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### Judge Robert Bork and the Quest for Original Intent (reviewing Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990))

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## JUDGE ROBERT BORK AND THE QUEST FOR ORIGINAL INTENT

JONATHAN K. VAN PATTEN\*

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW.  
By *Robert H. Bork*. New York: The Free Press. 1990. Pp. 432. \$22.50.

Although certain texts may be regarded as authoritative, it is rare that interpretation of such texts is uniform. Even radically difficult conclusions can be drawn from the same authoritative text. As Abraham Lincoln observed of both North and South in his Second Inaugural Address: "Both read the same Bible, and pray to the same God; and each invokes His aid against the other."<sup>1</sup> In much the same way, the Constitution of the United States is read in support of radically different views of, for example, church/state relations, affirmative action, the rights of those accused of a crime, and the power of the President to commit armed forces into action without prior authorization by the Congress.

Judge Robert Bork would undoubtedly place himself with those who say that the chief division among students of the Constitution is not over *how* to read the text, but rather over *whether* to read the text. Judge Bork believes that the text (and the law) has been corrupted by the temptation of politics in that "nothing matters beyond politically desirable results."<sup>2</sup> The main purpose of *The Tempting of America* is to describe how principled interpretation must follow the original understanding of the text and to argue that all theories of constitutional interpretation which depart from the original understanding are fundamentally flawed. The secondary purpose is to give his account of the confirmation battle and its meaning for the future of the Court and the Constitution. These two purposes are not unrelated because it is evident that Judge Bork believes his position as an adherent of original understanding was grossly distorted during the confirmation process. This book followed shortly after his resignation from the federal bench, at which time he stated his intention to speak more freely about law and other issues of public policy.<sup>3</sup>

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Because members of the law school community overwhelmingly opposed Judge Bork's nomination, there may be an assumption that this review is a setup. Let me clear the air on this one. During the confirmation battle, I publicly supported Judge Bork's nomination at a Women's Studies panel discussion on the USD campus. I also refused to join in what amounted to the law professors' version of a loyalty oath by declining to sign the national petition opposing the nomination. Tenure does have its benefits.

1. 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 333 (R. Basler ed. 1953).
2. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1 (1990) [hereinafter cited as BORK].
3. *Id.* at 317-19.

The fundamental point of departure for Bork lies in his view of the Constitution as law.<sup>4</sup> This is hardly a radical start, for the Constitution's self-characterization is as the "supreme Law of the Land."<sup>5</sup> It is this character as law, however, that restricts the ability of a judge to depart from the original understanding.<sup>6</sup> The judge is "bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment."<sup>7</sup> In simple terms, "the judge is bound to apply the law as those who made the law wanted him to."<sup>8</sup> Thus Bork contends that the obligation to apply the law as originally understood, and not to do justice, is the properly defined role of the judge.<sup>9</sup>

One of the principal misunderstandings of original understanding, according to Bork, is due to an incorrect assumption about *whose* intentions count. By original understanding, Bork means "the principles intended by those who *ratified* the document."<sup>10</sup> This clearly de-emphasizes the importance of the "Framers" to a correct understanding of the Constitution. Indeed, one of the initially puzzling aspects of the book is the relatively little consideration given to the views of James Madison, Alexander Hamilton, and Thomas Jefferson and to the Philadelphia Convention and the First Congress.<sup>11</sup> The explanation is that the thought of these men and the discussions at Philadelphia are important only as mere "evidence of what informed public men of the time thought the words of the Constitution meant."<sup>12</sup> As the Framers recede into the background, the importance of contemporaneous doc-

4. *Id.* at 5.

5. U.S. CONST., art. VI, cl. 2.

6. Judge Bork states:

If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives.

BORK, *supra* note 2, at 145.

7. *Id.* at 5.

8. *Id.*

9. *Id.* at 6.

10. *Id.* at 143 (emphasis added). Bork elaborates on what he means by the ratifiers:

Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this. The search is not for a subjective intention. . . . [W]hat counts is what the public understood. Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time.

*Id.* at 144.

