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Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), xiv + 432 pp. $22.50; $10.95 paper.

KEN MASUGI
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> Those who made and endorsed our Constitution knew man's nature, and it is to their ideas, rather than to the temptations of utopia, that we must ask that our judges adhere.[1]
>
> Robert Bork

Judge Bork's book elaborates on his jurisprudence of original understanding, which he regards as "the only method [of legal interpretation] that can preserve the Constitution, the separation of powers, and the liberties of the people" (p. 159). But can these noble aims be secured by the judge's version of "original understanding"? Bork claims to have produced a jurisprudential discourse on method, reflecting on Supreme Court history (with a focus on the development of substantive due process), current trends in constitutional law, and his own demonization during his Supreme Court confirmation hearings.[2] His defense of freedom focuses on legal and political institutions, for

> [t]he foundation of American freedom is in the structure of our Republic. The major features of that structure are the separation of powers of the national government and the limitation of national power to preserve a large degree of autonomy in the states. (P. 4)

Today the threat to freedom comes not so much from tyrannical majorities but rather a nonelected, life-tenured judiciary, which seeks to "remake the historic Constitution from such materials as *natural law*, conventional morality, prophetic vision, *the understanding of an ideal democracy*, or what have you" (p. 6, emphases added). These doctrinaire "theorists. . . . all wind up in the same place, prescribing a new constitutional law that is much more egalitarian and socially permissive than either the actual Constitution or the legislative opinion of the American public." This subversion of the original understanding of the Constitution comes about when judicial interpretation is mistaken for justice. Bork cites as the contrary "American orthodoxy" Oliver Wendell Holmes's contention that "[j]ustice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of a new law" (p. 6). But here, along with Holmes's animus against natural law, Bork imports a quite unorthodox doctrine—leading to legal positivism—that undermines him and his friends in their fight against nihilism and

their patriotic defense of freedom.[3] Moreover, Bork's approach distracts good citizens from more comprehensive and politically persuasive arguments. A critical reading of Bork reminds us of the political significance of philosophic principles, in other words, the political and philosophic sides of classical natural right—an enduring theme of American politics. (That Bork invites judgment by this high standard is implicit in his claim to have produced a book "not . . . ultimately about legal theory. It is about who we are and how we live; it is about who governs us and how, about our freedom to make our own moral choices . . ." [p. 11].)

In articulating his method of original understanding, Bork focuses exclusively on the text and its interpreters, the judges. "All serious constitutional theory centers upon the duties of judges. . ." (p. 155). The place of the Court is thus to assure neutrality, and "original understanding" intends to supply neutrality in deriving, defining, and applying principle (p. 146). In deriving original understanding, what interpreters look at is "how the words used in the Constitution would have been understood at the time," by the public, in their ratifying conventions (p. 144). Original understanding calls for the best judges can be expected to do; it is an imperative. For example, judges cannot interpret an "ink blot" (p. 16) like the Fourteenth Amendment's privileges or immunities clause. (". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") Bork summarizes:

> In short, all that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows. (Pp. 162–63)

This neat procedure not only provides for a disciplined, apolitical judiciary, but it also has the great political benefit of encouraging democratic self-government. A judge must exercise "abstinence from giving his own desires free play" and self-consciously renounce power, for this is "the morality of the jurist" (p. 178). In America's present circumstances this neutrality would have the political benefit, Bork observes, of combatting the left-wing assault on politics, culture, and morality (pp. 241–50).

But this jurisprudence is not mechanical, Bork argues; politics, in the form of making political judgments, *does* intrude on the courts. For Bork might well respect a precedent which he would have disputed purely on original-understanding grounds, by relying on what he calls "the prudence of a court." A

prior decision "may be clearly incorrect but nevertheless have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now" (p. 158). Thus a strict "original understanding" of the commerce clause—the principal constitutional justification for the expansion of federal power—might overturn New Deal and Great Society programs and "plunge us into chaos. No judge would dream of doing it" (p. 158). Though Bork appears to call for judicial statesmanship, he leaves us in the dark about when and how a judge knows when he need be more than an interpreter of the laws and applier of the "original-understanding" text.

