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THE BORK NOMINATION AND THE DEFINITION OF "THE CONSTITUTION"

Richard S. Kay*

Like his failed confirmation to the United States Supreme Court, Robert Bork's *The Tempting of America* reveals the distemper of modern constitutional law and scholarship. It exposes a subject whose students are in perpetual disharmony and often in intellectual isolation. More significantly, individual theorists of the Constitution are often at war with themselves, seeking to reconcile discordant assumptions about the nature of law, the practices of the courts, and their aspirations for a good society. That reconciliation is a goal few are equipped to achieve. Constitutional scholarship, in short, is a field afflicted with an abiding neurosis.

Bork's book is divided into three sections. The first is a condensed history of constitutional adjudication in the Supreme Court. It amounts to a kind of Cook's tour¹ of constitutional error. From Marshall's opinion in *Marbury v. Madison*² ("[n]one of this made much sense"³) to *Lochner v. New York*⁴ ("the quintessence[] of judicial usurpation"⁵) to *Roe v. Wade*⁶ ("in the entire opinion there is not one line of explanation, not one sentence that qualifies as legal argument"⁷), Bork finds an irrepressible tendency in the Court to reach beyond its legitimate authority. There are (especially in his rather hurried treatment of the earlier historical periods) many occasions to disagree with his conclusions.⁸ But in his overall assessment Bork is well within the mainstream. Most observers of the Supreme Court find in its history much to cause distress.

The second section is a similarly unhappy survey of modern aca-

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¹ A quick tour.

² 5 U.S. (1 Cranch) 137 (1803).

³ R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 24 (1990).

⁴ 198 U.S. 45 (1905).

⁵ R. BORK, *supra* note 3, at 44.

⁶ 410 U.S. 113 (1973).

⁷ R. BORK, *supra* note 3, at 112.

⁸ For example, Bork's endorsement of the limited holding in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), see R. BORK, *supra* note 3, at 37-40, on the ground that the privileges or immunities clause of the fourteenth amendment is a "mystery," *id.* at 166, ignores much illuminating historical scholarship on the subject. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 37-51 (1977); M. CURTIS, *NO STATE SHALL ABRIDGE* 174-78 (1986); McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 281, 287-88 (1986).

democratic writing on constitutional law. Bork defends his own position that adjudication must be based on the originally intended meaning of the Constitution. He then reviews the "revisionist" theorists, both left and right, who would locate the sources of constitutional judicial decisions outside of the rules of the constitutional text as understood by those who enacted them. Not surprisingly, he finds each such theory to be inadequate. As they will with his historical analysis in section one of the book, most people will find him sometimes off target. Many of the theorists he criticizes seem to me to deserve a more patient hearing. But again Bork is far from unusual. Indeed, as he correctly points out, "the revisionists regularly destroy one another's arguments . . ." ⁹ The norm of theoretical constitutional writing is to find that just about everyone else in the field has missed the boat.

Finally, in the last and shortest section of the book, Bork narrates his version of the process by which the Senate in 1987 rejected his nomination to the Supreme Court. Here, understandably, he shows the least disposition to take his opponents seriously. No one can read the voluminous record of the proceedings before the Senate Judiciary Committee without being impressed by the unrelenting and sometimes reckless ferocity with which the campaign against him was waged.¹⁰ It is probably asking too much to expect him to approach the subject with the perspective that would help us understand its implications for our system of constitutional government.¹¹ Bork is also a bit melodramatic in titling this section "The Bloody Crossroads." Still, he is right in seeing in that event a possible turning point in our national understanding of the Constitution and the Court. I believe he is also right to see it as a revealing

⁹ R. BORK, *supra* note 3, at 141.

¹⁰ Senator Edward Kennedy set the tone on the day Bork was nominated in his much reported description of "Robert Bork's America," where "women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim or [sic] government . . ." *Id.* at 268 (quoting 133 CONG. REC. S9188-89 (daily ed. July 1, 1987)).

Nothing in the Judiciary Committee record ever exceeded this level of stridency, but that record is still full of extreme and misleading attacks. A few examples make the point. Congressman Ted Weiss of New York submitted testimony noting Bork's "long record of hostility toward women, minorities, and public interest groups." *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 6117 (1987) [hereinafter *Hearings*]. Another submission mentioned "Bork's total disregard for constitutional and statutory rights and human dignity." *Id.* at 6147 (written testimony of Daniel Press, Youth for Democratic Action). The submission of the President of Planned Parenthood said Bork's views "may make him a curiosity in the classroom, but could create a monster in the highest court." *Id.* at 5894 (written testimony of Faye Wattleton). But People for the American Way complained that Bork's criticism of constitutional doctrine even "exceeds the bounds of scholarly dissent." *Id.* at 5701 (written testimony of John Buchanan, Chairman).