11. Bork offers, as support for ignoring the Framers, Madison's self-deprecating statement that what mattered was the intention of the ratifying conventions. *Id.* This misses the point of why Madison, Hamilton, and Jefferson, as well as other Founders are considered so important. We do not look to them for their understanding of the words as much as for their articulation of the principles of law, government, and natural rights that underlie the text. See generally W. BERNS, TAKING THE CONSTITUTION SERIOUSLY (1987) [hereinafter TAKING THE CONSTITUTION SERIOUSLY]; H. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION (1978); SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING (C. Kesler ed. 1987); Goldwin, *Of Men and Angels: A Search for Morality in the Constitution*; Storing, *Slavery and the Moral Foundations of the American Republic*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (R. Horwitz ed. 1979).

12. BORK, *supra* note 2, at 144.

uments comes to the front. "The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like."<sup>13</sup> The quest for the original understanding for Bork is therefore not grounded in history or political theory, but in lexicology.

The emphasis on the words of the text does not eclipse, however, the task of deriving principles from the text. But this must be done in a neutral manner so as to remain faithful to the original meaning of the text. The judge must not "make unguided value judgments of his own," rather he accepts the values of the ratifiers.<sup>14</sup> Once a principle is derived from the text, the judge must decide the scope, or what Bork terms "the level of generality," of the principle.<sup>15</sup> The resolution of this problem must be accomplished without transforming the principle into something not intended by the ratifiers. The breadth and final application of the principle itself must be grounded on the "words, structure, and history of the Constitution."<sup>16</sup>

The use of "structure and history" in addition to the text would appear to push interpretation beyond lexicology to consideration of political theory and history. Let us consider structure first. The central problem for the courts is the resolution of what Bork terms the "Madisonian dilemma":

The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty. To place that power in one or the other would risk either tyranny by the majority or tyranny by the minority. The Constitution deals with the problem in three ways: by limiting the powers of the federal government; by arranging that the President, the senators, and the representatives would be elected by different constituencies voting at different times; and by providing a Bill of Rights. The last is the only solution that directly addresses the specific liberties minorities are to have. We have placed the function of defining

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13. *Id.*

14. *Id.* at 146.

15. *Id.* at 148.

16. *Id.* at 150, 162. Judge Bork states:

We have abundant sources for an understanding of particular provisions of the Constitution. Of course, some meanings will be doubtful or even lost, but much that is certain or probable remains. We have, after all, the constitutional text, records of the Philadelphia convention, records of ratifying conventions, the newspaper accounts of the day, the Federalist Papers, the Anti-Federalist Papers, the constructions put upon the Constitution by early Congresses in which men who were familiar with its framing and ratification sat, the constructions put upon the document by executive branch officials similarly familiar with the Constitution's origins, and decisions of the early courts, as well as treatises men who, like Joseph Story, were thoroughly familiar with the thought of the time. Judges can also seek enlightenment from the structure of the document and the government it created.

*Id.* at 165.

the otherwise irreconcilable principles of majority power and minority freedom in a nonpolitical institution, the federal judiciary, and thus, ultimately, in the Supreme Court of the United States.<sup>17</sup>

Resolution of the conflict between majority rule and minority rights will be accomplished through understanding of the structure of constitutional government rather than interpretation of the text. This occurs by necessity when the text is "silent" on a particular issue. When the Constitution is silent, who bears the greater burden of persuasion—the government in the assertion of the power to regulate or the individual in the assertion of a right to be free from the regulation? There appears to be little doubt of Bork's position on this issue. The government may not "invade the liberties the Constitution specifies," but judges may not create new constitutional rights.<sup>18</sup> "Democratic choice must be accepted by the judge where the Constitution is silent."<sup>19</sup> The underlying presumption is in favor of the government if the text is silent because the judge does not have any textual (or structural) basis upon which to restrain the exercise of majority power.<sup>20</sup>