Closely related to this narrow view of the Court's function is Bork's legal positivism. While attacking leftist "moralism" and its concomitant relativism, Bork regards law as an expression of the community's morality (pp. 241–50, infra.). Like Max Weber, who propounded the fact-value distinction to fight Marxist corruption of the universities, Bork would use "original understanding" to rein in nihilism and prevent the corruption of the law and hence of politics and morality. Needless to say, the collapse of Weber's Weimar democracy advises against Bork's tactic here. Bork makes impossible demands on judges and, implicitly, on citizens as well:

> In order to gain the assent of the public, the judges' explanation of why they are entitled to displace our moral choices with theirs would require that the judges be able to articulate a system of morality upon which all persons of good will and adequate intelligence must agree. .
>
> I do not mean that moral philosophy is a failed or useless enterprise. I mean only that moral philosophy has never succeeded in providing an overarching system that commands general assent. (P. 253)

He continues in this radically skeptical vein in other places as well (p. 255). Adopting the language of earlier work, he argues that ". . . unless we can rank forms of gratification [of the parties in a case], the judge must let the majority have its way. There is, however, no principled way to make the necessary distinctions" between types of "gratifications" (p. 258; Bork relies on his earlier provisional essay, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal*, Vol. 47 [1971], p. 1.). Astoundingly, Bork characterizes this attitude as "moral abstention," not moral relativism. (Bork's assumption oddly resembles that of "the end of history thesis," that a consensus on political forms indicates the end of history/philosophy and the discovery of the truth.)

Of course it is true that "moral philosophy cannot create primary rules, or major premises" for a judge (p. 254), for American political morality is not something "created" but rather derived from natural rights and revealed religion. Yet Bork's positivistic blasts at those who attack "traditional views of morality" would backfire and destroy the morality of the Constitution he so passionately seeks to defend. For the Founders neither argued as positivists nor

conceived of constitutional law as primarily a matter for judges, but they did think and act in the natural-rights, higher-law tradition.

These differences place Bork closer to the dangerous tendencies in contemporary jurisprudence he criticizes than to the Founders, whose views he distorts. Founded as "a Madisonian system," the United States, Bork contends,

> 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. . . We have placed the function of defining the otherwise irreconcilable principles of majority power and minority freedom[,] ultimately, in the Supreme Court. . . . (P. 139)

The Court's obligation of resolving the "dilemma" of majority versus minority rule "impose[s] a need for constitutional theory" about the Court—his theory of original understanding (p. 140).

But Bork has rushed too quickly to the Court and too quickly from his principles, which are themselves problematic. Certainly Madison himself never formulated the democratic "dilemma" in the way Bork does. In *The Federalist*, number 10, for example, Madison notes the necessity for modern republics to deal with the effects of faction, majority or minority, while pointing (as he does in paper number 14) to the need for republics to deal with the causes of faction, through a civic education that teaches citizens to be "the mutual guardians of their mutual happiness," a "public happiness." Bork's jurisprudence is all means, purporting to take account of basic political principles, but in fact dismissive of higher political ends other than the *process* of democratic give and take. By contrast, Madison makes the question of democratic self-government depend not on numbers, large or small, but on legitimacy, a quality rather than a quantity, majority or minority.[4] Compare Bork's later comment that

> a person who understands these issues [viz. original understanding] and nevertheless continues to judge constitutional philosophy by sympathy with its results must, if he is candid, also admit that he is prepared to sacrifice democracy in order that his moral views may prevail. . . . He believes in the triumph of the will. (P. 265)

Here Bork assumes that the crisis of our times ("the tempting of America") is not on a par with the great regime crises of the Founding and the Civil War. As Bork stresses, the separation of powers is crucial to American freedom, but today Congress administers, the executive makes speeches, and the judiciary legislates. Ideological jurisprudence exhibits the willfulness that natural rights

and the classical portrayal of law embodying reason without passion were intended to overcome. The willfulness of former Mr. Justice Brennan is seen in his inventive opinions, and the willfulness of some conservatives occurs in their faith in majorities—but majorities evidently unrestrained by natural law or right reason. This is not government proceeding according to *enlightened* consent. (See John Marini, "The Political Conditions of Legislative-Bureaucratic Supremacy," *The Claremont Review of Books* [Spring 1988], pp. 7–9.) In light of such opposition, why now demand such an original-understanding jurisprudence for the Court, with its excessive deference to a Congress far gone from the Founders' understanding of deliberation? Had the judge forgotten Madison's query in number 10, "what are many of the most important acts of legislation but so many judicial determinations. . ."? What should we make of Madison's reference to the separation of powers as one of a pattern of "inventions of prudence"? Finally, can one understand any decent regime exclusively in terms of consent (and the institutions which produce it), while neglecting the role of wisdom?

