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# Bork was the Beginning: Constitutional Moralism and the Politics of Judicial Selection

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## BORK WAS THE BEGINNING: CONSTITUTIONAL MORALISM AND THE POLITICS OF FEDERAL JUDICIAL SELECTION

*Gary L. McDowell* \*

On 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 its power to advise and consent on nominations to the Supreme Court of the United States, the upper house voted 58-42 not to confirm Judge Robert H. Bork.<sup>1</sup> 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, a battle that would transform the process of judicial selection for years to come.<sup>2</sup>

Bork, of course, was not the first or the only nominee to be denied confirmation. From the days of the Washington Administration onward, some thirty of the 144 nominees whose names have been sent to the Senate for confirmation, including Bork, have been rejected.<sup>3</sup> What made the Bork confirmation so historic was that it was the first time that the Senate chose to deny confirmation to a nominee whose professional qualifications and legal abilities were never in question. The nominee had been Solicitor General of the United States, a Yale law professor, a scholar

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1. 133 CONG. REC. 14,985, 15,011 (1987). Note that Judge Bork is currently a member of the University of Richmond Law School faculty.

2. For accounts of the Bork hearings and their political implications, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 269–355 (1990); ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 208–327 (1989); and EUGENE W. HICKOK & GARY L. MCDOWELL, *JUSTICE VS. LAW: COURTS AND POLITICS IN AMERICAN SOCIETY* 148–62 (1993).

3. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 13 (rev. ed. 1999).

whose work in the field of antitrust law was widely acclaimed,<sup>4</sup> and, most recently, a judge on the United States Court of Appeals for the District of Columbia Circuit.<sup>5</sup>

Bork was denied a seat on the High Court because of his ideas, in particular, for his understanding of how a Justice was obligated to interpret the Constitution and the laws made pursuant to it. In brief, Bork's jurisprudential sin was that he agreed with Chief Justice John Marshall that "the most sacred rule of interpretation" is that the "great duty of a judge who construes an instrument, is to find the intention of its makers."<sup>6</sup> For Bork, originalism was the only, or at least the primary, means of interpretation. In his view, it would never be legitimate for a judge to substitute his moral judgment for the moral judgment of the legislator or the founder.<sup>7</sup> To his critics, this put him outside what they insisted was the mainstream of legal opinion and suggested that he lacked judicial temperament.<sup>8</sup>

Bork's supporters and critics alike could agree on one thing: his adherence to such a doctrine of originalism would mean an approach to judging that would likely call into question the doctrinal premises of such cases as *Griswold v. Connecticut*<sup>9</sup> and *Roe v. Wade*.<sup>10</sup> At a minimum, even if those decisions would not be overturned, his approach would surely put the brakes on the constitutional moralism that had led to them and which characterized much of the work of the Supreme Court at least since the ascension of Earl Warren to the center chair.<sup>11</sup> The senatorial attack on Bork's jurisprudence focused on how such an originalist view of interpretation would cramp American constitutional law

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4. See BRONNER, *supra* note 2, at 62-63, 73, 82; ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

5. BORK, *supra* note 2, at 272-73.

6. JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 167-69 (Gerald Gunther ed., 1969).

7. See ROBERT H. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 11 (1984) ("In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge."); see also Robert H. Bork, *Foreword* to GARY L. MCDOWELL, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY*, at v-xi (1985).

8. See ABRAHAM, *supra* note 3, at 298.

9. 381 U.S. 479 (1965).

10. 410 U.S. 113 (1973).

11. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 465-77 (1990).

and the willingness of the Court to create new rights such as that of the right to privacy in *Griswold* and that of abortion in *Roe*.<sup>12</sup>

The effect was deadly. The *New York Times* reported on the early volley of criticism launched against Bork by the Democratic Chairman of the Senate Judiciary Committee, Joe Biden, this way: "Biden's sweeping invocations of human rights antedating the Constitution were far easier to grasp than Judge Bork's insistent examinations of the purported legal derivations of such rights."<sup>13</sup> Bork's serious and scholarly defense of an ancient theory of interpretation would be no match for the glittering rhetoric of his critics. When Senator Alan Simpson asked Judge Bork why he wished to be on the Supreme Court, and the nominee answered that it would be "an intellectual feast," the Democrats were able to cement the image of Bork as an unfeeling, uncaring academic.<sup>14</sup>

The importance of the Bork fight can be seen in who finally came to occupy the chair he would have held. After a false start with Judge Douglas Ginsburg, the Reagan Administration opted for a lesser known United States Circuit Court judge from California, Judge Anthony Kennedy.<sup>15</sup> Unlike Bork, Kennedy had no real paper trail, and, unlike Bork, he did not seem to be intellectually rooted in any substantial jurisprudential soil.<sup>16</sup> History has made that much, at least, very clear.

In several cases, but especially in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>17</sup> and, most recently, *Lawrence v. Texas*,<sup>18</sup> Justice Kennedy has been instrumental in racheting out the limits of constitutional moralism, helping to craft the *Casey* opinion in league with Justices Sandra Day O'Connor and David Souter to uphold *Roe v. Wade*,<sup>19</sup> and writing for the majority of the Court in *Lawrence* to strike down state laws that made homosexual sodomy illegal on the basis of popular

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12. See BRONNER, *supra* note 2, at 158–60; see also ABRAHAM, *supra* note 3, at 297–98.

13. R.W. Apple Jr., *The Bork Hearings: Trying to Sway the Doubters; Judge is Witness: His Burden of Proof*, N.Y. TIMES, Sept. 16, 1987, at A26, quoted in HICKOK & MCDOWELL, *supra* note 2, at 151.

14. See BRONNER, *supra* note 2, at 275–76.

15. ABRAHAM, *supra* note 3, at 299.

16. *Id.* at 300.

17. 505 U.S. 833 (1992).

18. 539 U.S. 558 (2003).

19. *Casey*, 505 U.S. at 845–46; see also ABRAHAM, *supra* note 3, at 308.

views of morality.<sup>20</sup> In Kennedy's view, the Due Process Clause of the Fourteenth Amendment allows the Court to weigh the "substantive validity" of legislation,<sup>21</sup> but more, it also posits a notion of liberty that has "transcendent dimensions,"<sup>22</sup> dimensions the boundaries of which "are not susceptible of expression as a simple rule."<sup>23</sup> As the plurality opinion in *Casey* put it: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>24</sup>

These contrasting ideas about the nature and extent of judicial power—Bork's originalism and Kennedy's "transcendent" notion of rights awaiting judicial discovery—lie at the heart of the current battles over President George W. Bush's nominations to the lower courts and are central to what will surely be a bloodbath should he have the opportunity to appoint someone to the Supreme Court.<sup>25</sup> Given that the President is on record indicating that Justices Antonin Scalia and Clarence Thomas are his models of the sorts of Justices he might appoint<sup>26</sup> (both clearly in the Bork tradition), it seems safe to say that the Democratic members of the Senate must look upon Anthony Kennedy as their model

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20. *Lawrence*, 539 U.S. at 578–79.

21. *Id.* at 575.

22. *Id.* at 562.

23. *Casey*, 505 U.S. at 849.

24. *Id.* at 851.

