety for genuflecting to originalism because Bork rightly if incongruously reminds us of the danger of "absolutisms" and "abstract principles,"²⁶ criticizes reliance in constitutional law on "history and tradition,"²⁷ and implies in his interesting discussion of originalism's historical roots that the nonoriginalist heresy may be part of the original understanding of the Constitution.²⁸ Apparently there was no Eden.

Although the book has no chapter on the reasons why the judiciary should embrace originalism—a major and I think telling omission—several reasons are mentioned. The first is that it is implicit in our democratic form of government. Originalism is necessary in order to curb judicial discretion, and curbs on judicial discretion are necessary in order to keep the handful of unelected federal judges from seizing the reins of power from the people's representatives. This argument founders on three shoals. The first is that, for excellent reasons, the democratic (really Bork means the populist) principle is diluted in our system of government. We do not have government by plebiscite or referendum. (Some states have referenda, but there are none at the federal level.) We have *representative* democracy. The actual policy decisions are made by agents of the people rather than by the people themselves—precisely so that raw popular desire will be buffered, civilized, guided, mediated by professionals and experts, and will be informed through deliberation. Even the representatives do not have a blank check. They are hemmed in by the Constitution—itsself representing,

22. P. 9.

23. P. 159.

24. Pp. 352, 354.

25. P. 343. Not quite nobody: During the Crusades, the Inquisition, and other periods of Christian zealotry, many Jews, Turks, Arabs, and other infidels were killed on religious grounds, often by being burnt at the stake.

Despite Bork's fondness for religious imagery, I am sure his calling the "right of privacy" "a loose *canon*," p. 97 (emphasis added), is merely a typo.

26. P. 353.

27. P. 119.

28. Pp. 19–27.

to be sure, popular preferences, since the Constitution was ratified by popular vote; but they are the preferences of a sliver of a tiny population two centuries ago. The question posed by an originalist versus an activist or a pragmatic judiciary is not one of democracy or no democracy. It may not even be a question of more or less democracy—are nations like Great Britain that lack a constitutional court more democratic than the United States? It is a question of the *kind* of democracy we want, as Bork himself makes clear in his perceptive criticism of the Supreme Court's "one person, one vote" decisions.²⁹

Second, if democracy is the end, originalism is a clumsy means. This is apparent from Bork's discussion of the commerce clause of the Constitution. As he points out, the Supreme Court in the wake of the New Deal read out of the Constitution the limitations that the clause places on the powers of the federal government.³⁰ Bork's originalism implies that the Court erred. But by erring it transferred power to the people's representatives, who were in turn responding to an enormous and sustained tide of public opinion.

The third objection to Bork's democracy-mongering is that, on the evidence of the book, Bork himself is not an admirer of popular government. And why should he be? His appointment to the Supreme Court was rejected by the Senate of the United States, which with all its manifest faults, well documented in Bork's book, is a legislative body of above-average quality, albeit not so representative as many other such bodies (no "one person, one vote" there). And he was rejected because of a grass-roots political campaign that he devotes a quarter of the book to denouncing. The first page of the book warns against "the temptations of politics," and laments that "politics invariably tries to dominate" the professions and academic disciplines "that once possessed a life and structure of their own." Later Bork denounces "populism,"³¹ although his implicit definition of democracy is populism—the conforming of public policy to the popular preferences that he is so distressed to find the courts now and then thwarting in the name of the Constitution. He does not explain how increasing the power of legislatures by diminishing that of judges trying to limit legislative power could be the antidote to the rampant politicization of American life that he deplors.

The second reason Bork offers in defense of originalism is that it is needed to preserve the effectiveness of the Supreme Court. He fears that those who succeed in ousting originalism "will have destroyed a great and essential institution," namely the Court.³² But on Bork's account, the Court has wrought mainly mischief in its two centuries of existence, so one wonders why he is so passionate to preserve it. He

29. Pp. 84-90.

30. Pp. 56-57.

31. P. 132.

32. P. 2; *see also* p. 349.

points out that other Western nations, which do not have courts comparable to our Supreme Court, have roughly the same set of liberties that we have. The implication is that we could do quite nicely without a constitutional court.