By confronting such questions, Bork would have approached the *nature* of the original understanding. He comes close, at times, to recovering this horizon, but he is ultimately worlds apart from the Founders as they understood themselves. For example, he once refers to "[t]he orthodoxy of our civil religion, which the Constitution has aptly been called . . ." (p. 153). But how a Constitution lacking transcendent principles of God and nature could deserve the status of religion, even civil religion, is unexplained. Behind the principles of majority versus minority tyrannies is another set of principles, namely those of the American Founding—including natural rights, equality, liberty, and consent of the governed—which inform the debate over democratic rule.[5]

In sum, Bork slights the significance of the Declaration of Independence—that is, of fundamental principles—for the "structure of our republic." Nothing could better illustrate his aversion to natural right than his omission, marked by ellipses, of the Constitution's reference to the Declaration in its closing lines (completed on "the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and eighty seven and of the Independence of the United States of America the Twelfth") from the book's reprinting of the Constitution.[6] Bork is determined to battle the enemies of the regime without the resources of the original document that inspired the regime; such an effort will, to quote Bork on his enemies' doctrines, "wind up in the same place" as theirs.

That this is a possibility can be seen in his sketch of Supreme Court history. Bork focuses on the rise of the dubious concepts of substantive due process and substantive equal protection, doctrines enabling the Court to make willful moral judgments under the guise of interpreting the Constitution. Here we see some accusations which at first seem surprising. For example, even Chief Justice John Marshall does not escape criticism for favoring natural-law reasoning in some of his cases and for having reached a "few conclusions that could not be

justified by the Constitution" (p. 27). Moreover, Bork concedes that there was an overriding political purpose to Marshall's jurisprudence:

> It would be wrong for those of us who have never faced the possible failure of the entire enterprise that is the United States to be too easily critical of Marshall's performance. . . . [B]y the same token it would be a mistake for us to take Marshall's performance, in all its aspects, as a model for judges now that the basic structure and unity of our nation have been accepted. (P. 28)

But, if the Founding is one exception requiring judicial statesmanship, why would not the Civil War be another? And what about the Great Depression? And the struggle to preserve free government and western civilization today?

To the contrary, Hadley Arkes argues that the natural-law reasoning of Justice Wilson and Chief Justice Jay in *Chisholm v. Georgia* (2 Dallas 419, 1793) should serve as models for Supreme Court opinion writing (*First Things*, pp. ix–x). Note as well Jeremy Rabkin's remarks:

> Early decisions of the Supreme Court could invoke "the first principles of justice" or "natural law" to condemn government interference with contractual rights of private persons. . . . But the moral authority of courts was still sharply limited by the modest pretensions of this "higher law." Judges did not claim responsibility for promoting virtue or for securing the common good. In form, the judicial obligation, even in cases invoking the higher law of the Constitution, was simply an obligation to determine whether individuals had been subject to unlawful coercion. (*Judicial Compulsions* [New York: Basic Books, 1989], p. 119)

Today, when individual rights are under attack from diverse ideologies, is not the notion of limited government derived from the "higher law" indispensable?

But for Bork the common thread in cases such as *Dred Scott v. Sandford* (60 U.S. [19 Howard] 393), *Lochner v. New York* (198 U.S. 45 [1905], striking down a state law limiting bakers' work hours), and *Roe v. Wade* (410 U.S. 113 [1973]) is that they all equally distort the meaning of the Constitution's Fifth and Fourteenth Amendment due process clauses, that government may not deprive a person of "life, liberty, or property without due process of law." For Bork, the courts' using these procedural clauses to strike down laws concerning slavery, labor, and abortion is the negative proof of his positive defense of original understanding: "Who says *Roe* must say *Lochner* and *Scott*" (p. 32).[7]

