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Review Essay

Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice

Stephen L. Carter*

I

Like the man on the stair who wasn't there, the specter of Robert Bork's defeated nomination to the Supreme Court refuses to go away. Perhaps it is because Bork himself refuses to go quietly into the oblivion to which his most vigorous opponents sought to consign him. Nearly four years have passed since the Senate's decisive rejection of Bork by a vote of 58-42, both the largest number of votes and the largest plurality ever cast against a nominee for Associate Justice. Yet interest in the Bork battle seems never to wane. President Bush's successful nomination of David Souter to the seat vacated by Justice Brennan has in fact revived the debate, if any reviving was needed.

What is it about the Bork battle that continues to hold the American imagination? Robert Bork, in The Tempting of America: The Political Seduction of the Law, gives his own account of what happened to his nomination and offers a reason for the continuing furor. According to Bork, the debate is evidence of a cultural war in which his nomination was advertently snared. The fight, it seems, "was ultimately about whether intellectual class values, which are far more egalitarian and socially permissive, which is to say left-liberal, than those of the public at large and so cannot carry elections, were to be continued to be enacted into law by the Supreme Court."1 Thus, writes Bork, "[i]n the final analysis, the furor and the venom were less about me than about the issue of whether the Court would become dominated by the neutral philosophy of original understanding and thus decisively end its enlistment on one

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side of the war in our culture." In the world as Bork sees it, then, public interest in the battle over his nomination continues because the cultural war, the war for "left-liberal" hegemony, is still being fought.

Michael Pertschuk and Wendy Schaetzel, in The People Rising: The Campaign Against the Bork Nomination, offer an equally vigorous but sharply different view. The question presented by the nomination, they argue, was whether Americans "were prepared to refight the terrible struggles of the sixties, which have now largely receded into history." Bork's opponents, say Pertschuk and Schaetzel, were inflamed "by his passionate, relentless, assault on virtually everything the Supreme Court had done in the latter half of the twentieth century to strengthen the equality of citizens before the law and the defense of individual rights against the power of the state." This vision of a potential Justice Bork as a reactionary monster fueled much of the opposition's rhetoric; the vision, rightly or wrongly, lingers. In fact, it provides a kind of yardstick: would a Justice Souter, worried activists wanted to know, be as bad as a Justice Bork? Evidently, Bork has become a yardstick against which lesser evils are measured. Although the campaign against Bork always offered the caveat that Bork's personal integrity was never in question, many of the arguments pressed in the public arena—ably catalogued not only by Bork, but in a more even-handed way by Ethan Bronner in Battle for Justice: How the Bork Nomination Shook America—can only be considered personal attacks. Senator Kennedy's provocative floor speech, delivered on the same day that the nomination was announced, set the tone:

Robert Bork's America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.

2. Id. at 343.
4. Id. at 15.
And Kennedy concluded: "No justice would be better than this injustice."  

Now, it must be conceded that this was a colorful and attention-grabbing speech, and that, Pertschuk and Schaetzel tell us, is what was intended. Anti-Bork activists, who had not yet had the time to organize or to make their case, were afraid that because of Bork's impressive résumé, enough Senators would quickly line up in praise of the appointment that effective opposition would become impossible. Kennedy's speech, they explain, and other immediate comments, such as National Organization for Women president Molly Yard's statement that Bork was "a neanderthal," were designed to "freeze the Senate," to slow the momentum for the nomination by making the media and the public stop and take notice. Pertschuk and Schaetzel concede that Kennedy's declaration was "seen by critics as reckless and intemperate."  

Although there were easy responses to the Kennedy speech—let it suffice here to say that it confused criticism of the reasoning in Supreme Court cases with advocacy of the policy that the Court in those cases struck down—the declaration had the avowed purpose of making the intended audience pay attention. In this sense, Kennedy's speech was akin to the infamous Willie Horton television spots run during the 1988 presidential campaign. Those ads were quite successful in getting people to sit up and take notice. So was the Kennedy speech. The Senate was indeed frozen. There are moments, as every successful politician knows, when rhetorical melodrama works better than reasoned debate.  

Having said this, I must add that much of what was said and written about Robert Bork after President Reagan nominated him for the vacancy caused by Justice Powell's resignation was simple nonsense, especially when it came from partisans (on both sides of the conflict) posing as unbiased observers. The rhetoric on both sides was at the time and continues even now to be ridiculously overblown; one might almost suppose that because of the politicized treatment of this one nomination (by the President or the Senate—take your pick according to your predispositions) the future of the American soul was in hazard. Whereas for rea-
sons that I will presently explain, all that was really in danger was the constitutional mythos about the role of the independent judiciary in American society—by no means a triviality, but hardly an occasion for the bombast with which each side pleaded (and still pleads) its case.

So, to clear away the rhetorical underbrush, let me briefly summarize my own position on the Bork nomination and confirmation hearings, before proceeding to say a bit about the three books on the subject that I have mentioned. First, while much of the opposition to Bork was both principled and reasoned, I think that Bork's treatment by his most vociferous opponents was shameful.16 Second, having read very carefully through what opponents call "the Book of Bork," the collection of his writings and speeches that was widely circulated during the summer preceding the hearings, I never did discover the compelling case against confirmation that everybody kept shouting about. Third, I have no illusions that a Justice Bork would have voted in all important cases in the way that I believe the Constitution requires. Fourth (and although we tend in our passion for our favorite causes to forget, this is a logically separate point) I have no illusions that a Justice Bork would have voted in all important cases in the way that I believe morality compels.17 Fifth, I do not think that Bork's constitutional theory as he explains it can serve as the basis for a judicial philosophy that is consistent with and serves the needs of the Constitution. Sixth, I do not believe that Bork's judicial philosophy was remotely close to any sort of extremism that has no place in legitimate constitutional theoretic debate. Seventh, none of the matters covered by my points three, four, five, or six are legitimate matters of inquiry when the President selects a nominee or when the Senate votes on confirmation. The reasons for all of these positions will soon become clear; for the moment, let it suffice that I have set forth my biases on the record.