¹¹ For example, his postulated chain of causation from the 1960s counterculture to modern constitutional theory to the defeat of his nomination is seriously oversimplified. See R. BORK, *supra* note 3, at 337-43.

juncture of academic theories of law and the actual practice of constitutional judicial review.

Judge Bork's constitutional jurisprudence, which he defends in this book and which led to the rejection of his nomination, rests upon a single axiom. That axiom is the assumption that the Constitution (by which he means a set of rules written in a particular document) is supreme law. That does not, admittedly, seem to be a controversial proposition. It was on that assumption that Marshall founded the institution of judicial review in *Marbury v. Madison*.¹² That postulate, by definition, puts limits on the discretion of constitutional tribunals. Since its power rests solely on the Constitution, and since the Constitution is a finite and fixed thing, there are judgments and policies which are beyond a court's authority. Those extra-constitutional judgments and policies are the realm of politics and the political branches. Thus, for Bork, the great error of modern constitutional jurisprudence and its academic exponents is the confusion of politics and law.¹³

But there are no natural things called "law" and "politics." Bork's assumption that the Constitution is law is itself controversial. He takes note of academic writers who are "quite explicit about their intention to convert the Constitution from law to politics, and judges from magistrates to politicians."¹⁴ That preference is, itself, political. The powers of judges, the force of the rules of the written Constitution and—to say the same thing—the scope of topics withdrawn from ordinary electoral politics are matters that must be socially determined. They are inevitably the subject of political argument. Bork's own surveys of judicial history and modern scholarship reveal that the other side of the argument is not only conceivable but prevalent.

Nevertheless, the need to presume that the Constitution is law is deeply embedded in our legal and political culture. Bork himself often takes it to be self-evident.¹⁵ In this he is not alone. Certainly the Supreme Court regularly affirms the idea that the Constitution is binding law and the Court's own judgments merely extrapolations from that law.¹⁶ Moreover, even among theorists there is a striking reluctance to forego a rhetorical reliance on the Constitution as the source of judicial

¹² 5 U.S. (1 Cranch) 137 (1803).

¹³ R. BORK, *supra* note 3, at 2-7.

¹⁴ *Id.* at 136; *see also id.* at 8 ("A well-known Harvard law professor turned to me with some exasperation and said, 'Your notion that the Constitution is in some sense law must rest upon an obscure philosophic principle with which I am unfamiliar.'").

¹⁵ *See, e.g., id.* at 145, 175. *But see infra* notes 29-31 and accompanying text.

¹⁶ *See, e.g.,* the following from the opinion for the Court in a case invalidating certain state restrictions on the performance of abortions:

Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute. *See Cooper v. Aaron*, 358 U.S. 1 (1958). We recognized at the very beginning of our opinion in [*Roe v. Wade*, 410 U.S. 113, 116 (1973)] that abortion raises moral and spiritual questions over which

authority. Erwin Chemerinsky is particularly candid in arguing that "[t]he Court should stop pretending that objective constitutional principles exist apart from the preferences of the Justices."¹⁷ But in the same piece he notes that "[w]hether people agree or disagree with the Court, they accept that the Justices are interpreting and applying the Constitution. This helps to ensure that the Constitution remains at the core of society and can continue to serve as a unifying, constitutive document."¹⁸ This simultaneous attachment to the Constitution and rejection of its historically created rules is by no means uncommon. But, when people use the word "Constitution" in this kind of argument, what can they mean?

Given their disapproval of interpretation according to the original intentions or understanding, they certainly cannot mean the Constitution in the same way they mean "letter" or "guidebook" or "law review article." In these cases the texts are devices for understanding what someone intended to communicate. There are three other possibilities, but each raises questions about the propriety of such usage.