However this may be, there is no evidence that the Court's authority depends on adherence to originalism. Bork knows this, for he says (in great tension with his remark about the destructibility of a great and essential institution) that "the Court is virtually invulnerable"; it "can do what it wishes, and there is almost no way to stop it, provided its result has a significant political constituency."³³ This is a sensible observation; the Court's survival and flourishing are indeed more likely to depend on the political acceptability of its results than on its adherence to an esoteric philosophy of interpretation. In fact the Court has never been consistently originalist, yet has survived; perhaps the Justices know more about survival than their critics do.

Bork argues that if the only criterion for evaluating the Supreme Court's decisions is their political soundness, anyone who thinks the Court is politically wrong "is morally justified in evading its rulings whenever he can and overthrowing it if possible in order to replace it with a body that will produce results he likes."³⁴ He adds ominously:

The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution capable of wielding power. If the Court will not agree with him, why not argue his case to some other group, say the Joint Chiefs of Staff, a body with rather better means for enforcing its decisions? No answer exists.³⁵

Well, there are plenty of answers, and one is that Bork is posing a false dichotomy: a court committed to originalism versus a court that is a "naked power organ";³⁶ blind obedience versus rebellion. These dichotomies imply that the *only* method of justification available to a court, the only method of channeling judicial discretion and thus of distinguishing judges from legislators, is the originalist. No other method—one that emphasizes natural justice, sound justice, social welfare, or neutral (but not necessarily originalist) principles—so much as exists. There is no middle ground.³⁷ Which surely is false.

And it may be doubted whether the forbearance of the Joint Chiefs of Staff to attempt a takeover of the government of the United States is dependent to even a tiny degree on the Supreme Court's adherence to originalism. Judging by the evidence that Bork arrays, the Court has since the beginning strayed repeatedly from the originalist path, yet the

33. P. 77.

34. P. 265.

35. *Id.*

36. P. 146.

37. "The truth is that the judge who looks outside the historic Constitution always looks inside himself and nowhere else." P. 242. Beware any sentence that begins: "The truth is"

Joint Chiefs (or their predecessors) have never tried to take over the government. Nor are they likely to try. It is not true that the Joint Chiefs have better means of enforcing their decisions than the Supreme Court does. If the Joint Chiefs ordered the army to take over the government, their order would not be obeyed. Bork believes that the Court has issued a parallel order, "taking over" the government from the elected branches, and that its order *has* been obeyed. This implies correctly that, other than in times of general war, the Supreme Court is more powerful than the Joint Chiefs.

Bork's invocation of the Joint Chiefs proves only that he is almost as fond of military as of religious imagery. He particularly likes the Leninist metaphor of seizing the "commanding heights" or "high ground."³⁸ Military and religious terms are a common part of our speech ("war," "coup d'état," "anathema," "devotion," and so forth); it is the *density* of these particular systems of imagery in Bork's book that gives the book its militant and dogmatic tone, and a good deal of its polemical power. But that power is purchased at a price in accuracy.

Although Bork derides scholars who try to found constitutional doctrine on moral philosophy, it should be apparent by now that he is himself under the sway of a moral philosopher. His name is Hobbes, and he too thought the only source of political legitimacy was a contract among people who died long ago. This may have been a progressive idea in an era when kings claimed to rule by divine right, but it is an incomplete theory of the legitimacy of the modern Supreme Court. There are other reasons for obeying a judicial decision besides the Court's ability to display, like the owner of a champion airedale, an impeccable pedigree for the decision, connecting it to its remote eighteenth-century ancestor. And Bork knows this, for he believes that judges should give great weight to precedents, even when a precedent rests on a mistaken interpretation of the Constitution.³⁹

I said that the idea of the Constitution as a binding contract is an incomplete theory of political legitimacy; I did not say that it is an unsound theory. A contract induces reliance that can make a strong claim for protection; it also frees people from the necessity for continually reexamining and revising the terms of their relationship. These values are independent of whether the original contracting parties are still alive. But a long-term contract is bound eventually to require, if not formal modification (which in the case of the Constitution can be accomplished only through the amendment process), then flexible interpretation, to cope effectively with altered circumstances. Modification and interpretation are reciprocal; the more difficult it is to modify the instrument formally, the more exigent is flexible interpretation. Bork is well aware of the practical impediments to amending the Constitution,

38. *E.g.*, pp. 3, 338.