As to the books themselves, there are three, and my views on them are easily summarized. Ethan Bronner, a reporter for The Boston Globe,
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has penned a very interesting account of the hearings and their aftermath entitled *Battle for Justice: How the Bork Nomination Shook America*. As journalism it is an effective and, generally, an even-handed treatment of both sides in the controversy. Bronner obtained interviews from many people who were deeply involved—including Senators, opponents and supporters, government officials, the Bork family and, briefly, Bork himself—and he marshals the material well. As narrative, *Battle for Justice* makes quite compelling reading. Even though one knows from the start how the story ends, Bronner keeps the pages turning (if one likes this sort of thing, as I do) with his hour-by-hour account of the machinations of both sides, the seesaw struggle for public opinion, and, especially, the desperate last-minute efforts by the White House staff to stanch the flood of defections from the cause. What emerges is the possibility that the Bork nomination was defeated only in part because of the campaign against him; of near equal importance, perhaps, was the apparent ineptitude of the White House and the Justice Department in making a politically palatable case on Bork's behalf. Instead, thrown on the defensive by the vigor and, occasionally, the viciousness of the early attacks on Bork, the Reagan Administration and its allies responded with cautious reserve, then with confused attacks on the motives of the opponents, and finally, much too late, with point-by-point rebuttals of the case against Bork.

This is not to suggest that a more vigorous response would have saved the nomination, and Bronner makes no such claim, although some of Bork's partisans have blamed what they saw as tepid White House support—especially by Chief of Staff Howard Baker—for the defeat.18 Even if, as Pertschuk and Schaetzel seem to think, the nomination was doomed almost from the moment that Senator Kennedy succeeded in freezing the Senate, it is at least conceivable that a powerful and measured word from the President would have moved the public debate to a higher and better level. The hearings themselves, as Bronner reminds us in his detailed renderings, were carried on in a spirit of considerable seriousness.19 But few Americans watched the hearings gavel-to-gavel; most

18. *See, e.g.*, E. BRONNER, supra note 7, at 202 (noting that Patrick McGuigan of the Free Congress Foundation called the White House just prior to the hearings to protest that he had been working fervently to help the confirmation but that his efforts had not been matched by the White House). Bronner also captures some of the tension between the Justice Department and the White House over the handling of the nomination. *See, e.g.*, id. at 196 (quoting Assistant Attorney General William Bradford Reynolds's lament over the White House's strategy of trying to portray Bork as a moderate: "People here [at Justice] felt the strength was to state it harshly and boldly the way he does.").

19. *See, e.g.*, id. (noting that ex-President Ford, who led off as a showpiece witness for Bork, was questioned about his familiarity with Bork's writings).
probably saw a few minutes now and then, caught snippets in the paper,
and were blasted the rest of the time with the oratory of the Block Bork
campaign.

In *The People Rising*, Michael Pertschuk and Wendy Schaetzel offer
what is in effect an insiders’ view of that campaign, explaining how the
movement got started, how it operated, and what the ground rules were.
Unlike Bronner, Pertschuk and Schaetzel do not set out to tell both sides
of the story. They admit in the introduction that they interviewed only
those who were involved in the opposition.20 The result is not a very
good book, but tales by advocates describing the triumph of good over
evil rarely are. And that is very much the spirit of the book. The au-
thors, who actually have a fairly interesting tale to tell, are finally too
much the partisans to tell it well. They purport to be trying to hold their
biases in check,21 but they fail. In their rendering of the Bork battle,
Bork was a reactionary monster, defeated by a selfless and underfunded
coalition of public-spirited organizations dedicated to preserving the
fundamental rights of American citizens against the horrors that a Justice
Bork would wreak. If a committed opponent of the nomination wants to
relive the glorious battle that doomed it, *The People Rising* might make
good reading. If, on the other hand, one wants a more balanced and
definitive history of the campaign, one is better off with Bronner.

Still, *The People Rising* is in some ways a useful book, if only be-
cause it collects in a sensible, readable way the post hoc reminiscences of
many of Bork’s opponents. It is easy to understand their fears, which, no
matter the rhetoric of Bork’s supporters, were surely genuine, even if
often unfounded and occasionally muddled. But by spending so much
time on all the reasons that the Block Bork Coalition thought it impera-
tive to stop the confirmation, and by adding a defense of the Coalition’s
tactics against its critics—what one might call a rebuttal of the rebut-
tal—the authors, perhaps inevitably, skip over the intellectually interest-

21. See id. at 11 (“We have sought, throughout, to be accurate, fair, and objective . . . .”).

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confirmation process, in the direction that the public and the Senate, and perhaps the President, think best. Nowhere do Pertschuk and Schaetzel suggest that there is anything remotely frightening in this vision of the judicial role; on the contrary, they liken the "progressive movement" that doomed Bork to a tiger, ready to spring afresh should a new enemy appear.22

Is The People Rising a fair book? The authors assure us that they have tried to keep their anti-Bork biases out of their account.23 But they have selected adjectives and adverbs that are hardly consistent with their oath. For example, Bork's comment that service on the High Court would be "an intellectual feast" is dismissed as insensitive and "antisep tic"24—never mind that, as Bronner points out, Justice Powell, the putative moderate whom this monster was supposed to replace, had made an almost identical comment.25 Bork's disagreement with a line of antitrust cases becomes a "zeal to defy the plain will of Congress,"26 even though the Supreme Court has adopted the basics of his approach.27 (Of course, the Supreme Court that has come to agree with Bork could be evil too, a point to which I will return presently.)

