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The Language of Law and the Foundations of American Constitutionalism

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Introduction

The Politics of Original Intention

At 2:00 PM, on Friday, October 23, 1987, the United States Senate committed what many considered then – and what many still consider today – to be an unforgivable political and constitutional sin. Wielding their power to advise and consent on presidential nominations to the federal courts, the members of the upper house voted 58–42 not to confirm Judge Robert H. Bork to the Supreme Court of the United States, the post for which President Ronald Reagan had nominated him nearly four months earlier. The vote, which was the largest margin of defeat in history for a nominee to the Supreme Court, concluded one of the most tumultuous political battles in the history of the republic.¹

The Senators perhaps had every reason to believe that that would be the end of the story. However ugly it had been, however much time it had taken, Judge Bork's defeat was only one more routine sacrifice to partisan politics. But time would prove wrong anyone who actually thought that. The unprecedented vote against his confirmation reflected something far more fundamental than an ordinary partisan standoff. The battle over Bork was politically transformative, its constitutional lessons enduring.

Bork, of course, was not the first or the only nominee to the high court to be denied confirmation. From the days of President Washington, twenty-nine others had been rejected.² But the Bork confirmation fight was historic, and what made it so was that the Senate had chosen to deny confirmation

¹ 133 Cong. Rec. 14,985, 15,011 (1987). For accounts of the Bork hearings and their political implications, see Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), pp. 269–355; Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: W. W. Norton, 1989), pp. 208–327; and Eugene W. Hickok, Jr., and Gary L. McDowell, *Justice vs. Law: Courts and Politics in American Society* (New York: The Free Press, 1993), pp. 148–162.

² Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham, MD.: Rowman and Littlefield, 1999), p. 13.

to a nominee whose professional qualifications, legal abilities, and personal integrity were never in question.³ Instead, the Senate rejected his judicial philosophy, even though that philosophy had been the received tradition in the Anglo-American legal system for hundreds of years. His jurisprudence was what has come to be called originalism, the belief that judges and justices in their interpretations of the Constitution must be bound by the original intentions of its framers.

In the end, Bork was rejected on the basis of his beliefs about the limited nature and circumscribed extent of the judicial power he would wield as a justice on the Supreme Court. The issue that united the judge's critics in their scorched-earth opposition to his nomination was the fact that in his sober constitutional jurisprudence there was no room for any airy talk about a general right to privacy, allegedly unwritten constitutions, vague notions of unenumerated rights, or what the progressive Justice Hugo Black once derided as "any mysterious and uncertain natural law concept."⁴ In particular, Bork was denied a seat on the highest court because of his unfaltering belief in what Chief Justice John Marshall once called "the most sacred rule of interpretation," the idea that it is "the great duty of a judge who construes an instrument . . . to find the intention of its makers."⁵

For Bork, originalism was the only, or at least the primary, means of interpretation that can accord with a written and ratified constitution of

³ During the Senate confirmation hearings on the nomination, it was repeatedly recalled that former Chief Justice Warren Burger had recently described Judge Bork as being without question the most highly qualified candidate to have been nominated to the Supreme Court in Burger's professional lifetime – a lifetime, it is worth noting, that would have included the appointments of some of the giants of the Supreme Court such as Benjamin Cardozo (1932–38), Hugo Black (1937–71), Felix Frankfurter (1939–62), and Robert H. Jackson (1941–54). For years, Bork had been a formidable intellectual presence in American legal circles, both public and scholarly. He had been solicitor general of the United States, a Yale Law School professor, a scholar whose groundbreaking work in the field of antitrust law was widely acclaimed, and, most recently, a judge on the United States Court of Appeals for the District of Columbia Circuit, where none of his opinions had ever been overturned by the Supreme Court and where, on several occasions, his dissenting opinions had been adopted on appeal as the majority view by the Supreme Court. When pressed during his own testimony at the confirmation hearings, Chief Justice Burger never qualified his expansive praise of Bork; and he was far from being alone in making such an assessment of the nominee. *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. 33 (1987), pp. 2096–2117.* Hereinafter cited as *Hearings*. Burger insisted that Bork was a "very sound lawyer, and a very fair judge, on the whole record." Moreover, he said, "I surely do not understand the suggestion that he is not in the mainstream of American constitutional doctrine." *Ibid.*, pp. 2101, 2104.

⁴ Dissent in *Griswold v. Connecticut*, 381 U.S. 479 (1965), 522.