History may aid the determination of original understanding, particularly where the language of the text is general. Bork thus reads the equal protection clause in light of its motivating purpose—the protection of the newly freed slaves from discriminatory legislation—and confines heightened judicial scrutiny to racial discrimination.<sup>21</sup> However, where history does not illumine the meaning of a particular provision, then it should be regarded as a nullity. "A provision whose meaning cannot be ascertained is precisely like a provision that is written Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it."<sup>22</sup>

Bork sees no principled alternative to reading the text in light of its originally intended meaning.<sup>23</sup> The failure to follow the original understanding leads inevitably to the reading of one's own individual views into the text and this is inconsistent with the relatively limited role that judges were intended to perform.<sup>24</sup> The rejection during the Constitutional Convention of a proposal

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17. *Id.* at 139.

18. *Id.* at 147.

19. *Id.* at 150.

20. *Id.* at 153-54. Bork's position should be compared with the position taken by Alexander Hamilton in Federalist No. 84 where Hamilton argued that the national government could not infringe upon rights when it had not been granted the power to do so. THE FEDERALIST No. 84, at 513-14 (A. Hamilton) (C. Rossiter ed. 1961).

21. BORK, *supra* note 2, at 65-66.

22. *Id.* at 166. Bork regards the privileges and immunities clause of the fourteenth amendment as such a provision. *Id.*

23. *Id.* at 251-59.

24. *Id.* at 183. Judge Bork states:

[W]hatever purpose the ninth amendment was intended to serve, the creation of a mandate to invent constitutional rights was not one of them. The language of the amendment itself contradicts that notion. It states that the enumeration of some rights shall not be construed to deny or disparage others retained by the people. Surely, if a mandate to judges had been intended, matters could have been put more clearly. James Madison, who wrote the amendments, and who wrote with absolute clarity elsewhere, had he meant to put a freehand power concerning rights in the hands of judges, could easily have drafted an amendment that

for a Council of Revision, made up of the President and federal judges, with the power to review all legislation, indicates that the judges were not intended to exercise a political role.<sup>25</sup> Nevertheless, Bork views much of the Supreme Court's history as an illicit invasion of the judiciary into the political process.<sup>26</sup> Moreover, given what Bork terms as the prevailing left-liberal legal culture, the recent decisions of the courts have come to reflect the attitudes of the "intellectual" class and thus threaten to tip the balance of the Madisonian dilemma in the direction of a minority tyranny.<sup>27</sup> He saw his confirmation battle as "the bloody crossroads" where politics and law met.<sup>28</sup> "The battle was ultimately about whether intellectual class values, which are far more egalitarian and socially permissive, which is to say left-liberal, than those of the public at large and so cannot carry elections, were to continue to be enacted into law by the Supreme Court."<sup>29</sup> Bork believes that his defeat engineered by this "minority" was accomplished only through distortion and dishonesty.<sup>30</sup>

It is impossible to conduct a thorough evaluation of Bork's argument within the confines of a book review, but it can be tested against the highs and the lows of our constitutional jurisprudence. Is Bork's approach consistent with what is best in our constitutional history and does it avoid the pitfalls of what is worst? The two cases to be used for this purpose are *Brown v. Board of Education*<sup>31</sup> and *Dred Scott v. Sandford*.<sup>32</sup>

As Bork concedes, *Brown v. Board of Education* "has become the high ground of constitutional theory."<sup>33</sup> All theories must account for it and each proponent must, if possible, "capture it" as an example of a particular theory's application.<sup>34</sup> Bork acknowledges *Brown* as a "great and correct decision," but suggests that the weakness of the underlying opinion was due to the weakness of the political approach taken by the Court.<sup>35</sup> The accepted wisdom, of

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said something like 'The courts shall determine what rights, in addition to those enumerated here, are retained by the people,' or 'The courts shall create new rights as required by the principles of the republican form of government,' or 'The American people, believing in a law of nature and a law of nature's God, delegate to their courts the task of determining what rights, other than those enumerated here, are retained by the people.' Madison wrote none of those things, and the conventions ratified none of them. If the Founders envisioned such a role for the courts, they were remarkably adroit in avoiding saying so.

*Id.*

25. *Id.* at 154.