And then there is the book's depressingly cavalier treatment of what was probably the most controversial episode of the Block Bork campaign, the appalling misuse of Bork's opinion in Oil, Chemical & Atomic Workers International Union v. American Cyanimid Co.28 There, an employer, concededly unable to reduce toxicity in a portion of its workplace to levels safe for fetuses, adopted a policy requiring women of childbearing age to be sterilized or lose their jobs.29 It is difficult to imagine a colder or less sensitive solution to the problem, but the question before the District of Columbia Circuit did not involve the policy's morality, nor even, in the sex discrimination sense, its legality. The only

22. Id. at 291.
23. See id. at 11.
24. See id. at 30.
25. See E. Bronner, supra note 7, at 276 (quoting Powell as saying: "'I found the writing of opinions to be intellectually challenging and stimulating, at times quite exciting . . . .'").
27. See R. Bork, supra note 1, at 332.
28. 741 F.2d 444 (D.C. Cir. 1984). Mention of the case in The People Rising comes but twice. In the first instance, Pertschuk and Schaetzel reproduce part of what became known as the "Themes Memo," compiled by Block Bork Coalition lawyers, which simply states that in American Cyanimid, Bork "ruled in favor of a corporate policy requiring female workers in a hazardous area to be sterilized or be fired." M. Pertschuk & W. Schaetzel, supra note 3, at 138. In the second, over a span of about one page, they relate how Senator Metzenbaum came to read in open session a telegram sent by one of the American Cyanimid plaintiffs to the confirmation committee that disputed Bork's testimony earlier in the day that the women in American Cyanimid who underwent sterilization probably did not want to have children. See id. at 224-25.
29. American Cyanimid, 741 F.2d at 445.
question before the court was whether the word "hazard" in the Occupational Safety and Health Act could encompass an employer's decision to put female employees to this choice.\textsuperscript{30} Writing for a unanimous panel, then-Judge Bork concluded that it did not.\textsuperscript{31}

This perfectly plausible statutory interpretation became for many of Bork's most committed foes a statement of policy: in the rhetoric of the opposition, as Bronner notes, Bork seemed almost to be in favor of sterilization.\textsuperscript{32} Nor was the judgment to emphasize \textit{American Cyanimid} a casual, unthinking one: in surveys conducted for the Block Bork Coalition, the holding created far more outrage than any of the other "facts" that the pollsters brought to bear.\textsuperscript{33} Naturally, then, the case bore emphasis, not as a matter of statutory interpretation, where Bork was very likely correct, but as a matter of Bork's own views: he was said to have "approved" an employer's decision to force female employees to the choice between sterilization and unemployment.\textsuperscript{34}

Ironically, the fourth paragraph of Bork's opinion in the case decisively answered the principal argument of the anti-Bork activists:

As we understand the law, we are not free to make a legislative judgment. We may not, on the one hand, decide that the company is innocent because it chose to let the women decide for themselves which course was less harmful to them. Nor may we decide that the company is guilty because it offered an option of sterilization that the women might ultimately regret choosing. These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy.\textsuperscript{35}

Moreover, lest the moral point be missed, Bork's opinion noted that no one claimed that the company would have violated the Act by refusing to allow women of childbearing age to be exposed to toxic substances,\textsuperscript{36} and

\textsuperscript{30} \textit{Id.} at 447.
\textsuperscript{31} \textit{Id.} at 450.
\textsuperscript{32} \textit{See E. Bronner, supra note 7, at 179} (noting that People for the American Way, the National Abortion Rights Action League, and Planned Parenthood advertised Bork as "giving women workers a choice between sterilization and their jobs").
\textsuperscript{33} \textit{See M. Perschuk \& W. Schaetzl, supra note 3, at 138; E. Bronner, supra note 7, at 178-79.}
\textsuperscript{34} As Bronner as well as Perschuk and Schaetzl notes, Bork did not help matters with his suggestion during his confirmation hearings that the women were evidently "glad to have the choice" and that "some of them I guess did not want to have children," which led to swift action by the Coalition: a telegram from one of the women explaining the horror of the choice. \textit{See M. Perschuk \& W. Schaetzl, supra note 3, at 224-25; E. Bronner, supra note 7, at 236-37.} In his book, Bork says what I suspect he meant with the unfortunante and perhaps insensitive choice of the word "glad" during his hearings: "[S]ome of the women apparently wanted to keep these jobs, and the company informed them that sterilization was an option. Five of them chose that option." \textit{R. Bork, supra note 1, at 327.}
\textsuperscript{35} \textit{American Cyanimid, 741 F.2d} at 445.
\textsuperscript{36} \textit{Id.} at 449.
counsel for the union conceded at oral argument that the company would have been in compliance with the Act had it adopted a policy that “only sterile women” could suffer exposure.\(^{37}\) That hypothetical policy, Bork correctly pointed out, “would also have given women of childbearing age the option of surgical sterilization,” which means that “[t]he only difference between this case and the hypothetical is that here the company pointed out the option and provided information about it.”\(^{38}\) Thus, by the logic of those who used Bork’s *American Cyanimid* opinion against him, counsel for the union would also be unfit to sit as a Supreme Court Justice.