⁵ Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland* (Stanford, CA: Stanford University Press, 1969), pp. 167–169.

limited and enumerated powers. In his view, “the framers’ intentions . . . are the sole legitimate premise from which constitutional analysis may proceed.” Constitutionalism and the rule of law, if those ideas were to mean anything, Bork believed, had to mean that “the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge.”⁶ It could never be legitimate in a constitutional democracy for a judge as a matter of interpretation to substitute his own moral judgment for the considered moral judgments of the legislator or the Founder as expressed in the written law. To his critics, this view meant that Judge Bork lacked what they argued was proper “judicial temperament,” and put him outside what they insisted was “the mainstream” of legal opinion.⁷

In a sense, the critics were right. They feared – and probably correctly – that his jurisprudential approach to constitutional law would almost certainly threaten the liberal tradition of expansive interpretation that had begun in earnest when Earl Warren ascended to the center chair over thirty years earlier. The Warren Court, after all, was praised by Bork’s most committed critics for having taught more than one generation of lawyers and judges, in the words of an early supporter of the Warren Court’s activism, that there need be “no theoretical gulf between law and morality,” and that the Supreme Court was the branch of the federal government best equipped to speak “the language of idealism” for the nation. The result was nothing less than a “revolutionary” jurisprudential stance in which the historic written Constitution is to be supplemented or supplanted by judicial recourse to an allegedly unwritten constitution of a higher law that is in its essence morally evolutionary.⁸

This notion of a “living” constitution denies that there is any settled fundamental meaning to the Constitution whereby the politics of the nation may be ordered and guided; rather, it embraces and celebrates quite the opposite view, that judges should redefine the meaning of the Constitution over time according to their own “fresh moral insight.”⁹ The goal of judicial power after the Warren Court was no longer merely securing constitutional

⁶ Robert H. Bork, *Tradition and Morality in Constitutional Law* (Washington, DC: American Enterprise Institute, 1984), pp. 10, 11.

⁷ See Laurence H. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York: Random House, 1985), pp. 106–124.

⁸ J. Skelly Wright, “Professor Bickel, the Scholarly Tradition, and the Supreme Court,” *Harvard Law Review* 84 (1970–71): 769, 804, 804. The intellectual relationship between Alexander M. Bickel and Robert Bork that grew during their time together on the faculty of the Yale Law School is given a masterful consideration by Johnathan O’Neill in “Shaping Modern Constitutional Theory: Bickel and Bork Confront the Warren Court,” *Review of Politics* 65 (2003): 325–351.

⁹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), p. 137.

or legal rights – even judicially created ones. Rather, the goal had become the “moral evolution” of the nation to be led by the courts.¹⁰

At the most important level, the Bork defeat was about more than merely the partisan and ideological rejection of one highly qualified nominee to the Supreme Court. It was the very public affirmation by the Senate of this new ideological theory of moralistic judging that had been developing for quite some time – even before the advent of the Warren Court, in fact. And that new theory of judging was completely at odds with the great historical tradition of a jurisprudence of original intention of which Bork was so visible a part.¹¹ The defeat of Robert Bork was historic for what was clearly in danger of being lost when it came to a public understanding of the nature and extent of judicial power.

What was at stake was the original view of the Constitution, an understanding that took seriously the importance of its being a written document the terms of which are to be deemed permanent until and unless changed by the “solemn and authoritative act” of formal amendment.¹² This is the understanding that lies at the core of what may with propriety be called the Founders’ Constitution. And it is this idea of a constitution at once fundamental and permanent that is most in danger of being eroded by the new idea of moral judging under an evolving constitution that so fully infuses contemporary constitutional law and theory.

The Founders were concerned above all else with the abuses of political power. No one among them argued for unlimited power that would authorize government institutions to go forth and do justice: not the legislature, not the executive, and, most assuredly, not the judiciary. The Founders knew the dangers of arbitrariness in the exercise of power and were dedicated to the idea of limited government rooted in a constitution of clearly enumerated powers. They were committed to the proposition, as Chief Justice Marshall put it in *Marbury v. Madison*, that a written constitution is nothing less than “the greatest improvement on political institutions.”¹³ And, perhaps most important, they believed with Justice Joseph Story that the Constitution should have “a fixed, uniform, permanent construction. It should be . . . not dependent upon the passions or parties of particular times, but the same, yesterday, to-day, and forever.”¹⁴ As students of Marshall and Story, originalists such as Judge Bork argue for the recovery of the Founders’

¹⁰ Michael Perry, *The Constitution, the Court, and Human Rights* (New Haven, CT: Yale University Press, 1980), p. 101.