39. *See* note 92 *infra*.

but he is unwilling to draw the inference that flexible interpretation is therefore necessary to prevent constitutional obsolescence. The amendment process is too slow, too cumbersome, too easily thwarted to maintain a living Constitution.

In his advocacy of originalism Bork places considerable weight on what might be termed the argument from hypocrisy, defined for these purposes as the tribute that vice pays to virtue. The dominant rhetoric of judges, even activist judges, is originalist, for originalism is the legal profession's orthodox mode of justification. The judge is the oracle through which the god (Law) speaks. This stance may reflect a queasiness about the legitimacy—less grandly, the public acceptability—of nonoriginalist decisions; or it may simply be that judges, like everyone else, like to foist responsibility for difficult and unpopular decisions on others. The long-dead framers are a convenient group to whom to pass the buck, since they can't refuse it. But although judges are not immune from the all too human tendency to deny responsibility for actions that cause pain, the significance of this fact is another matter. It is a considerable paradox to suggest that the false reasons which uncandid judges give for their actions are the only legitimate grounds for judicial action.

If the result-oriented or activist judge is queasy about the pedigree or title deeds of his rulings, the originalist is (on the evidence of Bork's book, at any rate) queasy about the consequences of originalist rulings. And rightly so. A theory of constitutional interpretation that ignores consequences is no more satisfactory than one that ignores the importance of building a bridge between the contemporary judge's pronouncement and some authoritative document from the past. It is difficult to argue to Americans that in evaluating a political theory they should ignore its practical consequences. Bork is not prepared to make such an argument. He continually reassures the reader that originalism does not yield ghastly results, while at the same time denouncing judges who are "result-oriented." The argument from hypocrisy can be turned against originalism. Bork, as we are about to see, is not a practicing originalist.

1. The doctrine of incorporation holds that the fourteenth amendment makes some or all of the provisions of the Bill of Rights constraints on state governments. About the validity of the doctrine Bork says only: "There is no occasion here to attempt to resolve the controversy concerning the application of the Bill of Rights to the states."⁴⁰ Why not? The issue is central to determining the contemporary reach of the Constitution, and Bork is not elsewhere bashful about discussing controversial issues of constitutional interpretation. His diffidence here is all the more surprising because a rejection of incorporation is clearly entailed by his discussion of the only two clauses of the four-

40. P. 93.

teenth amendment that could be thought to incorporate the Bill of Rights. The Supreme Court has used the due process clause, but Bork is emphatic that all that this clause requires is that states use fair procedures in applying their substantive law.⁴¹ It could not, therefore, require the states to respect free speech or the free exercise of religion or any of the other substantive liberties in the Bill of Rights. As for procedural liberties, since the due process clause of the fifth amendment is, if it is purely a procedural clause, only one of the procedural clauses of the Bill of Rights, it is hardly likely, on an originalist construal, that transposed to the fourteenth amendment it stands for all the other procedural liberties in the Bill of Rights.

The other clause of the fourteenth amendment that might provide a vehicle for incorporation is the privileges and immunities clause, but Bork regards it as a "dead letter,"⁴² a "cadaver,"⁴³ a "corpse,"⁴⁴ because its meaning is unascertainable. Even to an originalist, bound to respect the dead hand of the past, a corpse is not a seemly vehicle for imposing the Bill of Rights on the states; nor does Bork suggest that it could be used for this purpose.⁴⁵ Among other objections to deriving the doctrine of incorporation from the privileges and immunities clause, it would make the due process clause superfluous.