The use of the *American Cyanimid* decision against Bork troubled even some of his most committed opponents. Bronner, for example, quotes Laurence Tribe:

“To treat the choice that was put to those women as a workplace hazard was stretching that law to purposes it was never meant to serve. . . . I think Bork’s decision in that case was defensible and attempts to use it to show him to be a pro-sterilization ogre were terrible. It was part of attempts to stir up fears about him as a person, which I tried not to do and regret that others did.”\(^{39}\)

Precisely. That was the point: to stir up fears about Robert Bork as a person. Tribe might have avoided it, but many others embraced it as a strategy. Said Tribe in another interview: “‘[Y]ou will simply not find anything in the testimony that questions Robert Bork’s personal views on these matters.’”\(^{40}\) Not in the testimony, perhaps, but the hearing room was only one of the venues in which the battle was waged. The more important battle was in the court of public opinion, where many members of the Coalition did not hesitate to question “Bork’s personal views.” Consider this blast from the National Women’s Law Center: “No amount of selective citation and interpretation can change Judge Bork’s record on women’s legal rights from what it demonstrably is—one of deep hostility.”\(^{41}\)

The nuance is important. The claim underlying this statement is not simply that Bork’s jurisprudence on women’s rights is wrong, nor even simply that it is harmful; no, the claim is that Bork is hostile to women’s rights, and that attack is undeniably a personal one.

There were other personal attacks on Bork, and there is no need to list them here, although Bronner, and Bork himself, do a tidy job of collecting them. What is fascinating about the Pertschuk and Schlaetzel

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37. *Id.* at 449-50.

38. *Id.* at 450.


41. *Id.* at 224.
book is its response to all of this. Did the campaign get out of hand? Was it fair? Here is the conclusion that Pertschuk and Schaetzel reach: "In our judgment, the principal contribution of the outside campaign was to force the Senate to take seriously its constitutional obligation to examine the Bork nomination." To be sure, Pertschuk and Schaetzel concede that "[w]hen an advocate says—as most of those working to defeat Bork did—that their central strategy was to 'educate' the public to the risks of Bork, the critical observer is entitled to be skeptical." But the authors do not match the skepticism; their view, finally, is that it was Bork's own work and words, fairly presented, that led to the Senate's decision that he was not suitable to serve on the Supreme Court of the United States.

Still, for all its faults, The People Rising is instructive. Not only does it trace the struggle to build the Block Bork Coalition in the face of rivalries and turf battles, but it serves as a practical and very frank guide on how to dress up a political position in the garb of nonpartisan service of nation and flag—in the past, a specialty of the right, who in the Bork debacle, as Pertschuk and Schaetzel note with understandable but unfortunate glee, got a little bit of their own back. Again, one sees a vision of a coalition that is utterly unselfconscious as its members try to decide how best to make their case to the Senate and to the nation, using oversimplification and discarding subtle nuance in a degree that should make political candidates, those eternal masters of the truthful misdirection, green with envy.

Also, the book is occasionally amusing. Its second most amusing moment comes when, in the midst of a discussion of the initial effort to slow the Bork nomination to enable interest groups to organize, the authors note: "A Supreme Court nomination was not, after all, an election campaign."

Right. And nobody sought campaign promises from the nominee, either. Nothing, of course, could be further from the truth, as the Block Bork Coalition understood quite well, and as the authors surely know. As the tales related in The People Rising make clear, the entire thrust of the campaign against the nomination was to try to cast it like an election—to force Bork the candidate to justify his views on the most arcane questions of constitutional law to the American people. And as we all

42. M. PERTSCHUK & W. SCHAETZEL, supra note 3, at 251.
43. Id. at 254.
44. See id. at 214 (concluding that "it would be flaws in the substance of Bork's testimony . . . that would help to seal his defeat").
45. Id. at 284-85.
46. Id. at 125.
know (the Democrats having just been reminded in 1984, and preparing to learn again in 1988), the candidate who fails to make promises most in line with the American people’s vision of themselves fails to win election. Which is, in fine, what happened to Bork.

But that is, as I said, the book’s second most amusing moment. The book’s most amusing moment comes when the authors describe the nation’s law professors, an extraordinary number of whom signed an anti-Bork letter, as “beyond any claim of ‘special interest.’” Then, taking the joke even further, they add that practicing lawyers, many of whom were also organized in opposition, are “members of a generally conservative profession.” What makes law professors immune to the siren song of politics—or, as Pertschuk and Schaetzel would have it, “ideology”—is never made clear. I doubt, however, that many conservatives imagine law professors to be a disinterested bunch of folks; for that matter, neither do many people on the left. There are some of us around who believe strongly in the separation of constitutional analysis from political preferences, but we are treated by left and right alike as dinosaurs, useful principally as exhibits to show what creatures existed in a more primitive era.

The second of the authors’ political claims—that lawyers are members of a conservative profession—mixes apples and oranges, confusing the technical meaning of the term “conservative” with its contemporary political significance. It is true that the law is a conservative force in the technical sense of the word, not only because law embodies what has already been decided, thus preserving the past, but also because the legal system prefers the status quo: if a plaintiff fails to make a case, a court will not disturb matters. But in contemporary political terms, the claim that lawyers are a relatively conservative group is simply nonsense. Had the authors wanted to present a more balanced picture, they might have examined the survey data showing that lawyers as a group are more liberal than the general public (at least as the word “liberal” is used in contemporary political dialogue) on virtually every issue.

47. Id. at 188.
48. Id.
words, both branches of the legal profession—the bar and the academy—are to the left of the American public. To call this an objective group, then, is to blink at reality.

I hasten to add, however, that this is only fact, not sin; no matter what the use to which the term is put in our politics, "liberal" is not a pejorative. This, I fear, is a proposition of which Robert Bork has lost sight. Bork's own book suffers from another variety of the same malady that plagues Pertschuk and Schaetzel, for Bork's understandable and predictable biases also infect his analysis. The Tempting of America is, for the most part, the book of a man embittered, although it does make some sharp points about the way in which contemporary liberal theory has distorted constitutional law. Bork devotes much of the book to the confirmation hearings, and there, no doubt because he is so involved in his material, he loses the scholarly distance which represents his comparative advantage over many of his more polemical critics. Indeed, his tendency to lump his opponents into a narrow range of pejorative categories (basically "left-liberal" and some variants thereon) reflects a narrow and partisan view of the world much like the one presented by his opponents, in their occasionally dreadful campaign against his confirmation, as the true Bork.