¹¹ See Raoul Berger, “‘Original Intention’ in Historical Perspective,” *George Washington Law Review* 54 (1985–86): 296–337.

¹² Jacob Cooke, ed., *The Federalist* (Middletown, CT: Wesleyan University Press, 1961), No. 78, p. 528. Hereinafter cited as *The Federalist*.

¹³ 5 U.S. 137 (1803), 176.

¹⁴ Joseph Story, *Commentaries on the Constitution of the United States*, 2 vols. (3rd ed.; Boston: Little, Brown and Co., 1858), I.426.303. Citation indicates volume, section, and page number.

Constitution and the idea that interpretation, in order to be legitimate, must be rooted in the text and the original intention behind that text.¹⁵

While this view may be more modest than the current dominant view, it is also safer, constitutionally and politically. For at bottom it accepts a basic truth of American constitutionalism. As James Wilson said at the Constitutional Convention, “laws may be unwise, may be dangerous, may be destructive . . . and yet not be unconstitutional.”¹⁶ This older view of the Constitution – the Constitution understood as positive law – was premised on the belief that when it came to interpreting the Constitution there were limits to the influence of higher law, limits to judicial recourse to an allegedly unwritten constitution in interpreting the written text.

Where the Constitution’s framers and ratifiers intended to protect rights, so argue the originalists, the document does so – clearly and simply. Where it is silent, it is silent. The due process clauses are not, nor were they intended to be, judicial wild cards whereby contemporary moral, political, or economic theories may be made to trump the Constitution’s original meaning; the Ninth Amendment is not a statement of unenumerated rights so fundamental and sweeping as to render all the other rights explicitly mentioned in the text superfluous; most of all, Article III, which creates the federal judicial power, is not the primary means whereby rights are to find their protection. It would have struck the Founders not only as dangerous but as bizarre to have expected the security of their rights to depend upon a judiciary willing to plunge into a moral discourse unattached to the constitutional text and divorced from the intentions that lie behind the document itself.¹⁷

A jurisprudence of original intention appreciates the design and objects of the Constitution. It unflinchingly recognizes the limitations of popular government – such as the possibility of majority tyranny – and the need to secure individual rights. But it also denies that good government and the sound security of rights are ever to be expected from any body of judges even if (or perhaps especially if) dedicated to the judicial pursuit of an allegedly higher law contained within an unwritten constitution. The Constitution

¹⁵ As Joseph Story put it, the “fundamental maxim . . . in the interpretation of . . . positive laws is that the intention . . . is to be followed. This intention is to be gathered from the words, the context, the subject matter, the effects and consequences, and the spirit and reason are to be ascertained, not from vague conjecture, but from the motives and language apparent on the face of the law.” Joseph Story, “Law, Legislation, Codes,” in Francis Lieber, ed., *Encyclopedia Americana*, 13 vols. (Philadelphia: Lea & Blanchard, 1844), VII: 576–592, p. 576. This essay has been reprinted in James McClellan, *Joseph Story and the American Constitution* (Norman: University of Oklahoma Press, 1971), p. 365.

¹⁶ Max Farrand, ed., *Records of the Federal Convention*, 4 vols. (New Haven, CT: Yale University Press, 1937), II: 73. Hereinafter cited as *Records of the Federal Convention*.

¹⁷ On the facts of the relationship between framers’ limited institutional provisions for the judiciary and their expectations of its role, see Gary L. McDowell, “Bork Was the Beginning: Constitutional Moralism and the Politics of Federal Judicial Selection,” *University of Richmond Law Review* 39 (2005): 809, 813–817.

with its carefully contrived institutional balances and checks was devised precisely to supply, as James Madison said in *The Federalist*, “the defect of better motives.”¹⁸ Sturdy institutions replaced good intentions as the source of good government in the Founders’ new science of politics. To allow the courts to enter the realm of substantive policy making denies the logic and the limits of the most basic idea of written constitutions. Distrusting the moral impulses of judges is not morally cynical; it is politically prudent.