26. *Id.* at 129-30.

27. *Id.* at 337-43.

28. *Id.* at 269.

29. *Id.* at 337.

30. *Id.* at 323-36.

31. 347 U.S. 483 (1954).

32. 60 U.S. (19 How.) 393 (1857).

33. BORK, *supra* note 2, at 77.

34. *Id.*

35. *Id.* at 75-76. Bork's description of the *Brown* litigation is erroneous in one important detail.

He states:

[*Brown*] was argued when Fred Vinson, a Truman appointee, was Chief Justice, but Vinson died before a decision was handed down, and Warren replaced him. In order to have a full Court, and to have the Chief Justice participate in a case of such magnitude and sensitivity, reargument was ordered in the next term.

course, is that *Brown* would not have been decided as it was if the Court had relied upon the original understanding. But Bork insists that the Court, and the scholars, assumed wrongly that the original understanding would not support the result reached in *Brown*.<sup>36</sup> His argument does not rest on the historical materials, but instead, curiously, is stated as a hypothetical:

Let us suppose that *Plessy v. Ferguson* correctly represented the original understanding of the fourteenth amendment, that those who ratified it intended black equality, which they demonstrated by adopting the equal protection clause. But they also assumed that equality and state-compelled separation of the races were consistent, an assumption which they demonstrated by leaving in place various state laws segregating the races. Let us also suppose, along with the Court in *Plessy*, as I think we must, that the ratifiers had no objection to the psychological harm segregation inflicted. If those things are true, then it is impossible to square the *opinion* in *Brown* with the original understanding. It is, however, entirely possible to square the *result* in *Brown* with that understanding.

. . . The ratifiers probably assumed that segregation was consistent with equality but they were not addressing segregation. The text itself demonstrates that the equality under law was the primary goal.

By 1954, when *Brown* came up for decision, it had been apparent for some time that segregation rarely if ever produced equality. . . . 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. There was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that. Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.

Had the *Brown* opinion been written that way, its result would have clearly been rooted in the original understanding, and its legitimacy would have been enhanced for those troubled by the way in which the Court arrived at a moral result without demonstrating its mooring in the historic Constitution.<sup>37</sup>

The argument has been quoted at length here in order to give a sense of its character; it is evident that he does not make a serious attempt to secure "its mooring in the historic Constitution." Instead, this is an argument based

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*Id.* at 75. On June 8, 1953, the case was set for a reargument in the next Term to specifically address the problem of the original understanding of the equal protection clause. This was done at the urging of Justice Frankfurter who wanted additional time to convince potential dissenters to join with the majority to outlaw segregation. R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 614-16 (1975) [hereinafter R. KLUGER]. On September 8, 1953, Chief Justice Vinson died unexpectedly of a heart attack. *Id.* at 656. Earl Warren was sworn in as his successor on October 5 (*Id.* at 665) and reargument began on December 7, 1953 (*Id.* at 667).

36. BORK, *supra* note 2, at 76-77.

37. *Id.* at 81-83 (emphasis in original).

on the *logical* resolution of two conflicting “values” which are *assumed* to be moored in the history. The historical question deeply troubled certain members of the Court, especially Justice Jackson.<sup>38</sup> Yet the argument here treats the matter of what the Framers and ratifiers understood almost cavalierly. This is not atypical, however, of how Bork approaches the original understanding. He is not a historian, nor is he particularly interested in political theory. The effect is unsettling because so much emphasis is placed upon ascertaining the original understanding. In any event, the explanation of how the result in *Brown* is consistent with the original understanding is not sufficient until we are provided with a better explanation of the content of such understanding.

Bork characterizes the *Dred Scott* decision as the “worst constitutional decision of the nineteenth century,”<sup>39</sup> an assessment with which most would undoubtedly agree. He also identifies the case as the intellectual predecessor of *Roe v. Wade*, in that he believes it to be an early example of what later came to be known as substantive due process.<sup>40</sup> Again, Bork maintains that the Court could have avoided the problems which the decision brought had it adhered to the original understanding.<sup>41</sup> In this assertion, there is a tremendous irony. Chief Justice Roger Taney’s opinion purported to follow exactly the approach which Bork advocates:

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. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes.<sup>42</sup>

It is hard to imagine that there could be within the volumes of the United States Reports a more faithful statement of the approach advocated in *The Tempting of America*. I am not sure whether Judge Bork is aware of this

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38. R. KLUGER, *supra* note 35, at 608-09.