This habit is doubly unfortunate because the tone detracts from the rest of the book—the part that does not concern the confirmation hearings and the campaign against him—which is a readable, insightful, and provocative defense of what Bork calls the jurisprudence of original intention. Bork's constitutional theory is, to be sure, a controversial one, but a better case for Bork's own vision of originalism is unlikely to be made. Bork takes the "tempting" language of the title as his text: his point is that in a society that grants judges as much power as this one does, there is a great temptation for the judges to enact their policy preferences into law and announce that the Constitution requires them to do so. He traces the temptation back to the opinion of Justice Samuel Chase in Calder v. Bull, decided in 1798, and is subsequently quite unrelenting in dismissing leading Justices in virtually every era—from John Marshall's Supreme Court through Warren Burger's—as "revisionist" or "activist" judges, people who claim "the power to strike down statutes on the basis of principles not to be found in the Constitution." By "found in the Constitution" Bork means found in accordance with his

50. See, e.g., R. Bork, supra note 1, at 337 ("The behavior of the people involved reflects a left-liberal culture in near despair.").
51. 3 U.S. (3 Dall.) 386 (1798); see R. Bork, supra note 1, at 19-20.
52. R. Bork, supra note 1, at 15; see id. at 19-128.
version of the jurisprudence of original intent. Consequently, a revisionist or activist judge is one who is not an adherent of Bork's constitutional theory. Possibly Bork is right and all of them wrong, but it is at least something of an irony that a theory so infused with the method of history dismisses so readily the possibility that this consistent historical disregard of Bork's position represents something other than error.

It is too bad that Bork's theory has received all of the bad press that it has, in the statements of the opposition, in the hearings, and in the academy. In a nation grown accustomed to having searing moral dilemmas resolved by the judicial branch, it may seem extreme to suggest that judicial review, if it is to carry legal authority, must represent an appeal to a higher authority that the legislature is bound to respect. Although Bork and I may differ sharply about what the method entails, we are in agreement on the basics: that the only ultimate authority for constitutional adjudication is the text, structure, and history of the document itself. Critics may argue that the wisdom of the authors of the Constitution is not an authority that any twentieth-century American ought to respect, but if they are right, as Bork points out, that is perhaps an argument against respecting judicial review; it is not at all clear why it is an argument against deference to twentieth-century legislatures.53

I will confess to having learned more from Bork's views on constitutional analysis than from anything he has to say about his own confirmation hearings, not because his side of the confirmation story holds no interest, but because Bork holds back all the best parts. What, one wonders, was the full content of some of those conversations with Administration officials to which he gives such short shrift, especially those held as it became clear that the nomination was about to collapse? In short, I find Bork the constitutional theorist far more interesting than Bork the polemicist, but it may be that my own biases are showing, for I have a decided preference for the reasoned, nuanced argument that is the province of the legal scholar.54

The curious thing about all three of the Bork books is that each devotes so much attention to the "fairness" of the Block Bork campaign. By fairness, the authors evidently mean accuracy; that is, the campaign is defensible if its principal charges are supported in the record, indefensible if they turn out to be distortions and fabrications. And, predictably, Pertschuk and Schaetzel find nearly all of the charges justified whereas Bork finds no substance to any of them. Bromer emerges somewhere in

53. See id. at 166-67.
54. So does Bork; he tells us so throughout the book. A pity, then, that in this book he so often fails to engage in it.
the middle: many of the charges were technically correct, but the omitted emphases effectively changed the meaning. I write not to adjudicate this dispute, but to note that there is something peculiar about it. Here, with the wisdom of hindsight, are a total of four authors, all smart, incisive observers, arguing back and forth over whether the campaign conducted by the Block Bork Coalition was fair and accurate. What makes this odd—although not, perhaps, unexpected—is that the authors are thereby missing the more intellectually interesting inquiry, namely, whether charges of the sort that were tossed around and rebuffed, fair or not, are the relevant considerations when one is choosing a Supreme Court Justice.55 I have argued in the past that they are not,56 and while it makes no sense to recapitulate that argument here, I will return to some of the themes of my thesis in Part II of this review.

There is a second reason that the focus of the Bork books on the accuracy of the charges seems misguided. It is not at all apparent why false or exaggerated charges should produce the sense of outrage that they evidently do. Anyone who follows the ebb and flow of electoral rhetoric understands that fairness and accuracy are, and have always been, peculiar lenses through which to view the rhetoric of a political campaign. No matter how hard we might wish matters otherwise, candidates are not always elected because they frame the issues and their differences with their opponents clearly and accurately; sometimes they are elected because they exaggerate their opponents' weaknesses and tell various whoppers about their own strengths.

But wait! Who cares about how elections are won or lost? The Block Bork campaign wasn’t about politics, was it? It was about ideology (whatever that is), specifically the nominee’s. It was about protecting our most fundamental rights and freedoms against a reactionary monster—wasn’t it?

