

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 10: The Reagan Era – Foundations/Principles

The Nomination of Robert H. Bork to the U.S. Supreme Court (1987)

At the time of his nomination to the Supreme Court by Ronald Reagan in 1987, Robert Bork was a judge on the influential Court of Appeals for the District of Columbia, having been easily confirmed to that position early in Reagan's presidency. A well-respected litigator, U.S. solicitor general during the Nixon administration, and former Yale law professor, Bork had long been a leading champion for conservative constitutional and legal causes as a lawyer, public speaker, and writer. As a vocal critic of many decisions of the Warren and early Burger Courts, he was particularly known for supporting judicial restraint and for insisting that a jurisprudence of original intent was the only legitimate approach to constitutional interpretation. Both supporters and opponents of the Reagan administration regarded Bork's nomination to the Supreme Court as central to conservative efforts to remake the judiciary and advance a distinct constitutional philosophy through judicial appointments.

*Bork's nomination took on added significance not only because he was thought to have the intellectual skills and beliefs necessary to influence the direction of the Court, but also because the vacancy was created by the departure of the moderate Lewis Powell. Powell was a crucial swing vote on many issues, including abortion and affirmative action. Most observers were confident that, if confirmed, Bork would provide the fifth vote for reversing such decisions as *Roe v. Wade* (1973). Bork's nomination also came after the midterm elections of 1986, when the Republicans lost their majority in the Senate. Just a year earlier a Republican Senate had confirmed two judicial conservatives: Associate Justice William Rehnquist had been elevated to chief justice and Antonin Scalia became an associate justice. Whether the new Democratic majority would be as accommodating to Reagan conservatives was not at all clear.*

Given Bork's qualifications and the absence of scandal or doubts about his character, Republicans hoped he would be easily confirmed by a bipartisan vote, as Scalia and Rehnquist had been. Instead, the confirmation debate focused explicitly on Bork's conservative judicial philosophy. Liberals engaged in an organized lobbying campaign complete with television advertisements in their effort to defeat the Bork nomination and Reagan responded with a special presidential address. The battle was particularly bitter. Bork's nomination was ultimately defeated in a largely party-line vote on the Senate floor. The vacancy was eventually filled by Anthony Kennedy, a lower profile and more moderate figure who later became a frequent swing vote on the Rehnquist and Roberts Courts. Conservatives complained that the Judge Bork's record had been badly misrepresented, remembered afterwards as having been "Borked." Is this complaint valid? Were liberals right to claim that Reagan presented Bork as more moderate than he actually was? Was this just an instance of normal politics? Should we expect judicial confirmation struggles to be more elevated than normal politics?

Ronald Reagan, "Address to the Nation"

...

In the last 6½ years I have spoken with you and asked for your help many times. When special interests and power brokers here in Washington balked at cutting your taxes, I asked for your help. You went to your Congressmen and Senators, and the tax cuts passed. And by the way, as a result, at the end of this month we will mark the longest peacetime economic expansion on record.

... Yes, all that America has achieved in the last 6½ years—our record economic expansion, the new pride we have at home, the new strength that may soon bring us history's first agreement to eliminate an entire class of U.S. and Soviet nuclear missiles—all of this has happened because, when the

chips were down, you and I worked together.

As you know, I have selected one of the finest judges in America's history, Robert Bork, for the Supreme Court. You've heard that this nomination is a lost cause. You've also heard that I am determined to fight right down to the final ballot on the Senate floor. I'm doing this because what's now at stake in this battle must never in our land of freedom become a lost cause. And whether lost or not, we Americans must never give up this particular battle: the independence of our judiciary.

Back in July when I nominated Judge Bork, I thought the confirmation process would go forward with a calm and sensible exchange of views. Unfortunately, the confirmation process became an ugly spectacle, marred by distortions and innuendos, and casting aside the normal rules of decency and honesty. As Judge Bork said last Friday, and I quote: "The process of confirming Justices for our nation's highest court has been transformed in a way that should not and, indeed, must not be permitted to occur again. The tactics and techniques of national political campaigns have been unleashed on the process of confirming judges. That is not simply disturbing; it is dangerous. Federal judges are not appointed to decide cases according to the latest opinion polls; they are appointed to decide cases impartially, according to law. But when judicial nominees are assessed and treated like political candidates, the effect will be to chill the climate in which judicial deliberations take place, to erode public confidence in the impartiality of courts, and to endanger the independence of the judiciary."

...

During the hearings, one of Judge Bork's critics said that among the functions of the Court was reinterpreting the Constitution so that it would not remain, in his words, "frozen into ancient error because it is so hard to amend." Well, that to my mind is the issue, plain and simple. Too many theorists believe that the courts should save the country from the Constitution. Well, I believe it's time to save the Constitution from them. The principal errors in recent years have had nothing to do with the intent of the framers who finished their work 200 years ago last month. They've had to do with those who have looked upon the courts as their own special province to impose by judicial fiat what they could not accomplish at the polls. They've had to do with judges who too often have made law enforcement a game where clever lawyers try to find ways to trip up the police on the rules.