25. It is not uncommon for those on the liberal side of the present constitutional divide to dismiss originalism in constitutional interpretation as nothing more than "a judicial tool of convenience and not one of restraint." See William P. Marshall, *The Judicial Nomination Wars*, 39 U. RICH. L. REV. 819, 829 (2005). As is argued elsewhere in this issue, the idea of a principled resort to originalism is "simply untenable" because, it is alleged, all too often those who proclaim themselves to be originalists "have been willing to manipulate not only their applications of originalism but also their views on deference to elected officials, judicial restraint, and judicial power in order to accomplish specific results." See *id.* at 829–31. But the fact is, originalism is not simply a matter of deferring to the political branches on all matters of policy but of using the original meaning of the Constitution as the benchmark of legitimacy against which such political judgments must be measured. Voting to strike down misbegotten legislation does not make an advocate of originalism into a judicial activist. Nor is it enough to suggest that because those who espouse a jurisprudence of original intent occasionally stray from the path that the idea of originalism itself is flawed or insufficient. It is only to say that even those with the true faith still can sin. Conservative activism that abandons the original meaning of the Constitution to achieve particular results is not more legitimate than such activism from the left; and in both cases it is the original meaning that is the most reliable standard by which to measure the extent of such judicial transgressions.

26. See Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24 (noting that Bush has "singled out Justices Antonin Scalia and Clarence M. Thomas, the court's two most conservative members, as justices whom he held in high regard").

nominee, the best they might hope for from a Republican administration. Where Bork felt himself bound by what Thomas Jefferson called the "chains of the Constitution,"<sup>27</sup> Kennedy and his ilk would never feel so constrained. Indeed, pursuing justice is how they see the essence of their jobs. It is not too much to say that Kennedy the Justice has revealed himself to be very much in line with Kennedy the senator when it comes to constitutional interpretation.

These facts are worth recalling, not to dwell on the long-ago political tragedy of the Bork confirmation battle, or even to be critical of Justice Kennedy, although the temptation on both counts is very strong indeed. Rather, the facts point toward the necessity of raising a simple question that all too frequently gets lost in the ideological shuffle that has come to surround judicial nominations to the federal bench: Is it conceivable that the Founders created the federal judiciary with the expectation (or even the hope) that it would be the moral guardian of the people, an institution, as the Court put it in *Casey*, "invested with the authority to . . . speak before all others for [the people's] constitutional ideals?"<sup>28</sup>

In answering this question it is necessary to reflect briefly upon both the general understanding of the Founders on these matters and the constitutional details of the judicial power they actually created. The Founders generally were concerned above all with the abuses, and the potential abuses, of political power.<sup>29</sup> No one among them argued for unlimited power for those who would institutionally possess such power to go forth and do justice: not the legislature; not the executive; and not the judiciary. The Founders were dedicated, rather, to the idea of limited government rooted in a constitution of enumerated powers.<sup>30</sup> Perhaps most

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27. Thomas Jefferson, Draft of the Kentucky Resolutions, in THOMAS JEFFERSON: WRITINGS 449, 455 (Merrill D. Peterson ed., 1984).

28. *Casey*, 505 U.S. at 868.

29. THE FEDERALIST NO. 48, at 332-33 (James Madison) (Jacob E. Cooke ed., 1961) (describing the threat of the "encroaching nature" of power); THE FEDERALIST NO. 51, *supra*, at 349-51 (James Madison) (arguing for the division of government so that each branch "may be a check on the other"); THE FEDERALIST NO. 78, *supra*, at 525 (Alexander Hamilton) (stating that the power of the government is derived from and subject to the power of the people).

30. THE FEDERALIST NO. 14, *supra* note 29, at 86 (James Madison) ("In the first place it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any.").

important, they were committed to the proposition, as Chief Justice Marshall put it in *Marbury v. Madison*,<sup>31</sup> that a written constitution was “the greatest improvement on political institutions.”<sup>32</sup> And 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.”<sup>33</sup>

In light of what some on the federal judiciary have come to boast about as their powers, it pays to consider the way the Constitution treats the judiciary as an institution. First, the Constitution does not create a federal judicial system; it grants a judicial power and leaves the creation of the institution to the Congress.<sup>34</sup> There is not, for example, any provision for a set scheme of courts. The Constitution simply states there shall be merely “one supreme Court” and “such inferior Courts as the Congress may from time to time ordain and establish.”<sup>35</sup> By that language, the Congress could create many inferior courts, a few inferior courts, or no inferior courts at all, thereby leaving all the cases and controversies to the state courts in the first instance. It is instructive, for example, that it was not until 1891 that the Congress saw the need to create the federal appeals courts.<sup>36</sup>

Second, there are no constitutional requirements that there be any particular number of Justices.<sup>37</sup> The only explicit provision is that there be one Chief Justice of the United States, and we only learn that in Article I, where the Constitution provides that in cases of an impeachment of the president that “the Chief Justice shall preside.”<sup>38</sup> True to the original intention, the number of Jus-

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31. 5 U.S. (1 Cranch) 137 (1803).