Bork is unwilling to follow the logic of his analysis to its inevitable conclusion, which is that the doctrine of incorporation is thoroughly illegitimate. On the contrary, throughout most of the book he takes the doctrine for granted, as something he has no wish to disturb.⁴⁶ He must realize that his originalist position would be rejected out of hand were it understood to make the Bill of Rights totally inapplicable to the states. He is being pragmatic, not originalist.

2. No constitutional theory that implies that *Brown v. Board of Education*⁴⁷—which held that public school segregation violates the equal protection clause of the fourteenth amendment—was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it *was* decided incorrectly. The language of the equal protection clause, which does not speak of legal equality but of equal protection of the laws (whatever they may be), and its background in the refusal of law enforcement authorities in southern states to protect the freedmen against the private violence of the Ku Klux Klan, suggest that all the clause forbids is the selective withdrawal of legal protection on racial grounds. A state cannot make black people outlaws by refusing to enforce the state's criminal and tort law when the

41. P. 31.

42. P. 166.

43. P. 180.

44. *Id.*

45. In this he is correct. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 344-51 (1985); see also pp. 181-82 of Bork's book.

46. P. 49.

47. 347 U.S. 483 (1954).

victims of a crime or tort are black. To the consistent originalist that should be the extent of the clause's reach. Bork points out that the framers and ratifiers of the fourteenth amendment did not intend to bring about social equality between the races and would not have cared if the failure to achieve such equality inflicted psychological wounds on blacks.⁴⁸ And Bork objects to extracting from a constitutional provision "a concept whose content would so dramatically change over time that it would come to outlaw things that the ratifiers had no idea of outlawing."⁴⁹

Yet he shies away from concluding that *Brown* was wrong, and offers in its defense the following argument:

By 1954, when *Brown* came up for decision, it had been apparent for some time that segregation rarely if ever produced equality. Quite apart from any question of psychology [an irrelevant question, on Bork's reading of the fourteenth amendment], the physical facilities provided for blacks were not as good as those provided for whites. That had been demonstrated in a long series of cases. The Supreme Court was faced with a situation in which the courts would have to go on forever entertaining litigation about primary schools, secondary schools, colleges, washrooms, golf courses, swimming pools, drinking fountains, and the endless variety of facilities that were segregated, or else the separate-but-equal doctrine would have to be abandoned. The Court's realistic choice, therefore, was either to abandon the quest for equality by allowing segregation or to forbid segregation in order to achieve equality.⁵⁰

So the Court chose equality. But the equal protection clause does not (on its face anyway) require equality; it requires equal protection of the laws. The talk of "equality" makes it sound as if Bork is on the side of the angels, but the passage quoted above shows that Bork favors desegregation only because he believes it the only way of sparing the courts the bother of monitoring segregated schools (and other facilities) to make sure they are physically equal. This is an unconvincing reason. Measurement of physical equality is easier than many things that courts do. Physical equality of schools could be measured by per-pupil expenditures, by teacher-student ratios, and by other dimensions of effort or quality. It is also a petty reason—imagine the tinny sound that would be emitted by a *Brown* opinion that made the decision turn on the difficulty of measuring physical equality coupled with indifference to the psychological impact of segregation. And it is a reason inconsistent with Bork's criticism of *Miranda v. Arizona*⁵¹—a decision explicitly premised on the administrative costs of ensuring compliance with the rule against coerced confessions.⁵² He does not explain why those

48. P. 76.

49. P. 214.

50. P. 82.

51. 384 U.S. 436 (1966).

52. P. 94. In *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 12-15

costs should be decisive in race law but illegitimate in criminal law.