First, the term "Constitution" might be invoked to refer not to a particular set of rules created with a specific content at discrete historical moments, but to other rules which might be consistent with the particular words found in the constitutional document. The outer boundaries of the language of the Constitution would thus create limits on the range of judicial choice.¹⁹ To the extent, however, that this use of the term Constitution is intended to bestow some otherwise unavailable legitimacy on judicial action, it suffers from a substantial defect. The influence of the Constitution is the consequence of continuing regard not for a particular assortment of words, but for the authority and sense of a certain constituent act. To give effect to the words used independently of the intentional act which created them is to disregard exactly that which makes the text demand our attention in the first place. That the words will bear some different meaning is purely happenstance. Without their political history, the words of the Constitution have no more claim on us than those of any other text.²⁰

honorable persons can disagree sincerely and profoundly. But those disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully.

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 771-72 (1986).

¹⁷ Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 101 (1989).

¹⁸ *Id.* at 86.

¹⁹ This proposition has been called "textualism." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205-09 (1980). It has recently received its most considered defense in Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 CONST. COMMENTARY 231 (1989).

²⁰ This difficulty with a purely textual approach has been receiving increasing notice. See Kay, *Original Intentions, Standard Meanings and the Legal Character of the Constitution*, 6 CONST. COMMENTARY 39 (1989); McConnell, *The Role of Democratic Politics in Transforming Moral Convictions*, 98 YALE L.J. 1501, 1526-29 (1989); Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989) (considering methods of statutory interpretation).

Second, the invocation of the Constitution may be a reference to a deliberate historical delegation of discretionary decisionmaking power to the judges. That delegation was effected by the enactment of the constitutional rules. The Constitution, then, is like a license granted to the judiciary to overrule decisions made elsewhere in government when they conflict with values selected and elucidated by the courts. It may be proper in this sense to refer to judicial review as application of the "Constitution," even though that document provides no substantive rules to guide the particular action. The problem with this usage is that its historical premise is open to serious doubt. While the question may still be regarded as an open one, it is unlikely that the enactors of the Constitution believed they were authorizing an ongoing and undefined power to revise the actions of the political branches.²¹

Finally, and perhaps most plausibly, the use of the word "Constitution" may be entirely symbolic. It may stand not for the particular set of rules created and written down at a particular moment, but rather for a practice and tradition in which the courts have reviewed the acceptability of governmental actions in light of independent principles which are developed by the judges over time. Because this practice was once thought to involve merely the application of the rules of the written Constitution, that word has become associated with it even though the connection dissolved long ago. The use of the "Constitution" in this way, therefore, cannot logically be used in justification of judicial action. It is, at most, a signal of the kind of public power the court is exercising in a particular decision. It is a serious objection to this practice, however, that this usage is so unnatural. To employ it without careful explanation is, especially when one considers the more common understanding, bound to be misleading.

While some defenders of broad judicial power have been explicit in arguing that the term can only be used in this last way,²² they have more

²¹ In a recent exhaustive study, Philip Hamburger has concluded that "[t]he framers and ratifiers did not want the Constitution to change in adaptation to the economic, political, cultural, or moral developments of American society." Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 325 (1989). Even if the framers did authorize such a revising power, it is unlikely they would have placed it in the judiciary. See R. BORK, *supra* note 3, at 153-55; Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 281-84 (1988). The existence of such an ongoing and undefined power to revise the actions of the political branches was apparently very important to the majority of the Senate Judiciary Committee. In recommending that Judge Bork's nomination not be confirmed, the Committee placed great importance on the recognition of "unenumerated rights" in the ninth amendment. SENATE COMM. ON THE JUDICIARY, REPORT ON THE NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, 100th Cong., 1st Sess. 11-21 (1987) [hereinafter REPORT]. The historical problems with this interpretation are manifold. A recent comprehensive discussion is McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. (forthcoming 1990).

²² Paul Brest analogized the relation of the Constitution to modern adjudication to "having a remote ancestor who came over on the Mayflower." Brest, *supra* note 19, at 234. Certainly the most

commonly assumed that the constitutional text does provide reasons for the decisions of the courts, either in one of the two other ways mentioned above, or in some other, unexplained way. Certainly the judicial practitioners of "non-originalist" adjudication have often insisted that they act, somehow, at the command of the Constitution. When Justice Brennan dissented from the Court's holding that there is no fourteenth amendment right held by a natural father to some relationship with his child, he founded his disagreement on the Constitution: "I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold."²³

The argument about the proper role of the Courts in our public decisionmaking is only obscured by these apparently ineradicable references to the Constitution—references made even by those who prefer adjudication in which the Constitution's role is, at best, marginal. That argument is about two ways to structure governmental power. The claims for a strong judicial power are really functional. They suppose that we will get a superior set of governmental results if we rearrange the legislative authority to include an irregular veto by the judges.²⁴ There are many ways this power might be exercised and many possibilities for defining the rea-

explicit recognition of the merely symbolic use of the constitutional text was by the American Legal Realists. Karl Llewellyn described a process of "pseudo-interpretation":

The present need is thus served *as if* by ancient meaning; more recent wisdom clothes itself in ancient words; the road over fiction has begun. . . . By its own phrasing it invites confusion. By its own verbal expression it invites its own inventors, in any subsequent case, to overlook it, or to throw it out.

Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 13 (1934).

²³ Michael H. v. Gerald D., 109 S. Ct. 2333, 2351 (1989) (Brennan, J., dissenting). For Bork's discussion of this case, see R. BORK, *supra* note 3, at 235-40.

²⁴ While rarely put so explicitly, the idea that the proper job of the courts is the practical one of participating in the ongoing formulation and reformulation of governing political principles was ubiquitous in the criticism of Bork. In questioning Bork, Senator Arlen Specter referred to "a very broad articulation of what the Supreme Court does, meeting the needs of the nation." *Hearings*, *supra* note 10, at 285; *see also id.* at 842. Senator Paul Simon expressed a wish that the courts should "provide leadership in protecting the rights we have and expanding that base of rights." *Id.* at 442. Judge Shirley Hufstедler doubted in her testimony that Bork was the "moderate constitutional architect that the country requires at this time . . ." *Id.* at 2332. The Executive Committee of the National Council of Churches of Christ suggested that courts ought to "rectify the ingrained malfunctioning of other parts of the Constitutional structure, to advance [sic] the fair and humane working of the commonwealth, and to protect the unalienable rights of the people—including those not enumerated in the Constitution . . ." *Id.* at 5569.

This conception of the appropriate judicial role is summed up in two statements presented to the Committee. The first was from The Nation Institute:

In its 200 years, the text of the Constitution has changed comparatively little, but its meaning has changed often and dramatically. All American citizens and institutions are invited to participate in that interpretive process. Each of us can be part of the constant, shifting and robust debate over the meaning of our supreme law. It is a debate that never ends, but from time to time the courts, and finally the Supreme Court, must resolve particular questions. Some resolutions are masterstrokes and endure for decades, even centuries. Others are quickly cut back, sometimes reversed altogether, within a year or two. It is proof of our collective participation in the great debate over the meaning of the Constitution that even a Supreme Court decision on a constitutional issue need not, and often does not, end the public argument over it. It may even

sons for exercising it. As a purely political argument it has an undeniable appeal, not entirely unlike the arguments for a bicameral legislature or for an executive veto.²⁵ Something very like it, the Council of Revision, was proposed, although rejected, at the Philadelphia Convention of 1787.²⁶

Stripped of its legal-constitutional rhetoric, this viewpoint requires a rather different kind of response than the one Bork usually offers. It is not enough to note that the "revisionist" model of the judiciary is unwarranted by law; it cannot really be advanced as a matter of existing positive law since it is an argument about what law, as an institution, ought to be.²⁷ On this level, the Philadelphia drafters' explicit rejection of a Council of Revision²⁸ is simply irrelevant. The response, like the argument itself, must be political. Why, as an original matter, is it better to refer to the judgments of the framers than to the judgments of today's courts?

Bork does, at places, address the question in these terms.²⁹ He argues, for example, that the judges should not decide on the basis of extra-constitutional moral standards because there is no viable consensus on the nature of those standards.³⁰ He concludes that since agreement on questions of morality is unobtainable, "the only way to settle the questions is by a vote, not a judge's vote but ours."³¹ That is, his objection to

intensify it. Many times in our history the Court has been "overruled" by this popular debate, with the Court eventually revising or reversing itself.

Id. at 5089-90. To the same effect, although phrased in terms that lawyers would avoid, is the opinion of artist Robert Rauschenberg offered in his testimony against Bork's confirmation: "The Supreme Court is a final discriminating force to guide us into the future of global concerns. This responsibility requires a talent as creative and tolerant as the world is unpredictable. Flexibility, resilience and sensitivity are tantamount. A fixed point of view will only lead to disaster." *Id.* at 1998.

²⁵ See, e.g., THE FEDERALIST No. 62, at 415-22 (J. Madison) (J. Cooke ed. 1961) (bicameralism); THE FEDERALIST No. 73, at 492-99 (A. Hamilton) (J. Cooke ed. 1961) (executive veto).