32. *Id.* at 176.

33. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426, at 303 (3d ed. 1858).

34. U.S. CONST. art. III, §§ 1–2 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . [T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

35. *Id.* art. III, § 1.

36. See Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826, 826.

37. See U.S. CONST. art. III.

38. *Id.* art. I, § 3, cl. 6.

tices of the Supreme Court has varied over time—from as few as five to as many as ten—as Congress has seen fit.<sup>39</sup>

Third, there are no specific minimal requirements for the Justices of the Supreme Court any more than for the judges of the inferior courts. There are, for example, no specifications for age, residence, or even citizenship, as there are for representatives, senators, and presidents.<sup>40</sup> Nor is there any concern for experience or even if the nominee has legal training.<sup>41</sup> It was assumed, apparently, that these factors would be considered by the president who would nominate and by the Senate who would advise and consent to any nomination.

Fourth, the Constitution is largely silent on exactly how the judicial process shall be constituted and how the courts are to conduct their business. In comparison to the enumeration of powers and duties listed in Article I for the legislative branch<sup>42</sup> and in Article II for the executive,<sup>43</sup> Article III is remarkably vague.<sup>44</sup> Like the number of Justices, this area, too, was left up to Congress as was seen in the first Congress's passage of the Judiciary and Process Acts of 1789.<sup>45</sup> It is worth recalling that it was not until the Judiciary Act of 1925 that the legislature gave the Court some control over its own docket including the power to issue writs of certiorari.<sup>46</sup> In short, as indicated earlier, the Constitution created a judicial power but left it up to the more representative institutions to create the structure of the judicial system.

Fifth, not only is the original jurisdiction of the Court limited, but the appellate jurisdiction is granted subject to "such Excep-

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39. See Judiciary Act of 1866, ch. 100, § 1, 12 Stat. 794, 794 ("[T]he supreme court of the United States shall hereafter consist of a chief justice and nine associate justices."); Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89 (providing that the Supreme Court "shall consist of five justices only"). There have been nine justices on the Supreme Court since 1869. Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44, 44. Despite attempts to alter the size of the Court, the number has remained at nine due to political and practical necessity.

40. Compare U.S. CONST. art. III, with *id.* art. I, and *id.* art. II (comparing the age and citizenship requirements for representatives and senators with Article III, which contains no such requirements for judges).

41. See *id.* art. I, § 2, cls. 1, 3; *id.* art. II, § 1, cl. 5.

42. *Id.* art. I.

43. *Id.* art. II.

44. See *id.* art. III.

45. See Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73–93 (creating the lower federal courts and their powers); Process Act of 1789, ch. 21, 1 Stat. 93, 93–94 (creating and describing the judicial process of federal courts).

46. Judiciary Act of 1925, ch. 229, § 1, 43 Stat. 936, 937–39.

tions, and under such Regulations as the Congress shall make."<sup>47</sup> During the Civil War era Congress undertook not only to remove jurisdiction from the Court, but to do so in the middle of a case making its way through the Court (arguments in fact had already been heard).<sup>48</sup> The Court itself upheld congressional removal of Supreme Court jurisdiction in its 1869 decision of *Ex parte McCardle*.<sup>49</sup> It has always been understood since then that Congress has a reasonably free hand to make such exceptions and regulations to appellate jurisdiction as it sees fit.<sup>50</sup> Indeed, the Supreme Court has held that when it comes to making exceptions or regulations to appellate jurisdiction, the power of Congress is "plenary."<sup>51</sup>