The answer to both questions is no, and the no should by now have lost its capacity to surprise. The campaign against Bork was very much about politics, and had very little to do with protecting “our” rights and freedoms from this single monster. The campaign is better viewed as a battle waged to preserve a particular set of decisions that Justice Bork, it was feared, might work to overturn. The path to this goal, as Pertschuk and Schaetzel relate in excruciating detail, was to turn the confirmation battle into a political one. Martin Shapiro, a political scientist who has studied defeats of Supreme Court nominees, has observed that defeat is

55. All of the authors mention it, but none dwell on it.
far more likely when the opposition is able to turn the debate away from matters of qualification and integrity to questions of what in American politics we label, with some loss of accuracy, ideology.\(^{57}\) The activists who formed the Block Bork Coalition already knew this. And whether one wants to blame the President, the Senate, the activists, or Bork himself for the decidedly political cast of the campaign that followed, what Shapiro's work teaches is that once a campaign becomes political, the chances of confirmation are reduced. So it may be that even had the White House's point-by-point rebuttal of the charges against Bork come earlier in the process or been more effectively publicized, once the process became a public political battle, the nomination was doomed. Mud, as many a defeated political candidate can attest, tends to cling. And even when the mud is washed off, what the voter remembers is not that the face is now clean, but that it was once dirty.

II

Arlen Specter probably does not remember me, but if he does, he likely recalls me with irritation. Specter, a Republican who sits on the Senate Judiciary Committee, was, according to Ethan Bronner, "the committee member who had distinguished himself as the most serious, the most high-minded constitutional student" during the Bork hearings;\(^{58}\) he also voted against confirmation, starting a steamroller of defections. Specter's attitude toward the hearings was almost scholarly. He tried hard, despite the occasional lapse into speechmaking, to keep the discussion on a lofty plane. His long and complex exchanges with Bork were magnificent moments in the hearings, for they represented a rare opportunity for the American public, watching on television, to hear some of the most powerful members of their government engage in constitutional debate. Unsurprisingly, perhaps, Bork's view of Specter is different from Bronner's: "[H]e had at best quite erroneous notions of my views on the Constitution and the relationship of judicial supremacy to democracy."\(^{59}\) Bork adds, in evident frustration: "Because I was, out of necessity, patient with him, a lot of people not versed in constitutional law got the impression that this was a serious constitutional discussion."\(^{60}\) My view of Specter is closer to Bronner's than to Bork's; I think


\(^{58}\) E. BRONNER, *supra* note 7, at 311.

\(^{59}\) R. BORK, *supra* note 1, at 305.

\(^{60}\) *Id.* at 306.
that he is a serious student of constitutional law. But I still think that he's mad at me.

A couple of years ago, Specter and I were members of a panel discussing the Supreme Court confirmation process. As we chatted before the formal session began, he alluded to an article of mine criticizing the way that the Bork hearings were conducted. In objecting to the use of judicial philosophy as a tool for measuring judicial qualification, I ventured the opinion that the members of the Senate were not "competent" to assess it. Specter took exception to my choice of words. I did not, he told me sternly, understand the work of the Senate, which I readily concede is true. Senators, he assured me, do the tough work of constitutional analysis every day, which I suppose is also true, after a fashion. The Senators and their staffs, like the President and his, "do" constitutional law—but with a decidedly partisan cast.

What I mean by a partisan cast is this: When a political candidate out on the hustings calls a particular course of action unconstitutional, the claim is essentially political, not jurisprudential. Although it is true that some members of the Senate, Specter surely among them, make an effort at high-mindedness, what one too often sees is a remarkable coincidence between policy positions and constitutional analysis. Time and again, members of the President's party conclude that the President possesses constitutional authority to take actions of many sorts without regard to the will of the Congress; and time and again we see the opposition insisting that the President is engaged in unconstitutional usurpation. H. Jefferson Powell, in his sparkling list of "Rules for Originalists," has warned that any constitutional theory that repeatedly leads to victory for a particular political position is probably being applied inconsistently. Of course; constitutional analysis in the service of specific policy goals is not the same as constitutional law, and no amount of clever theorizing by law professors can make it so.

Analysis of this sort is important; the political branches of the federal government, no less than the judicial, are called upon to make constitutional decisions, and probably more often. The decisions involve the day-to-day workings of the government, and no matter what the dissenting views of sophisticated scholars who doubt that texts have meanings, there is widespread agreement on the meaning of the clauses involved in

61. See Carter, supra note 56.
62. Id. at 1195.
63. See Powell, Rules for Originalists, 73 VA. L. REV. 659, 677-78 (1987) ("When . . . [the founders] seem to confirm our deepest wishes, we must suspect that our portrait of them is in fact a mirror of ourselves.").
what Frederick Schauer calls the "easy" cases. The best evidence of this is that the government works. When there is doubt, there is open and public dispute, because both the Congress and the President try to exercise powers at the margins of constitutional authority. Both sides cite impressive precedents for their positions, and both are, in a real sense, involved in the practice (not the theory) of constitutional law.

But none of this has anything to do with the Senate's ability to assess judicial philosophy. Let me quote the offending sentence from my earlier article: "Passing entirely the question of what judicial philosophy is, it should be perfectly plain that at any level more sophisticated than 'Will this nominee vote my party's line?' the members of the Senate are not competent to evaluate it." Perhaps in selecting the word "competent," I chose inelegantly, because when used to describe something that is lacking, the word has become vested with a pejorative connotation. I didn't mean it that way; I meant it in the way that I would mean the statement "Stephen Carter is not competent to 'do' nuclear physics"—as a description, not a criticism. My claim, simply put, is that constitutional theory is a serious discipline, one that takes many years to master (although one might not know it from the extraordinarily broad claims made by many scholars just beginning their careers). I quoted Alexander Bickel, who wrote hopefully that judges should have "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government." By necessity and by design, I argued, the members of the Senate lack all three.