²⁶ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (M. Farrand ed. 1911) (Madison's notes); *id.* at 94-95 (journal of June 4); *id.* at 131 (journal of June 6).

²⁷ See Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 194-203 (1981) [hereinafter Kay, *Preconstitutional Rules*].

²⁸ See R. BORK, *supra* note 3, at 154.

²⁹ His discussion under the heading "The Claim that the Constitution Is Not Law," *id.* at 171-76, seems to assume that there is some objective way of finding out what the status of the Constitution *really* is. Thus, he responds to Paul Brest's claim that the constitutional text lacks legal authority by contending that the judicial authority that Brest would substitute has not acquired general assent. But this supposes that there are accepted rules about what makes constitutional law. It is exactly the nature of constitutional authority that is in contest. Bork concludes that "it is necessary to any polity that there be ground rules or assumptions that identify certain propositions as laws . . ." *Id.* at 174. This response cannot be sufficient to someone who challenges those ground rules or assumptions on an explicitly nonlegal basis. See Kay, *Preconstitutional Rules*, *supra* note 27, at 192-93.

³⁰ See R. BORK, *supra* note 3, at 251-59; cf. M. PERRY, *MORALITY, POLITICS AND LAW* (1988).

³¹ R. BORK, *supra* note 3, at 259.

activist judging is complemented by his insistence on the primacy of democratic decisionmaking.

This attachment to democratic government creates an obvious irony, given Bork's blistering account of the way the political institutions of this country failed when put to the test in his own confirmation. There is, however, an even more fundamental difficulty. Bork's own theory of the Constitution contains significant and inescapable undemocratic elements. Every reference to the right of the political branches to decide is qualified by the reservation of cases plainly covered by the rules of the Constitution as originally understood.³² The application of those rules in the teeth of contrary contemporary political decisions is hardly democratic. There is, of course, a sense in which the Constitution once represented the popular will. But even if we put aside the uncomfortably narrow definition of "the people" that prevailed when most of the Constitution was enacted, the fact is that those enactors have long ago departed this world and their claim to represent the people has long since evaporated. Bork responds that this is equally true of any enacted law. The obvious difference is that non-constitutional law governs only at the sufferance of current legislative majorities.³³ Bork also accurately notes that the undemocratic nature of application of the rules of the constitutional text is most often raised by people who themselves want to add new restrictions on legislative power.³⁴ But he does not tell us why, when we *do* thwart contemporary democratic decisions, we should resort to the judgments of the drafters and ratifiers of 1787-89 (or 1868 or 1929) rather than to those of the judges of 1990.³⁵

There is a good political argument for this apparently strange position, although Bork gives it little attention. The rules created one or two hundred years ago (if applied as originally understood) have the special virtue of being unchangeable, save by the extraordinarily difficult process of amendment. The principles favored by the judiciary, on the other hand, are, as we have ample evidence to show, subject to continual refinement, redirection, or reversal. That flexibility has a certain attraction, and it is, indeed, one of the principal arguments for a more or less unfettered judicial role. Still, it undermines what was and continues to be regarded as a central value of constitutional government—the capacity to fix, relatively permanently, the boundaries of permissible government action.³⁶ Only such a permanent demarcation makes possible the confident

³² See, e.g., *id.* ("[W]here the Constitution does not apply, the judge, while in his robes, must adopt a posture of moral abstention . . .") (emphasis supplied).

³³ See *id.* at 175.

³⁴ See *id.* at 170-71, 175.

³⁵ Nor does Bork tell us why we ought not to defer to democratic decisionmaking even in cases where the Constitution as originally understood tells us to do otherwise. The political question doctrine, a distinctly "non-originalist" device, is arguably more solicitous of democratic decisions than is faithful adherence to the original intentions.

³⁶ See R. BERGER, *supra* note 8, at 290-91; F. HAYEK, *THE CONSTITUTION OF LIBERTY* 156-59,

exploitation of personal liberty, free of the ever-present threat of official intrusion that accompanies the insatiable human appetite for power. Such security is the special contribution of the rule of law. This is the value which animated Jefferson when he wrote: "In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."³⁷

This value, of course, is not the only one a society may esteem, and it cannot be preserved without cost. Most obviously it prevents a government from regularly molding its behavior to the principles and standards thought worthy at a particular time but not embodied in the applicable constitutional rules. For many, the structural arrangements that vest discretionary power in the courts provide the most promising way of developing those principles and of seeing that they are effective.³⁸ The sacrifice of that prospect is a cost our society appears to be increasingly unwilling to pay, an attitude made particularly clear in the arguments advanced to reject the Supreme Court nomination of Robert Bork.