There is a grudging quality to Bork's defense of *Brown*. It emerges not only in the tortured character of his argument but also in his assimilation of the decision to "liberal" and "egalitarian" policy measures,⁵³ for Bork considers himself neither a liberal nor an egalitarian. To him, a liberal is a modern welfare state liberal and an egalitarian is someone who believes in equality of result, not of opportunity. There is an older tradition of liberalism, however, the liberalism of John Locke, Adam Smith, Jeremy Bentham, and John Stuart Mill. They believed in a limited state, and (the last three anyway) would have disapproved of the efforts of our southern states to use law to back a caste system. This tradition of liberal thought provides a footing for *Brown* that does not require the embrace of the egalitarian principles which Bork deplors. Indeed, this tradition nourishes the libertarian or free-market strand of modern conservative thought, a strand not at all egalitarian. The other strand—call it social conservatism—is rooted in religious ideas and attitudes, in love of stability, and in fear of change. *Commentary's* neoconservatism is a form of social conservatism. Its spirit suffuses Bork's book, and is crystallized in such remarks as "no activity that society thinks immoral is victimless. Knowledge that an activity is taking place is a harm to those who find it profoundly immoral."⁵⁴

3. Bork would use the obscure, and usually assumed to be nonjusticiable, "guarantee" clause in article IV of the Constitution (guaranteeing each state the right to a republican form of government) to correct extreme forms of legislative malapportionment.⁵⁵ This suggestion confuses republican with democratic and contradicts Bork's own statement that the clause left the states free to experiment with different forms of government, provided only that state governments did not become "aristocratic or monarchical."⁵⁶

4. Bork suggests that the guarantee clause might also be used to require states "to avoid egregious deviations from their own laws."⁵⁷ If adopted, this suggestion, by making federal judges the final arbiters of state law, would license a degree of judicial activism that would make the ghost of Earl Warren blush.

5. Bork notes with apparent approval the suggestion that "if anyone tried to enforce a law that had moldered in disuse for many years, the statute should be declared void by reason of desuetude."⁵⁸ He is

(1971), Bork had offered additional arguments for *Brown*. They are not repeated in his book, and it is unclear whether Bork still subscribes to them. They are no more convincing than the argument he does repeat. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 305-07 (1990).

53. Pp. 92-93.

54. P. 123.

55. Pp. 85-86.

56. P. 87 (quoting Madison).

57. P. 86 n.*.

58. P. 96.

referring to the statute banning contraceptives that was struck down in *Griswold v. Connecticut*,⁵⁹ but the logic of “desuetude” applies equally to the long-unenforced sodomy statute upheld in *Bowers v. Hardwick*⁶⁰—a decision of which Bork thoroughly approves.⁶¹ He does not indicate where in the Constitution we should look for the desuetude clause.

6. Bork hints that there is a residual power, lurking in some unspecified provision of the Constitution, to invalidate “horrible” laws,⁶² although he can find no constitutional basis for the decision in *Skinner v. Oklahoma*,⁶³ which invalidated a statute, fairly describable as “horrible,” that authorized the sterilizing of larcenists (but not embezzlers!), presumably on some notion of the heritability of criminal tendencies.⁶⁴

7. Bork believes that courts have the power to create “buffer zone[s]” around constitutional rights “by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution.”⁶⁵ In other words, explicit constitutional rights create penumbras of further constitutional protection. Yet Bork is derisive about Justice Douglas’s use of the penumbra concept in *Griswold*⁶⁶ and also says that a judge “may never create new constitutional rights.”⁶⁷

8. Bork even appears to believe—this is his most startling backsliding from originalism—that “any challenged legislative distinction [must] have a rational basis” and hence that “all legislative distinctions between persons [must] be reasonable” or else stand condemned under the equal protection clause.⁶⁸ This is the approach of Justice Stevens, and differs from what has become (pardon the expression) the orthodox approach because it jettisons reference to fundamental rights. Bork hates the approach of judges’ deciding which rights are fundamental (for example, the right not to be discriminated against on grounds of sex or by reason of illegitimate birth or of alienage, and the right to access to the courts) and which are not (for example, the right to an education) and giving the former more protection than the latter. But he likes Stevens’s approach. “Justice Stevens’ formulation might not in fact cause any major change in the application of the equal protection clause but it would focus judges’ attention on the reasonableness of distinctions rather than on a process of simply including or

59. 381 U.S. 479 (1965).