This aversion to involving the Court in matters of fundamental political principle may explain Bork's puzzling comments on policies of abortion and race and gender preference, the two principal moral questions facing our polity today. In criticizing Laurence Tribe for citing Lincoln on *Dred Scott* in support of a constitutional right of abortion, Bork makes the astounding assertion that "[t]he abortion issue does not threaten the survival of the nation, and Lincoln certainly never suggested that the cure for a nation half slave and half free was for the Supreme Court to end slavery by inventing the Thirteenth Amendment"

(p. 203). While Tribe certainly is preposterous, as Bork's well-taken observation about Lincoln indicates, Bork misses the point of Lincoln's "crisis of the house divided" speech. He was referring even more to the survival of the character of a free nation than to an impending war. Slavery would kill the nation's soul. Thus, Lincoln's arguments against slavery are the pro-life movement's best resource, as it too argues that America's *spiritual* survival is in jeopardy.[8]

But the oddest, and most revealing, result of Bork's doctrine of original understanding occurs in the area of racial preference. Here we see most vividly the consequences of his dichotomy between the Constitution and natural right. He attacks the federal companion case to *Brown v. Board of Education* (347 U.S. 483 [1954]), *Bolling v. Sharpe* (347 U.S. 497 [1954]), for using the Fifth Amendment due process clause to strike down racially segregated schools in the District of Columbia. (The Fifth Amendment due process clause reads: "No person . . . shall be deprived of life, liberty, or property, without due process of law. . . .") Bork is certainly correct in noting that the Fifth Amendment requirement restraining the federal government cannot be facilely equated with the Fourteenth Amendment's equal protection clause, which restricts state legislation. (Consider the Japanese-American relocation cases from World War II, in which the Supreme Court rejected such challenges and accepted the military-necessity arguments of the elected branches.) Yet,

> [i]ronically [*sic*], given the motives for this innovation, the Court's fifth amendment equal protection clause is the main basis for attacking federal legislation compelling affirmative action or reverse racial discrimination. Without *Bolling*'s invention, it is not easy to think of how a constitutional challenge to such laws could be mounted. (P. 84)

This shocking legitimation of racial preference laws indicates the extent of his belief in legislative-executive supremacy. This is the *reductio ad absurdum* of Bork's peculiar attack on substantive due process. Particularly in *Dred Scott* and *Bolling* an appeal to the origins of American constitutional government in the Declaration of Independence's reliance on human equality would confirm the Constitution as a document protecting *individual* rights. This was indeed the failure of the Court's reasoning (as opposed to its decisions) in *Brown* and all the race-related cases: overlooking the Civil War amendments' revival of the principles of the American Founding. Thus Bork's jurisprudence is unable to deal satisfactorily with today's leading moral issues of American politics.

Good citizenship requires recognition of the nation's birth in and perpetuation through these principles. A Supreme Court justice is not exempt from this common understanding of citizenship obligations. Deprived of his character and legal talents in public life, Americans can hope that in his good fight the judge would add to his armory the weapon of natural right, for he has been much too kind to the enemies of free government.

NOTES

1. P. 355. All further references to *The Tempting of America* occur in the text. I wish to acknowledge the aid of John Marini in developing my argument, as we watched the Bork controversy unfold when we worked in Washington together, and of Dennis Teti and Jeffrey Wallin and the challenging commentaries of various members of the Federalist Society.

2. A faithful insider account of the Bork nomination struggle can be found in Patrick B. McGuigan and Dawn M. Weyrich, *Ninth Justice* (Washington, DC: Free Congress Research and Educational Foundation, 1990). Bork's singular act of statesmanship was to insist on a full Senate vote—a demand for senatorial responsibility.

3. For Holmes's contempt for reason, see "Natural Law" in *The Political Thought of American Statesmen*, Morton J. Frisch and Richard G. Stevens, eds. (Itasca, IL: F.E. Peacock Publishers, 1973), pp. 263–67. Note Walter Berns's reflections:

> Holmes was a man of the law, but the Supreme Court of the United States is not simply, and in one sense not even primarily, a court of law; and this explains his failure as a justice. The Supreme Court is primarily a court of constitutional law in the sense that its power to enforce constitutional principle gives it a role—in one sense the decisive role—in the governing of Americans. [B]ut no judge in the history of the Supreme Court made less of an effort to learn what was expedient for the United States, or what the Constitution regarded as expedient for the United States. And contrary to the Holmesian iconographers, no man with anything approaching his length of service on the Court, contributed so little in the development of the constitutional law that defines the rights, privileges and immunities of Americans even as it imposes limits on the government.
>
> The cause of his failure in this respect is not hard to find. The Constitution occupied no special place in his thoughts, *because the idea of natural principles of justice which the Founders understood to be embodied in the Constitution was wholly alien to his thought.* ("Oliver Wendell Holmes, Jr., and the Question of Judicial Activism," in William F. Buckley, Jr., and Charles R. Kesler, eds., *Saving the Tablets* (New York: Harper and Row, 1988), p. 302, emphasis added, footnotes omitted.)