I am sorry that Specter took this as an insult; I am sorry if anyone else considered this an attack on the Senate. It was meant in quite a different spirit. I sought to emphasize the comparative advantages that the Senate has as well as those that it lacks. The Senate, I argued, is far better equipped for a reflective assessment of a nominee's entire persona (including but not limited to the individual's moral vision) than for a coherent determination on that individual's judicial philosophy. When an economist testifies before the Congress about the incentive effects of differing tax structures, it is her responsibility to express herself in terms

64. See Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 401-02 (1985); see also Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 Yale L.J. 821, 848 (1985) (noting that constitutional decisions are not necessarily the challenges to neutral rules of law that they are perceived to be, because of the existence of the "political Constitution," whose relatively more determinate clauses "play by far the more important role in determining how the nation is governed").

65. Carter, supra note 56, at 1195.


67. See Carter, supra note 56, at 1198.
that the members are able to understand. Nobody supposes, however, that the members are economists. When an epidemiologist testifies about the rate at which a particular disease spreads through the general population, what matters is the conclusion, not the methodology. No one would imagine that the members have the training to decide whether the evidence justifies the result. Why, then, is there a sense of insult when the same proposal—the notion of limited competence—arises in a discussion of the assessment of judicial philosophy?

One reason, I think, is that there is in our everyday political language an important confusion about constitutional theory. Constitutional theory, too many decision makers (and too many theorists!) seem to think, is simply ideology: liberal, conservative, strict constructionist, judicial activist, originalist, living Constitution. In political debate, these words are tossed around as though they have some substantive content, as though once the right label is found, we know all that we need to know. But this is an absurdity. Serious constitutional theory is carried on at a level of considerably greater nuance. The often simplistic reduction of complex theoretical argument to applause lines—a sin of which Bork, alas, is as guilty as anyone, both in his book and since—masks the magnificent tension inherent in any effort to make sense in a contemporary case of the words of the Constitution.

The truth about constitutional theory is that it is *difficult*. The problems of interpretation—historical, hermeneutical, legal, linguistic—are not matters readily explained to the general public. This is not the place to determine whether Philip Kurland was right or wrong to say of Bork’s jurisprudence that it is not really a theory, but a call for particular results. What is surely true, however, is that when most politicians refer to an original understanding, or a living Constitution, or anything else, they have in mind not the hermeneutical problems inherent in trying to make sense of any text, but particular results that they like.

Consider two examples. One is the matter of the constitutional right to privacy. Bork, it was said by many of his opponents, refused to acknowledge the existence of such a right, notwithstanding the existence of more than half a century of precedents sustaining it. Well, okay, suppose that the critics are right: so what? How do we determine whether Bork’s position is “right” or “wrong”? I would suggest that there is no


way to do so by public debate. It may be the case that most of us are comfortable with the idea that there is a right to privacy in the Constitution. Many of us regard it as a fundamental democratic freedom. But one cannot simply say that the Court has decreed it and therefore the right exists. Nor can one say that the Constitution is a living document and therefore the right exists. One must present an argument—the right derives from this clause, in accordance with this theory—and, unless we suddenly live in a world in which constitutional meaning is authoritatively supplied by popular fiat, one must also leave room for the dissenter who says, No, I do not see that right in that clause and your theory is bunk. And that, too, is a point that must be made about the constitutional right to privacy: whatever the degree of our affection for it, the right does not have the firm constitutional pedigree that one might want our fundamental rights to have. The argument is thin; not necessarily wrong, but certainly attenuated. It is not clear why it is a disqualification for the nation’s highest judicial honor to point this out, as Bork has, and often. More to the point, it is not clear why public support for the right translates into its existence. But in a political institution like the Senate, the public support obviously must matter; which is why I do not think that such matters as which constitutional rights actually exist and which do not are proper matters for Senate inquiry.

Brown v. Board of Education—everybody’s litmus test—provides a second good example. Few constitutional scholars find Chief Justice Warren’s opinion for a unanimous Court in Brown particularly compelling. On the other hand, few scholars want to be caught on the wrong side of history. Consequently, far more scholarly effort has been exerted shoring up the footing of the decision than attacking the opinion itself. It is hard for any scholar to call Brown wrong—not morally wrong, but wrong in the sense that it is bad law. (But even today, a few courageous, if perhaps wrongheaded, scholars are willing to say it: Robert Nagel is perhaps the most prominent.70 Bork, as we shall see, flirts with the same conclusion but does not quite get there.71) Brown is the single unimpeachable opinion of our times; no constitutional theory that denies its correctness will be admitted to the mainstream.

The result is predictable: no serious constitutional theory denies its correctness. Indeed, the effort to avoid calling Brown a wrongly decided case has led to some peculiar arguments such as former Attorney General Edwin Meese’s claim that Brown rediscovered the ideal of color blindness that the authors of the Fourteenth Amendment meant to lay

70. See R. Nagel, Constitutional Cultures 4-5 (1989).
71. See infra notes 106-11 and accompanying text.
The truth, of course, is that the authors of the Fourteenth Amendment intended nothing of the sort. The records have survived and they are, on this point, unambiguous. The authors plainly intended to preserve some distinctions based on color, and no amount of originalist wriggling can transform that rather plain intention into something else. Indeed, the records of ratification are far more consistent with an anti-oppression principle than with either the color-blindness or antidiscrimination principles that motivate most contemporary scholarship.

That is not to say that no form of originalism can circumvent this difficulty with the history of the Fourteenth Amendment. Many forms of originalism have this ambition, and many spirited originalist defenses of Brown have been written. (I hasten to add that the definitive originalist defense of the color-blindness principle has not been written. Bork, in his book, tries to produce one, but fails, as has everyone else.) But the dispute over the varieties of originalism, and their relationship to Brown, seems ill-suited for resolution in the Senate Judiciary Committee. One can well imagine a scholar who has tried achingly hard to find an originalist justification for Brown and cannot, and therefore, reluctantly, concludes that the case is wrongly decided: should she be barred from judicial service, at least on the nation's highest court? Perhaps so, but let's be honest about the ground. The argument cannot be that We, the People, have decided that she has misread the history, since only a vanishingly small percentage of Us are likely to have read it at all; so the argument can only be that We, the People, don't like the result that she is likely to reach, no matter what the Constitution might actually say.