60. 478 U.S. 186 (1986).

61. Pp. 116–17.

62. P. 97.

63. 316 U.S. 535 (1942).

64. P. 62.

65. P. 97.

66. Pp. 97–99.

67. P. 147. “[T]he ratifiers’ creation of one set of rights is simultaneously a failure or refusal to create more. There is no basis for extrapolating from the rights they did create to produce rights they did not.” P. 198.

68. P. 330. He means all legislative distinctions not involving race; virtually all racial distinctions are invalid by virtue of *Brown* and the cases following it.

excluding groups on criteria that can only be subjective and arbitrary."⁶⁹ In other words, for all his fulminations against fundamental rights jurisprudence, Bork appears to accept the bulk of modern equal protection law.⁷⁰ He just objects to the subjectivity of fundamental rights talk compared to the (imagined) objectivity of a standard of reasonableness. He does not discuss the originalist foundations, if any, of the Stevens approach.

Originalism's bark (at least this originalist's bark), it appears, is worse than its bite. Originalism may indeed be completely plastic; for besides the examples I have given, apparently it is acceptable originalist argumentation to defend a statute that forbids defacing the American flag by pointing out that "[n]obody pledges allegiance to the Presidential seal or salutes when it goes by."⁷¹ Originalism—at least Bork's originalism—is not an analytic, but a rhetoric that can be used to support any result the judge wants to reach. The conservative libertarians whom Bork criticizes (Richard Epstein and Bernard Siegan) are originalists; his disagreement with them is not over method, but over result. The *Dred Scott* decision—to Bork, the very fount of modern judicial activism⁷²—is permeated by originalist rhetoric.⁷³

We should, of course, distinguish between good originalism and bad originalism. As Bork correctly notes,⁷⁴ the key holding of the *Dred Scott* decision—that the Missouri Compromise was unconstitutional—was a straight application of substantive due process;⁷⁵ and while Bork is not prepared to reject the possibility that the due process clause of the fourteenth amendment incorporated the Bill of Rights, he never wavers in his rejection of the possibility that the clause, in either the fifth or fourteenth amendments, might license the creation of new rights. Yet there is a lesson, in the bad originalism, that the good originalist may wish to ponder. Some of the most activist judges, whether of the right or of the left, whether named Taney or Black, have been among the judges most drawn to the rhetoric of originalism. For

69. *Id.*

70. Though elsewhere he flirts with the idea that the equal protection clause forbids only discrimination based on race or ethnicity. Pp. 65–66. For “the Constitution does not prohibit laws based on prejudice *per se*,” and “how is the Court to know whether a particular minority lost in the legislature because of ‘prejudice,’ as opposed to morality, prudence, or any other legitimate reason?” P. 60. If this is what Bork really believes, he cannot accept Justice Stevens's view of equal protection.

71. P. 128.

72. Pp. 31–32.

73. For example:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, 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.

Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1856).

74. D. CURRIE, *supra* note 45, at 263–73.

75. 60 U.S. (19 How.) at 450.

it is a magnificent disguise. The judge can do the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don't argue with me, argue with Them. If originalist rhetoric could somehow be outlawed and a Taney forced to wrestle in the open with the pragmatics of the Missouri Compromise, maybe *Dred Scott* would have been decided differently.