If there was a single most prominent point in the criticisms of Bork's general constitutional philosophy, it appears to have been his reluctance to acknowledge an implicit model for constitutional adjudication that has three essential elements: (1) there are other legitimate rules of decision for judges in constitutional cases than those found in the historical Constitution; (2) such rules will inevitably change over time; and (3) such change is best effected by the courts in constitutional adjudication.³⁹ Thus, the report of the majority of the Senate Judiciary Committee centered its criticism of Bork's general views on his denial of the protection of "unenumerated rights." The Committee's position was in part based on the dubious proposition that the Constitution-makers somehow intended to create this judicial power.⁴⁰ The real unacceptability of Bork's view, however, was based on functional considerations. It was illustrated almost entirely by the risks that view would entail for certain modern judicial doctrines (including that of constitutional "privacy"⁴¹) that many people have come to see as essential in regulating public power.

208-09 (1960). This was certainly a powerful motive for the framers. See generally Hamburger, *supra* note 21.

³⁷ 4 THE DEBATES IN THE SEVERAL STATE CONSTITUTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 543 (J. Elliot ed. 1881) (Kentucky Resolutions of 1798 and 1799), quoted in R. BERGER, *supra* note 8, at 252.

³⁸ Bork argues that there is nothing to stop these principles from being followed and implemented by democratically elected legislatures. See R. BORK, *supra* note 3, at 170-71. For reasons of political structure and dynamics, however, or simply the plain intransigence of the electorate, this is unlikely to happen. It is perfectly logical for those who do not give to democracy the same priority that Bork does to prefer a less democratic but substantively more promising arrangement.

³⁹ See *supra* note 24.

⁴⁰ REPORT, *supra* note 21, at 8-29. On the weaknesses of this position, see *supra* note 21 and accompanying text.

⁴¹ REPORT, *supra* note 21, at 30-36.

The commitment to a policymaking role for the judiciary is evident in Bork's opponents' preoccupation with his attitude toward existing Supreme Court precedent. Once the utilitarian judicial role is conceded, it follows that the judicial product should be safeguarded not because it is derived from the law of the Constitution, but for its intrinsic worth. This accounts for the special emphasis placed on the contribution the courts have made to the fairness and well-being of society.⁴² Bork's philosophy, on the other hand, calls for an evaluation not of the soundness of the policy at issue, but its consistency with the constitutional rules. This view naturally puts into jeopardy those doctrines which are not defensible on those grounds. That is, it puts into jeopardy most of what people find valuable in modern constitutional law.

Bork, of course, assured his critics that he would not overrule most precedents even if they were at odds with the original understanding of the Constitution. This tolerance for wrongly decided doctrine is not, and cannot be, derived solely from his approach to constitutional law. Erroneous precedent is, by definition, unauthorized by the Constitution, and a decision to adhere to it is likewise supportable only by an extra-constitutional judicial choice. Such adherence can only be a compromise with the approach that treats the Constitution, itself, as the sole source of authority in judicial review—a compromise required by practical necessity. This, at least, is Bork's view of the matter.⁴³ The majority of the Senate Judiciary Committee treated Bork's profession of adherence to *stare decisis* only as a possible mitigating factor in his otherwise unacceptable constitutional jurisprudence.⁴⁴ Bork's treatment of precedent was an inadequate "breakwater" against his desire to sweep much modern doctrine "out to sea."⁴⁵

There is, of course, a definite tension between the logic of adherence to the original understanding, which dictates reconsideration of established lines of case law, and the political justification for that position,

⁴² See, e.g., *Hearings*, *supra* note 10, at 3130 (testimony of William Leuchtenberg); *id.* at 5702 (written testimony of John Buchanan, Chairman, People for the American Way).