The only way the inherently undemocratic power of judicial review can be reconciled with the demands of republican government is by keeping it tied to the written text of the fundamental law. Only by conforming to the “intention of the people”¹⁹ as expressed in the document can the judges legitimate what they do; as they range further from the text and intention, their power becomes increasingly suspect. “The Court,” as Justice Byron White once argued, “is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”²⁰

This is the essential dilemma posed by the new anti-originalist jurisprudence, the wide-ranging moralistic judging rooted in a so-called “living” constitution that has come to characterize the exercise of contemporary judicial power. Not only does such judicial activism violate the separation of powers and make the judges policy makers at a given moment, but over time it weakens the role of the Court by undermining its only claim to legitimacy – that when it speaks it is only enforcing the clear will of the sovereign people as already expressed in their Constitution.

As Madison said of the legislatures of his day, so might it be said about the courts of the present: the judiciary has “every where extended the sphere of its activity and draw[n] all power into its impetuous vortex.”²¹ Where the Founders could say with confidence that “[j]udges . . . are not presumed to possess any peculiar knowledge of the mere policy of public measures,”²² more recent generations have come to believe that judges are indeed quite well equipped to deal with the most sensitive and politically controversial areas of policy. And as the courts have become ever more immersed in the “mere policy of public measures,” the choice of who shall wield those vast extra-constitutional powers has become ever more politically important, with the sad result – made clear in the Bork confirmation fight – that the federal courts are no longer to be left above the fray.

¹⁸ *The Federalist*, No. 51, p. 349.

¹⁹ *The Federalist*, No. 78, p. 525.

²⁰ *Bowers v. Hardwick*, 478 U.S. 186 (1982), 194.

²¹ *The Federalist*, No. 48, p. 333.

²² Nathaniel Ghorum in the Constitutional Convention, *Records of the Federal Convention*, II: 73.

How did this state of affairs come about? It is not enough to say that the present dilemma is the result of power-grabbing judges bent on wielding their powers in order to achieve the policy ends they prefer. There is some of that, of course; but the whole answer is more complicated. The story involves not just judicial usurpation but also Congress's abdication of its responsibility to shape the judicial process by rules and regulations and to make exceptions to the Supreme Court's jurisdiction. In many ways, Congress has been more than willing to leave the federal courts to their own devices.²³

But neither does the whole answer lie simply in the institutional relationship between the judiciary and the legislature. It has also involved something far more subtle. Since the last third of the nineteenth century there has been a change in the ideas about judicial power. The new ideas have been largely created and encouraged not by the courts themselves but by the scholarly community. Legal scholars have become adept at creating new theories of interpretation, and new understandings of what constitutionalism generally and the United States Constitution in particular demand of the judges. Indeed, the new dominant anti-originalist, aconstitutional constitutionalism has its roots as much in the classroom as in the courtroom. As Edward S. Corwin once put it, "if judges make law, so do commentators."²⁴ At the head of the fight against Robert Bork's nomination was a phalanx of professors that was able to persuade the public and the Senate that Bork's originalism was outside the "mainstream" of legal opinion that the professors themselves had helped to divert from its long-established, traditional path.²⁵

More important, in a sense, than what led to the current state of affairs is what might reasonably be done about it. What might help restore an appreciation for the Constitution's original institutional design and thus a firmer understanding of the true nature and proper extent of judicial interpretation? It is in this sense that the vote over Judge Bork's nomination to the Supreme Court is not just a matter of quaint historical interest but the first great battle in the contemporary war for the Constitution – a continuing war that must be won if true self-government as envisioned by the Founders is to prevail. Time has shown that originalism as a theory of constitutional interpretation remains very much alive; Bork was defeated, but his central idea was not. That theory of interpretation and its implicit belief in restrained judging continues to guide those who believe that the inherent arbitrariness of government by judiciary is not the same thing as the rule of law.

²³ See Gary L. McDowell, *Curbing the Courts: The Constitution and the Limits of Judicial Power* (Baton Rouge: Louisiana State University Press, 1988).

²⁴ Edward S. Corwin, "Review: *The Law of the American Constitution*, by Charles K. Burdick," *Michigan Law Review* 22 (1923): 84, p. 84.

²⁵ For a listing of those in the legal academy who opposed the Bork nomination, see *Hearings*, pp. 1335-1341, 1342-1345, 3351-3354, 3355-3412.

Changing the public mind is never quick or easy. To recover the Founders' Constitution it will be necessary to demonstrate that recourse to original intention – John Marshall's "most sacred rule of interpretation" – is the true mainstream flowing from the well-established legal and constitutional traditions of the nation. This book is an attempt at that recovery of the intellectual and philosophic foundations of that jurisprudence of original intention as the most sound approach to judicial interpretation under our constitution of enumerated and limited powers and liberties.