I have hinted, with deliberate paradox, that the problem with Bork's originalism may be that it is not originalist enough. As a public man, and one who quite properly tried to conciliate critics and reassure doubters at his confirmation hearing, Bork may have disabled himself from pressing originalism to its logical extreme; and perhaps the exigencies of writing a popular book preclude complete intellectual rigor. For a pure originalism, a consistent originalism, a rigorous originalism, we may have to turn elsewhere. But the impurities of Bork's originalism are a strength rather than a weakness of his book, for in his concessions to practicality and public opinion, and in other remarks scattered throughout the book, one can find materials for constructing an alternative to strict originalism. Call it pragmatism, not in its caricatural sense of deciding today's case with no heed for tomorrow, but in the sense of advocating the primacy of consequences in interpretation as in other departments of practical reason, the continuity of legal and moral discourse, and a critical rather than pietistic attitude toward history and tradition.⁷⁶ Introducing Bork the pragmatist:

1. "Results that are particularly awkward, in the absence of evidence to the contrary, were probably not intended [by the framers]."⁷⁷ Bork implies that such results can and should be avoided through flexible interpretation: "The Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words alone might suggest."⁷⁸

2. "Law will not be recognized as legitimate if it is not organically related to 'the larger universe of moral discourse that helps shape human behavior.'"⁷⁹

3. "[H]istory is not binding, and tradition is useful to remind us of the wisdom and folly of the past, not to chain us to either. . . . Our history and tradition, like those of any nation, display not only adher-

76. I defend this conception of legal pragmatism in *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 52; see also Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. — (1990) (forthcoming).

77. P. 165.

78. P. 147.

79. P. 354. Bork seems unable to decide exactly what he thinks about morality. He doubts "that there are any moral 'facts,'" p. 121, but on the next page denounces "moral relativism," p. 122, and later denies emphatically that he is a "radical moral skeptic," p. 259. He is equally emphatic that "[m]oral outrage is a sufficient ground for prohibitory legislation." P. 124. His ultimate position appears to be that the raw preferences of the people have great moral weight but that the moral views of judges are mere raw preferences having zero moral weight. Pp. 125, 257, 259.

ence to great moral principles but also instances of profound immorality."⁸⁰ So obedience to the past has its pitfalls: "[N]ot all traditions are admirable."⁸¹

A judge whom Bork does not mention—Benjamin Cardozo—described the pragmatist creed in words that Bork might have done well to ponder:

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.

....

. . . Not the origin, but the goal, is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead. . . . The rule that functions well produces a title deed to recognition [T]he final principle of selection for judges . . . is one of fitness to an end.⁸²

The originalist faces backwards, but steals frequent sideways glances at consequences. The pragmatist places the consequences of his decisions in the foreground. The pragmatist judge does not deny that his role in interpreting the Constitution is interpretive. He is not a lawless judge. He does not, in order to do short-sighted justice between the parties, violate the Constitution and his oath, for he is mindful of the systemic consequences of judicial lawlessness. Original understanding is therefore a component of pragmatist constitutional adjudication, and a pragmatist may therefore share, for example, Bork's reservations regarding the Supreme Court's jurisprudence of sexual freedom ("privacy"). Like Samuel Lipman's ideal conductor, however, the pragmatist judge believes that constitutional interpretation involves the empathic projection of the judge's mind and talent into the creative souls of the framers rather than slavish obeisance to the framers' every metronome marking. In the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations are decisive; to the consistent originalist, they are irrelevant. Those consequences include, but they are not exhausted by, the consequences for such institutional values as maintaining the

80. P. 119. Yet on the same page, Bork remarks approvingly that "because homosexual sodomy has been proscribed for centuries, Justice White said [in *Bowers v. Hardwick*] the claim that such conduct was 'deeply rooted in this Nation's history and tradition' was 'at best, facetious.'" The entire discussion is facetious, in an unintended sense. Homosexual sodomy has been widely practiced for millennia, and in that sense is deeply rooted in every nation's history and tradition. And although it has generally but not universally been disapproved, see, e.g., K.J. DOVER, GREEK HOMOSEXUALITY (rev. ed. 1989), efforts to suppress it have been sporadic. The verdict of history and tradition thus is ambiguous, and in any event should not be controlling, for precisely the reasons that Bork eloquently states. Bork himself, like Justice White, appears to regard the suggestion that efforts to suppress homosexuality might raise constitutional questions as the *reductio ad absurdum* of judicial activism, for at one point he suggests that the moral claims of homosexuals to be left in peace are no stronger than those of kleptomaniacs. P. 204.