...

So, my agenda is your agenda, and it's quite simple: to appoint judges like Judge Bork who don't confuse the criminals with the victims; judges who don't invent new or fanciful constitutional rights for those criminals; judges who believe the courts should interpret the law, not make it; judges, in short, who understand the principle of judicial restraint. That starts with the Supreme Court. It takes leadership from the Supreme Court to help shape the attitudes of the courts in our land and to make sure that principles of law are based on the Constitution. That is the standard to judge those who seek to serve on the courts: qualifications, not distortions; judicial temperament, not campaign disinformation.

In the next several days, your Senators will cast a vote on the Bork nomination. It is more than just one vote on one man: It's a decision on the future of our judicial system. The purpose of the Senate debate is to allow all sides to be heard. Honorable men and women should not be afraid to change their minds based on that debate.

I hope that in the days and weeks ahead you will let them know that the confirmation process must never again be compromised with high-pressure politics. Tell them that America stands for better than that and that you expect them to stand for America. . . .

Thank you, and God bless you all.

*Senate Judiciary Committee Hearings on Bork Nomination*¹

CHAIRMAN JOSEPH BIDEN (Democrat, Delaware)

¹ "Hearings Before the Committee on the Judiciary, United States Senate, One Hundredth Congress, First Session, on the Nomination of Robert H. Bork to be Associate Justice on the Supreme Court of the United States." (Sept. 15, 16, 17, 18, 19, 21, 22, 23, 25, 28, 29, and 30, 1987). Serial No. J-100-64. (U.S. Government Printing Office, 1989).

...

Judge, each generation in some sense has had as much to do to author our Constitution as the 39 men who affixed their signatures to it 200 years ago. Indeed, two years after its signing, following a bitter national debate over its ratification, at the insistence of the people, the Constitution was profoundly ennobled by the addition of what has come to be known as the Bill of Rights.

...

America is the promised land because each generation bequeathed to their children a promise, a promise that they might not come to enjoy but which they fully expected their offspring to fulfill. So the words "all men are created equal" took a life of their own, ultimately destined to end slavery and enfranchise women. And the words, "equal protection and due process" inevitably led to the end of the words, "separate but equal," ensuring that the walls of segregation would crumble, whether at the lunch counter or in the voting booth.

...

So let's make no mistake about it, the unique importance of this nomination is in part because of the moment in history in which it comes, for I believe that a greater question transcends the issue of this nomination. And that question is, will we retreat from our tradition of progress or will we move forward, continuing to expand and envelope the rights of individuals in a changing world which is bound to have an impact upon the individuals sense of who they are and what they can do, will these ennobling human rights and human dignity, which is a legacy of the past two centuries, continue to mark the journey of our people?

...

... In passing on this nomination to the Supreme Court, we must also pass judgment on whether or not your particular philosophy is an appropriate one at this time in our history.

You are no ordinary nominee, Judge, to your great credit. Over more than a quarter of a century you have been recognized as a leading—perhaps the leading—proponent of a provocative constitutional philosophy, one that when I was in law school—I did not go to Yale; I am not bragging about that but I did not go to Yale—one where our constitutional law professor would say, "and this is such and such," and then, "as Professor Bork at Yale says."

You have been a man of significant standing in the academic community and thus in a special way, a vote to confirm you requires, in my view, an endorsement of your basic philosophic views as they relate to the Constitution. And thus the Senate, in exercising its constitutional role of advice and consent, has not only the right in my opinion but the duty to weigh the philosophy of the nominee as it reaches its own independent decision. ...

...

I believe all Americans are born with certain inalienable rights. As a child of God, I believe my rights are not derived from the Constitution. My rights are not derived from any Government. My rights are not derived from any majority. My rights are because I exist I have certain rights. They were given to me and each of my fellow citizens by our creator and they represent the essence of human dignity.

I agree with Justice Harlan, the most conservative jurist and Justice of our era, who stated that the Constitution is, quote, "a living thing" and that "its protections are enshrined in majestic phrases like 'equal protection under the law' and 'due process' and thus cannot be," as he said, and I quote, "reduced to any formula."

It is, as the great Chief Justice John Marshall said, intended, and I quote, "intended to endure for ages to come and consequently to be adapted to the various crises of human affairs, only its great outlines marked," ...

...

JUDGE ROBERT BORK

... As you have said, quite correctly, Mr. Chairman, and as others have said here today, this is in

large measure a discussion of judicial philosophy, and I want to make a few remarks at the outset on that subject of central interest.