Sixth, one looks in vain at the records of the Federal Convention for any detailed discussion of what we have come to call judicial review—the power to invalidate legislation as unconstitutional. It was not until the Anti-Federalists' *Brutus*<sup>52</sup> and the *Federal Farmer*<sup>53</sup> attacked the Constitution's provisions for a judiciary that Alexander Hamilton had to return to the subject in *The Federalist* to give a defense of the courts as "an intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority."<sup>54</sup> But even then Hamilton insisted that the courts would "have neither Force nor Will, but merely judgment."<sup>55</sup> When it came to interpreting the Constitution and the law, judges would be bound by "the intention of the people" as expressed in their Constitution, which was to be deemed the "fundamental law."<sup>56</sup> There is noth-

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47. U.S. CONST. art. III, § 2, cl. 2.

48. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 304–07 (1985) (describing the events surrounding *Ex parte McCardle*).

49. 74 U.S. (7 Wall.) 506 (1869); see also CURRIE, *supra* note 48, at 304–07.

50. See *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514–15.

51. *Yakus v. United States*, 321 U.S. 414, 472–73 (1944).

52. See 2 *THE COMPLETE ANTI-FEDERALIST* 358–452 (Herbert J. Storing ed., 1981). *Brutus* argued that the Constitution gave the judges power to "enable them to mould the government, into most any shape they please." *Id.* at 422; see also *id.* at 419–22, 442.

53. See *id.* at 214–357. *The Federal Farmer* insisted that when it came to the proposed judiciary that the people were "more in danger of sowing the seeds of arbitrary government in this department than in any other." *Id.* at 316.

54. *THE FEDERALIST* NO. 78, *supra* note 29, at 525 (Alexander Hamilton).

55. *Id.* at 523.

56. *Id.* at 525.

ing in the writings of Hamilton or any of the other Founders to suggest it would be legitimate for the courts to create new rights out of whole cloth.

These six facts are essential to understanding why the politics of judicial selection has become so vicious and vitriolic. The courts have become the objects of such political wrath as has been seen in the past two decades because over time they have assumed constitutional powers never envisioned and never granted. But even if one might wish to argue that the Founders implicitly intended the courts to be the moral guardians of the republic, and to embark on the creation of new rights such as privacy, abortion, and homosexual sodomy, surely one would not also wish to argue that so important and powerful an institution as courts thus described should have their powers and jurisdiction left open to congressional tampering. But on this point the Constitution is absolutely clear. Congress's power to fashion the court system of inferior courts, to set the number of judges and justices, to make exceptions to, and create regulations for, appellate jurisdiction, and to establish the rules of civil and criminal procedure is indeed plenary.<sup>57</sup> The only reasonable conclusion one can reach is that the judicial power of today is something far different from what the Constitution's framers and ratifiers envisioned and empowered.

As James Madison said of the legislatures of his time, so might we say of the courts of our day: The judiciary has "every where extend[ed] the sphere of its activity, and draw[n] all power into its impetuous vortex."<sup>58</sup> And it is into that impetuous vortex that the politics of judicial selection in our day has inevitably been pulled. Where the Founders could say with confidence that "[j]udges . . . are not to be presumed to possess any peculiar knowledge of the mere policy of public measures,"<sup>59</sup> more recent generations have come to have confidence that judges are indeed quite well equipped to deal with the most sensitive areas of policy. And as the courts have become more politically immersed in

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57. See *supra* notes 42–51 and accompanying text.

58. THE FEDERALIST NO. 48, *supra* note 29, at 333 (James Madison).

59. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., rev. ed. 1966) (statement of Mr. Gorham).

the "mere policy of public measures,"<sup>60</sup> the choice of who shall wield those vast extra-constitutional powers has become ever more politically important with the sad result that the federal courts are no longer left above the fray.

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60. *Id.*