39. BORK, *supra* note 2, at 28.

40. *Id.* at 32.

41. *Id.* at 30-34.

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



passage.<sup>43</sup> It is likely that he would respond that it does not matter how Taney characterized his approach; what matters is what he did and what he did was not faithful to the original understanding. With this I would agree, but this only underscores the necessity of ascertaining the substance of the "original understanding." If one must read the text without imposing his or her own "value judgments," then one must know the "values" of the Founders.

While *The Tempting of America* is an extended argument for following the original understanding, the reader will not get a good sense from Bork what the Founders' views were.<sup>44</sup> He apparently believes their understanding to be self-evident. We do learn that the constitutional liberties "arose out of historical experience with unaccountable power and out of political thought grounded in the study of history as well as in moral and religious sentiment."<sup>45</sup> This grounding is placed in opposition to what Bork terms "abstract, universalistic styles of constitutional reasoning" and "abstract moral philosophy."<sup>46</sup> But is not the Constitution itself ultimately grounded in "the Laws of Nature and of Nature's God?" Bork would say no,<sup>47</sup> but whether this conclusion is faithful to the view of the Founders is another matter. Bork would have been well-advised to have considered the assessment of his friend and colleague, Walter Berns, who has characterized the Declaration as "the first of our founding documents."<sup>48</sup>

The fundamental problem with Bork's argument is that he does not understand the Founders. He rules out—a priori—the possibility that the Con-

43. I am indebted to Professor Harry V. Jaffa who has pointed out this passage in his writings. See Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 PUGET SOUND L. REV. 351, 352 (1987) [hereinafter Jaffa].

44. For example, in the 29 pages of notes following the text, there are but three citations to Farrand's *The Records of the Federal Convention* and one citation to the *Federalist Papers*. BORK, *supra* note 2, at 388. There are no citations to any of the ratification debates nor to any of the contemporaneous materials collected in Phillip Kurland's and Ralph Lerner's masterful five volume *The Founder's Constitution* published in 1987 or in Herbert Storing's seven volume *The Complete Anti-Federalist* published in 1981. Similarly, there is no citation and virtually no discussion of the intentions of the framers and ratifiers of the fourteenth amendment. Most of Bork's citations come from secondary sources.

45. BORK, *supra* note 2, at 353.

46. *Id.* at 352-53.

47. In what I believe is the only reference to the Declaration of Independence in the entire book, Bork says that the ninth amendment cannot be read as if it stated: "The American people, believing in a law of nature and a law of nature's God (sic), delegate to their courts the task of determining what rights, other than those enumerated here, are retained by the people." *Id.* at 183. Whether the misquote is rooted in sarcasm or in lack of respect for the text cannot be determined.

48. TAKING THE CONSTITUTION SERIOUSLY, *supra* note 11, at 11.

In our official documents . . . in what are described as 'The Organic Laws of the United States,' the Declaration of Independence occupies first place: in the Statutes at Large, in the Revised Statutes, in the United States Code, and in a volume entitled, *The Federal and State Constitutions, Colonial Charters, and Other Organic Law of the United States*. Whatever place it holds in the hearts and minds of today's scholars, in the Organic Law it is first and it is listed first. . . . And there, one should like to think, it will continue to be, an obstacle, as Lincoln rightly said, to anyone who 'might seek to turn a free people back into the hateful paths of despotism.' Its authors knew 'the proneness of prosperity to breed tyrants, and they meant when such should re-appear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.'