That is, my understanding of how a judge should go about his or her work. That may also be described as my philosophy of the role of a judge in a constitutional democracy.

The judge's authority derives entirely from the fact that he is applying the law and not his personal values. That is why the American public accepts the decisions of its courts, accepts even decisions that nullify the laws a majority of the electorate or of their representatives voted for.

The judge, to deserve that trust and that authority, must be every bit as governed by law as is the Congress, the President, the state governors and legislatures, and the American people. No one, including a judge, can be above the law. Only in that way will justice be done and the freedom of Americans assured.

How should a judge go about finding the law? The only legitimate way, in my opinion, is by attempting to discern what those who made the law intended. The intentions of the lawmakers govern whether the lawmakers are the Congress of the United States enacting a statute or whether they are those who ratified our Constitution and its various amendments.

Where the words are precise and the facts simple, that is a relatively easy task. Where the words are general, as is the case with some of the most profound protections of our liberties—in the Bill of Rights and in the Civil War Amendments—the task is far more complex. It is to find the principle or value that was intended to be protected and to see that it is protected.

As I wrote in an opinion for our court, the judge's responsibility "is to discern how the Framers' values, defined in the context of the world they knew, apply in the world we know."

If a judge abandons intention as his guide, there is no law available to him and he begins to legislate a social agenda for the American people. That goes well beyond his legitimate power.

He or she then diminishes liberty instead of enhancing it. That is why I agree with Judge Learned Hand, one of the great jurists in our history, when he wrote that the judge's "authority and his immunity depend upon the assumption that he speaks with the mouths of others: the momentum of his utterances must be greater than any which his personal reputation and character can command if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate." To state that another way, the judge must speak with the authority of the past and yet accommodate that past to the present.

The past, however, includes not only the intentions of those who first made the law, it also includes those past judges who interpreted it and applied it in prior cases. That is why a judge must have great respect for precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a prior decision. That requires much careful thought.

Times come, of course, when even a venerable precedent can and should be overruled. The primary example of a proper overruling is *Brown against Board of Education* (1954), the case which outlawed racial segregation accomplished by Government action. *Brown* overturned the rule of separate but equal laid down 58 years before in *Plessy against Ferguson* (1896). Yet *Brown*, delivered with the authority of a unanimous Court, was clearly correct and represents perhaps the greatest moral achievement of our constitutional law.

...

I can put the matter no better than I did in an opinion on my present court. Speaking of the judge's duty, I wrote: "The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the Framers specified are made effective in today's circumstances."

But I should add to that passage that when a judge goes beyond this and reads entirely new values into the Constitution, values the Framers and the ratifiers did not put there, he deprives the people of their liberty. That liberty, which the Constitution clearly envisions, is the liberty of the people to set their own social agenda through the processes of democracy.

Conservative judges frustrated that process in the mid-1930's by using the concept they had invented, the Fourteenth Amendment's supposed guarantee of a liberty of contract to strike down laws designed to protect workers and labor unions. That was wrong then and it would be wrong now.

My philosophy of judging, Mr. Chairman, as you pointed out, is neither liberal nor conservative. It is simply a philosophy of judging which gives the Constitution a full and fair interpretation but, where the constitution is silent, leaves the policy struggles to the Congress, the President, the legislatures and executives of the 50 states, and to the American people.

...

SENATOR ORIN HATCH (Republican, Utah)

...

Mr. Chairman, I feel honored to welcome to the Committee one of the most qualified individuals ever nominated to serve on the United States Supreme Court. His resume—outstanding law student, successful trial practitioner, leading law professor, esteemed author and lecturer, excellent Solicitor General, and respected judge on the District of Columbia Circuit—speaks for itself.

Nonetheless a few details might demonstrate the quality of his life's work. He was not merely one of the top law students at the University of Chicago, but he was the managing editor of the *Law Review*, as has been stated. He was not merely one of the top law professors for 15 years, but the holder of two endowed chairs. He was not merely an excellent Solicitor General, but successfully represented the United States before the Supreme Court in hundreds of cases during his four-year tenure. He was not merely another appellate judge, but a judge who in at least 416 total cases was never once reversed on appeal. Moreover, the Supreme Court six times adopted his dissenting opinion when he had the courage to dissent from the majority of his judicial colleagues. Now, this is a jurist who, in the words of President Carter's legal counsel, Lloyd Cutler, will be counted by history as belonging alongside a few select justices, like Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Potter Stewart—whose wife is with you here today and whom I have a great deal of admiration and respect for, of course, her husband—and Lewis Powell, as well.

...

In light of these remarkable credentials, it is hard to understand why your nomination would generate controversy. The answer is found in one word, which is tragic in this judicial context, and that word is "politics." . . .

Federal judges are not politicians and ought not to be judged like politicians.