Of course, Bork and his allies have seen natural law typically used to justify left-wing positions.

4. Hence Bork criticizes his late friend and colleague Alexander Bickel for his emphasis on the "legitimating function" of the Supreme Court through the making and articulation of principled decisions (pp. 190–91). Bickel argues, ". . . [I]t has in large part been left to the Supreme Court to concretize the symbol of the Constitution" (*The Least Dangerous Branch* [Indianapolis: Bobbs-Merrill, 1962], p. 31). For reflections on reconciling principle and expediency in American politics, Bickel (pp. 65–72) relies on Harry V. Jaffa, *Crisis of the House Divided* (Garden City, N.Y.: Doubleday, 1959; reprinted, Chicago: University of Chicago Press, 1982).

5. For secondary sources that point to some of the most interesting primary sources for recovering original understanding in its fuller sense, see, e.g., George Anastaplo, *The Constitution of 1787: A Commentary* (Baltimore: Johns Hopkins University Press, 1989); Hadley Arkes, *First Things* (Princeton, N.J.: Princeton University Press, 1986); Herman Belz, "Abraham Lincoln and American Constitutionalism," *The Review of Politics* (Spring, 1988), pp. 169–97; Harry Clor, "Constitutional Interpretation and Regime Principles," in *The Constitution, the Courts, and the Quest for Justice*, Robert A. Goldwin and William A. Schambra, eds. (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1990), pp. 115–35; Edward J. Erler, "Natural Right in the American Founding," and Thomas G. West, "The Classical Spirit of the Founding," in *The American Founding*, J. Jackson Barlow, Leonard W. Levy, and Ken Masugi, eds. (Westport, CT: Greenwood Press, 1988), pp. 195–223, pp. 1–56; Charles R. Kesler, ed., *Saving the Revolution: The Federalist Papers and the American Founding* (New York: Free Press, 1987); Michael Zuckert, "Completing the Constitution: The Thirteenth Amendment," *Constitutional Commentary*, vol. 4 (Summer, 1987), pp. 259–83. Unfortunately this review could not take account of Arkes's

Beyond the Constitution, which was just being published by Princeton as the review was being completed.

6. This portion of the Constitution, not to be mistaken for a mere flourish, is frequently omitted; e.g., Garry Wills's edition of *The Federalist* (New York: Bantam Books, 1982), p. 462. Presidential proclamations end with this formulation. See "Introduction," *The American Founding*, pp. xii–iv.

7. See Abraham Lincoln's great speech on the *Dred Scott* case, June 26, 1857 (*Complete Writings* [Camden, N.J.: Rutgers University Press, 1956], vol. 2, pp. 398–410). For a critical analysis of Bork's few pages on *Dred Scott* see Harry V. Jaffa, *National Review* (July 9, 1990), pp. 40–43. Note as well Professor Jaffa's "What Were the 'Original Intentions' of the Framers of the Constitution of the United States?" *University of Puget Sound Law Review*, vol. 10 (Spring, 1987), pp. 351–448. Regarding the *Lochner* case, the question arises—especially given the experience of the socialist countries—of the extent of economic regulation a liberal democracy can tolerate before it is transformed.

8. For understanding the Court's early cases on another method of population control, sterilization, see Walter Berns's classic article, "*Buck v. Bell*: Due Process of Law?" *Western Political Quarterly*, vol. 6 (December, 1953), pp. 762–75. Professor Berns notes the common intellectual patrimony of the eugenicist movement and the Nazi party. Regarding the constitutional question, he observes: "In the end, *procedural* due process is a *substantive* right which is denied everyone to whom injustice is done" (p. 775). For thoughtful commentary on the abortion issue which acknowledges natural right see Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987).