⁴³ See R. BORK, *supra* note 3, at 155-59. Henry Monaghan, in the most careful modern treatment of *stare decisis* in constitutional adjudication, regards adherence to precedent and adherence to text as competing techniques—each of which might be used in the appropriate circumstances to engender stability and legitimacy to constitutional law. See Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 772-73 (1988) [hereinafter Monaghan, *Stare Decisis*]; see also Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 57-58 (1989) (texts, judicial finality, and precedential constraint can all be employed as a means to justice). This position treats both the text and precedent instrumentally and thus is inconsistent with any privileged position for enacted law over judge-made law. It denies the assumed hierarchy by which the Constitution prevails over statute, and both prevail over judicial decision. The Senate Judiciary Committee, therefore, I think, got it right in the caption to one of the sections of its report where it spoke of "an irresolvable tension" between a desire to follow original intention and an acceptance of "settled law." REPORT, *supra* note 21, at 22.

⁴⁴ See REPORT, *supra* note 21, at 21-29.

⁴⁵ *Id.* at 24.

which rests upon the values of certainty and stability.⁴⁶ Taken seriously, at this late date, judicial conformity to the original understanding would portend the upsetting of many entrenched assumptions. Thus, the frequent characterization of Bork as a dangerous radical.⁴⁷ On the other hand, to sanction (as Bork sometimes did⁴⁸) the continued effectiveness of decisions inconsistent with the original rules would doubly endorse the independent policymaking role of the courts. It would keep in place the consequences of judicial invention and it would do so for reasons that cannot themselves be traced to the original constitutional rules.⁴⁹

Not surprisingly, therefore, Bork's acceptance of existing doctrine he believed wrongly decided was a grudging one. This was a telling point for his opponents, who preferred a more functional judicial model. Bork's uncomfortable accommodation with *stare decisis* created the special danger that he would not extend the principles of wrongly decided cases to later similar, but distinguishable, disputes. There is a substantial risk, the Judiciary Committee majority reported, that Bork would read a precedent "very narrowly, so that it had little, if any, substantial effect on future decisions."⁵⁰ The appropriate judicial task, in the Committee's view, was not the application of pre-existing rules, but the continuing careful elaboration and refinement of a developing body of general principles extractable from a growing corpus of case law. This is the model of the common-law judge.⁵¹

This understanding of judicial review was plain in another feature of the confirmation debate. This was the growing acclaim attached to the

⁴⁶ See Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1482, 1527 (1985). The need to construct a theory that employs both adherence to the text and *stare decisis* to promote the stability and legitimacy of constitutional adjudication is examined in Monaghan, *Stare Decisis*, *supra* note 43, at 772-73; see also Alexander, *supra* note 43, at 57-59.

⁴⁷ See, e.g., *Hearings*, *supra* note 10, at 1987 (testimony of Lee Bollinger) (noting Bork's "quite radical view of the proper interpretation and scope of the first amendment"); *id.* at 2518 (prepared statement of Thomas Grey) (noting that Bork's approach to constitutional law is "the most radical departure from existing and accepted constitutional doctrine ever proposed by any Supreme Court nominee"); *id.* at 6014 (prepared statement of John C. Roberts) (stating that "Judge Bork's view of the legal world is truly radical"); *id.* at 6023 (submission of Louis Schwartz) (describing Bork as a "radical activist").

⁴⁸ R. BORK, *supra* note 3, at 155-59.

⁴⁹ See Monaghan, *Stare Decisis*, *supra* note 43, at 767-70. For an interesting case in which a refusal to hold immediately void concededly unconstitutional statutes based on an implicit command of the Constitution, see *Re Manitoba Language Rights* [1985] 1 S.C.R. 721.

⁵⁰ REPORT, *supra* note 21, at 24.

⁵¹ A number of Bork's critics held this model out as the preferred method of constitutional adjudication. See, e.g., *Hearings*, *supra* note 10, at 2517 (prepared statement of Thomas Grey) (referring to "the long-accepted concept of a living constitution, an evolving body of law that develops the meaning of the broad clauses of the fourteenth amendment and the Bill of Rights through the traditional Anglo-American judicial process of case-to-case reasoning"); *id.* at 6014-15 (prepared statement of John C. Roberts) (stating that judges apply "principles articulated in earlier cases to new situations, and [argue] from analogy to determine whether the principle covers the new case").

judge Bork hoped to replace, Justice Lewis Powell. Justice Powell's judicial technique was in close sympathy with the common law model. In his constitutional decisions he regularly sought to avoid the statement of general and rigid rules. His favored device was the multi-factored balancing test.⁵² Using such tests a judge can take account of the idiosyncrasies of each case that comes before him. One tribute to the Justice on his retirement noted that for Powell "[t]he universe of each case was bounded by the record; what mattered most were facts."⁵³ This case-by-case approach, as has often been noted in the common-law context, has the advantage of sensitivity to new and unforeseen problems.⁵⁴ The same virtues were argued to be essential in constitutional review, and Bork was especially criticized for holding a view of the Constitution that was rigid and insensitive to new circumstances.⁵⁵