The great danger I see in the impending ideological inquisition is injury to the independence and integrity of the Supreme Court and the whole Federal judiciary. When we undertake to judge a judge according to political rather than legal criteria, we have stripped the judicial office of all that makes it a distinct separated power. . . .

Now, recognizing precisely this danger, the Senate has refused to employ political litmus tests while confirming 53 justices over this past century. Senate precedent does not support subjecting judicial nominees to ideological inquisitions.

Moreover, the Constitution itself does not support that practice. Based on the common sense observation that a diverse congressional body would have difficulty overcoming jealousies and politics to select the best candidate, the Framers . . . unanimously voted to vest the nomination power in the President. The Senate, however, was given a checking function. In the words of Alexander Hamilton, the advice and consent function was to prevent "nepotism" and "unfit characters." The advice and consent function is a checking function, not a license to exert political influence on another branch, not a license to control the outcome of future cases by overriding the President's prerogatives.

...

This is the reason that politics are injected into this proceeding, because many politicians are hoping to win from unelected judges what they cannot win in the Congress or with the people of the United States of America. My fear, however, is that the price of a politicized judiciary is too high to pay in

exchange for a short-term policy set of gains. If judges fear to uphold the Constitution due to political pressures or sense that their judicial careers might be advanced by reading that document in the smoky back rooms of political intrigue, then the Constitution will no longer be the solid anchor holding our nation in place during the times of storm and crisis. Instead, the Constitution will just become part of that political storm, blowing hot and cold whenever the wind changes. That is a price that we in this country cannot afford to pay, and I think it is important that the American people understand that here.

...

SENATOR EDWARD KENNEDY (Democrat, Massachusetts)

...

From the beginning, America has set the highest standards for our highest Court. We insist that a nominee should have outstanding ability and integrity. But we also insist on even more: that those who sit on the Supreme Court must deserve the special title we reserve for only nine Federal judges in the entire country, the title that sums up in one word the awesome responsibility on their shoulders—the title of “Justice.”

Historically, America has set this high standard because the Justices of the Supreme Court have a unique obligation: to serve as the ultimate guardians of the Constitution, the rule of law, and the liberty and the equality of every citizen. To fulfill these responsibilities, to earn the title of “Justice,” a person must have special qualities:

A commitment to individual liberty as the cornerstone of American democracy.

A dedication to equality for all Americans, especially those who have been denied their full measure of freedom, such as women and minorities.

A respect for justice for all whose rights are too readily abused by powerful institutions, whether by the power of government or by giant concentrations of power in the private sector.

...

These are the standards by which the Senate must evaluate any judicial nominee. And by these standards, Robert Bork falls short of what Americans demand of a man or woman as a Justice on the Supreme Court. Time and again, in his public record over more than a quarter of a century, Robert Bork has shown that he is hostile to the rule of law and the role of the courts in protecting individual liberty.

He has harshly opposed—and is publicly itching to overrule—many of the great decisions of the Supreme Court that seek to fulfill the promise of justice for all Americans.

He is instinctively biased against the claims of the average citizen and in favor of concentrations of power, whether that is governmental or private.

And in conflicts between the legislative and executive branches of Government, he has repeatedly expressed a clear contempt for Congress and an unbridled trust in the power of the President.

...

In Robert Bork’s America, there is no room at the inn for blacks and no place in the Constitution for women, and in our America there should be no seat on the Supreme Court for Robert Bork.

Mr. Bork has been equally extreme in his opposition to the right to privacy. In an article in 1971, he said, in effect, that a husband and wife have no greater right to privacy under the Constitution than a smokestack has to pollute the air.

President Reagan has said that this controversy is pure politics, but that is not the case. I and others who oppose Mr. Bork have often supported nominees to the Supreme Court by Republican Presidents, including many with whose philosophy we disagree. I voted for the confirmation of Chief Justice Burger and also Justices Blackmun, Powell, Stevens, O’Connor and Scalia. But Mr. Bork is a nominee of a different stripe. President Reagan has every right to take Mr. Bork’s reactionary ideology into account in making the nomination, and the Senate has every right to take that ideology into account in acting on the nomination.

...

... All Americans should realize that the confrontation over this nomination is the result of a

deliberate decision by the Reagan Administration. Rather than selecting a real judicial conservative to fill Justice Powell's vacancy, the President has sought to appoint an activist of the right whose agenda would turn us back to the battles of a bitterly divided America, reopening issues long thought to be settled and wounds long thought to be healed.

I for one am proud of the accomplishments of America in moving towards the constitutional ideas of liberty and equality and justice under law. I am also proud of the role of the Senate in ensuring that Supreme Court nominees adhere to the tradition of fairness, impartiality, and the freedom from bias.

I believe the American people strongly reject the Administration's invitation to roll back the clock and relive the more troubled times of the past. I urge the Committee and the Senate to reject the nomination of Mr. Bork.



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