81. P. 235.

82. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66, 102-03 (1921).

intelligibility of language as a medium of communication and preserving a stable balance among the branches of government.

And speaking of consequences, I think Bork misreads the lesson of his defeat in the Senate. He attributes it to the machinations of the "new class"—the "knowledge class"—of left-liberal academics and journalists.⁸³ That there is such a class, that it is predominant in American universities and the mass media, and that it played a role in Bork's defeat, all are true. But I do not think its role was decisive. The decisive factor, besides Reagan's being a lame duck crippled by the Iran-Contra affair and the Senate's being controlled by the Democrats, was that a large number of Americans (I do not say a majority—but passionate and articulate minorities can be very powerful in a system of representative government, and a number of otherwise conservative Democratic Senators from the South owed their seats to black voters) do not want the Constitution to be construed as narrowly as Bork would construe it. They do not think that states should be allowed to forbid abortion (*Roe v. Wade*,⁸⁴ which Bork argues should be overruled) or to enforce racial restrictive covenants (*Shelley v. Kraemer*,⁸⁵ which Bork argues was decided incorrectly). They do not think that the federal government should be free to engage in racial discrimination. (Bork thinks that *Bolling v. Sharpe*,⁸⁶ which read a duty of equal protection into the due process clause of the fifth amendment, was erroneous too.⁸⁷) They do not think that states should be free to enact "savage" laws. They do not believe that a judge should practice "moral abstinence," as Bork urges.⁸⁸ They doubt whether minorities whose rights are not expressly protected by the Constitution should be left to the mercy of the prejudices of the majority.⁸⁹ They are not upset that "No Justice renounces the power to override democratic majorities when the Constitution is silent."⁹⁰ (Bork argues that no current member of the Supreme Court is a genuine originalist, and, so far as appears from the book, he does not believe that there has *ever* been a Supreme Court Justice who was a consistent originalist.) They do not believe that under Chief Justice Rehnquist as under his predecessors "[t]he political seduction of the law continues apace."⁹¹ They do not believe that the books should be closed on judicial innovation, preventing the creation of new rights (which is what Bork means when he tells the Supreme

83. Pp. 337, 339.

84. 410 U.S. 113 (1973). Bork writes that *Roe v. Wade*, "the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned." P. 116.

85. 334 U.S. 1 (1948). Bork believes that to apply the principle of *Shelley v. Kraemer* in a neutral fashion "would be both revolutionary and preposterous." P. 153.

86. 347 U.S. 497 (1954).

87. P. 83.

88. P. 259.

89. See note 70 *supra*.

90. P. 240.

91. *Id.*

Court to sin “no more”).⁹² They think results are more important than theory and they don’t like the results that Bork would be likely, on the evidence of this book as well as of his previous writings, to reach. They may be morally or politically immature to think such things, and they may also have (I think they do have) an incomplete picture of the consequences of some of the decisions he criticizes. It is even possible that the conception of law held by lay people is incoherent, because they believe both that judges’ decisions should be dictated by positive law rather than by moral principles and that the decisions should yield results that conform to such principles, so that at one level they agree both with Bork and with his arch enemy, Ronald Dworkin, and at another level they reject both. Finally, it is by no means clear that a majority of Americans agree with the particular views of policy that I have described.

But these are details. In a representative democracy, the fact that many (it need not be most) people do not like the probable consequences of a judge’s judicial philosophy provides permissible grounds for the people’s representatives to refuse to consent to his appointment, even if popular antipathy to the judge is not grounded in a well thought out theory of adjudication. The people are entitled to ask what the benefits to them of originalism would be, and they will find no answers in *The Tempting of America*. If, to echo Samuel Lipman again, originalism makes bad music despite or perhaps because of its scrupulous historicity, why *should* the people listen to it?

92. Bork repeatedly invokes stare decisis—for example, to reassure his readers that he doesn’t believe the government should be forbidden to issue paper money, whatever an originalist interpretation of the Constitution might suggest on that score. Pp. 155–56.