This analogy of common-law judging to constitutional interpretation is perfectly consistent with the idea that judges play an independent policymaking part in constitutional decisions.⁵⁶ It is no longer a matter of dispute that common-law judging is a form of legislation. Once the historical Constitution is abandoned as the source of decision, it is, as Holmes concluded with respect to the common law, an "illusion" to suppose "that there is this outside thing to be found."⁵⁷ The preferences of the judges, constrained perhaps by some form of institutional and traditional deference, control the outcome of constitutional litigation, and, to the extent the rest of the system tolerates it, those preferences govern the exercise of public power.

One remarkable feature of the experience of Judge Bork's nomination was the extent to which this vision of the judiciary was expressed openly by actors in the political process. Bork finds it understandable that politicians should take such a position, but is particularly disappointed that academics should do so.⁵⁸ For me, it is unsurprising that academics should attempt to account for a style of adjudication that has, in fact, so long prevailed. What is notable is that public actors should so candidly depart from the conventional view that it is the Constitution and not just the courts that protect us from governmental overreaching.

⁵² A good example is the test used for the constitutionality of administrative procedures formulated in Powell's opinion for the Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). For a criticism of this method of opinion writing in constitutional cases, see R. NAGEL, *CONSTITUTIONAL CULTURES* 121-55 (1989).

⁵³ Wilkinson, *Tribute to Lewis F. Powell, Jr.*, 101 *HARV. L. REV.* 417, 420 (1987).

⁵⁴ See J. STORY, *Value and Importance of Legal Studies*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 503, 526 (1972) (W. Story ed. 1852).

⁵⁵ See especially the majority report's comparison of Bork's views with those of Justices Frankfurter and Harlan. *REPORT*, *supra* note 21, at 14-16.

⁵⁶ See Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353, 391-95 (1981).

⁵⁷ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

⁵⁸ R. BORK, *supra* note 3, at 261-62.

It is also worth noting, however, how almost everyone who supports a wide discretion in judicial review is unwilling to let go of the rhetorical support of the constitutional text. Notwithstanding the dubious connection between the judicial practice preferred and the historical Constitution, that document was, and is, regularly invoked by both academics⁵⁹ and politicians.⁶⁰ That is because the idea of the rule of law is so entrenched in our political culture. The reference of a political decision to an ancient and general set of rules endows it with a legitimacy unavailable to the contemporary judgment of human beings. As the Bork episode shows, however, we are unwilling to sacrifice the satisfaction of our immediate and often real needs in order to achieve that legitimacy. Thus, we insist on naming our commitment to changing governing principles "adherence to the Constitution"—the "living" Constitution. Senator Carl Levin captured this tendency in his speech on the confirmation. He described the Constitution in terms that have become entirely commonplace:

The Constitution is broad enough, flexible enough, artfully enough drafted, to guarantee for all Americans those basic freedoms and protections which are so essential to a free society. In fact, it is that very flexibility that has allowed us to flourish as a society for over 200 years, making it possible for us to celebrate the bicentennial anniversary of the Constitution.⁶¹

We want, that is, both to have limits and not to be bound by those limits, both the rule of law and the rule of men. And since we really cannot have both, we want, at least, to have one thing and to call it something else. We want and perhaps we need to have it both ways.

⁵⁹ Michael S. Moore has recently written that "no one should wish to defend a non-text-based view of constitutional law." Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 113 (1989).

⁶⁰ Senator Howard Metzenbaum, who was strongly opposed to Bork's confirmation, accused President Reagan of wanting to "revise the Constitution through his appointments to the Supreme Court." *Hearings, supra* note 10, at 44. One way or another, every opposing senator on the Judiciary Committee indicated that it was the "Constitution" at issue. *See, e.g., id.* at 32 (Kennedy); *id.* at 52 (DeConcini); *id.* at 66 (Leahy); *id.* at 79 (Heflin); *id.* at 93 (Simon); *id.* at 95 (Biden); *id.* at 6306 (Specter).

⁶¹ 133 CONG. REC. S14,922 (Oct. 23, 1987) (remarks of Senator Levin).