W. BERNS, IN DEFENSE OF LIBERAL DEMOCRACY 55 (1984); see also Jaffa, *supra* note 43, at 397-422.

stitution is grounded on principles of natural justice.<sup>49</sup> He does this because he is suspicious (and rightly so) of what has been done in the name of natural justice.<sup>50</sup> Hence, the primary (and often exclusive) focus is to be on the plain words of the text. But if the scholars he criticizes have erred by divorcing the overarching principles from the text, Bork has erred by depriving the text of its overarching principles.<sup>51</sup>

It was this very problem that caused him to be on the defensive in the confirmation battle. The moral high ground was left to his Senatorial critics because he was so insistent on keeping personal principles out of judging that he did not adequately articulate and defend the principles of the Founders. Even now, he commends the response of Justice Holmes to Judge Learned Hand's admonition of "Do justice, sir, do justice": "That is not my job. It is my job to apply the law."<sup>52</sup> By posing the conflict in terms of law versus justice, he places the original understanding approach in a very unfavorable light.

The confirmation battle is aptly characterized by Bork as a battle for control of the legal culture.<sup>53</sup> The account of the nomination, the hearings, and the rejection by the Senate is by far the most readable, and most persuasive, portion of the book. Without trying to resolve here who fired the first shot, it is clear that the process became thoroughly politicized. The questioning by members of the Senate Judiciary Committee cannot be considered a high point in American jurisprudence, nor even a "constitutional moment." Law professors who have the sensitivity to detect any irregularity or misstatement, whether real or imagined, in their own tenure process apparently regarded the end of defeating Bork as sufficient to override concerns about fairness. A favorite technique of his opponents was to treat the result in a case heard by Judge Bork as if it represented his personal views on the subject. Thus, in probably the most notorious example, he was accused of condoning the pumping of lead into the air by American Cyanamid and the sterilization of certain of its female employees.<sup>54</sup> The legal issue in the case was actually whether the plaintiffs had brought their action under the appropriate law, and the decision by the administrative law judge that it had not been was affirmed by the Occupational Safety and Health Review Commission and the court of appeals' panel on which Judge Bork participated.<sup>55</sup> This apparently, however, furnished the basis for Senator Metzenbaum's assertion that the women of America were afraid of Bork.<sup>56</sup>

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49. BORK, *supra* note 2, at 6.

50. *Id.* at 66, 209-10.

51. Jaffa, *supra* note 43, at 358. Although Bork does make some references to the principles of the Constitution (BORK, *supra* note 2, at 162-63, 352), he does not, save for the principle of self-government (*Id.* at 353) articulate what those principles are.

52. Bork, *supra* note 2, at 6.

53. *Id.* at 271.

54. *Id.* at 327.

55. *Id.* at 328; see *Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984).

56. *Id.* at 290, 326.

Such tactics cannot be beneficial for the process of nominating and confirming or rejecting Supreme Court nominees. Even apart from the distortions, the emphasis on results diverts attention away from the more important question of judicial philosophy, *i.e.*, the approach that the nominee promises to bring to the task of judging. Perhaps the more recent hearings on the nomination of Judge David Souter have had a healing effect. We have probably not seen the end, however. Again, without resolving who fired the first shot, it seems clear that the linkage of Michael Dukakis and Willie Horton in the subsequent presidential campaign had its roots in the linkage of Judge Bork and sterilization.

If there is indeed a battle for control of the legal culture, it would be comforting to know that we are not required to choose between law and justice. The Founders certainly did not believe that such a choice was required. Bork's emphasis on law, to the exclusion of justice, implies that constitutional interpretation should be value free. His reading of the Constitution thus may, in an ironic way, encourage the type of judicial activism that he condemns. To the extent that Bork's reading of the Constitution is divorced from its overarching principles, it will be "seen not as the embodiment of fundamental and clearly articulated principles of government but as a collection of hopelessly vague and essentially meaningless words and phrases inviting judicial construction."<sup>57</sup> The Constitution was never intended to be a moral vacuum. To imply that it is so, by failing to offer any defense of its principles, is to invite the filling of the vacuum with philosophies repugnant to the principles of free government.

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57. TAKING THE CONSTITUTION SERIOUSLY, *supra* note 11, at 214.