This, it should be noted, is a rare instance in which the distinction between what most people think is in the Constitution and what is really there actually matters. As Robert A. Goldwin has pointed out in a sparkling little essay entitled What Americans Know About Their Constitution, the many surveys that uncover a lack of popular knowledge of constitutional language also confirm the widespread acceptance of a very fine vision of what democracy should be: "They might be 'the wrong answers' on a quiz, but as a citizen's view of our governing principles, it

72. See, e.g., Meese, The Battle for the Constitution, POL'Y REV. Winter 1986, at 32, 34 (claiming that Brown merely recognized "the clear intent of the framers of the Civil War amendments to eliminate the legal degradation of blacks").

73. See W. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 4, 96-100, 142 (1988).


75. See infra notes 105-12 and accompanying text.
Bork Redux

seems to me all to the good.'" When one is selecting Supreme Court Justices, however, whose task is to resist pressures to conflate popular notions of justice with what values inhere in the document, the confusion makes a difference.

One might of course respond (as some of today's critical legal scholars do) that no values inhere in the Constitution, that interpretation is so subjective an enterprise that one can reasonably conclude that the Constitution does not say anything, but is only what the judges, in their biases, make of it. I have elsewhere expressed my skepticism about this proposition, but even if accepted as true, it is not an argument for a selection process that takes into account the likely votes of candidates for the High Court. It is, rather, an argument against the institution of judicial review.

III

Of course, the Senate did not buy my arguments, and the American people have evidently chosen to go another way. In the relatively quiet hearings on the Souter nomination, Senators from both sides of the aisle expressed frustration at their inability to pin down the nominee on how he was likely to vote on a variety of issues, and this was generally accepted by the media as a perfectly legitimate reason for frustration. That is fine; the role of the scholar is not to be popular, but to be reflective. The Bork hearings really did finally turn on what members of the Judiciary Committee described as judicial philosophy, by which they evi-

77. See, e.g., M. TUSHNET, RED, WHITE, AND BLUE, A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 35-36 (1988) (contending that the originalist approach to constitutional interpretation does not resolve concerns about judicial tyranny, because "in resolving historical ambiguity, drawing inferences from limited evidence, and taking account of social change, originalist judges have as much room to maneuver as nonoriginalist ones").
79. See 136 CONG. REC. S14035-36 (daily ed. Sept. 27, 1990) (statement of Sen. Adams opposing Souter's confirmation because Souter failed to reveal his position on privacy rights and abortion; Marcus, Senators Left Wondering After Hearing: Which Is the Real David Souter?, Wash. Post, Sept. 23, 1990, at A4, col. 2 (reporting that after the Souter hearings, both Republicans and Democrats were still pondering the question, "Which is the real David Souter?" (quoting an interview with Sen. Paul Simon)).
80. See, e.g., Lewis, Washington Talk: Liberal Bloc in Turmoil After Souter Encounter, N.Y. Times, Sept. 27, 1990, at A16, col. 5 (referring to Souter's unwillingness to divulge his views as "gentle jousting," and suggesting that the "more elusive target" had thus made his confirmation "all but a certainty").
dently meant constitutional theory, and which boils down to results that one prefers. Robert Bork, the Senate announced when it rejected his nomination, would have voted the wrong way. The Block Bork Coalition celebrated, as it had a right to do, for the members of the Coalition, whether one wants to call them elitist or not, had sacrificed selflessly for their goal. I might dispute the goal, and I will certainly argue with the method, but I think it folly to dispute the hard work and, again, the sacrifice. In their rhetorical vision, the Court and the nation it serves were saved.

Yet, think about it. Nearly four years now have passed since the Bork hearings. How much damage could the monster that Bork was said to be have done in that time? Well, the public accommodations provisions of the Civil Rights Act of 1964 have not been presented to the Supreme Court, so I suppose that Bork could not have voted to constitutionalize his opposition to the "principle of unsurpassed ugliness" that would force people to associate with those whom they would rather ignore. But there have been civil rights cases—especially, but not exclusively, on affirmative action—and I do not suppose that any of Bork's opponents imagine that he would have voted differently from the way that Justice Anthony Kennedy, confirmed in his stead, has. And while the issue of mandatory sterilization has not been before the Court, the issue of abortion has, and Justice Kennedy has voted exactly the way that the monster Bork was supposed to. But of course, there is free speech, where Bork was thought to be especially dangerous. In Texas v. Johnson, Justice Kennedy voted quite rightly to overturn a flag desecration statute. How Justice Bork would have voted no one can say, although he has certainly been critical of the protection of symbolic speech under the First Amendment. But even if Bork's vote had transformed the outcome to 5-4 the other way, it is difficult to imagine that the essence of the battle over his nomination was protecting the rights of those who convey political messages by burning the flag.

82. See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469, 518 (1989) (Kennedy, J., concurring and dissenting) (joining the majority to strike down the City of Richmond's "minority set-aside" plan for city contracts).
85. Id. at 2548 (Kennedy, J., concurring).
86. See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 27-28 (1971); see also E. BRONNER, supra note 7, at 76 (quoting Bork's article and commenting: "Such a notion—that only political speech advocating legal acts was worthy of protection—was shockingly narrow.")
The unsurprising short of the matter is that on nearly all the most controversial matters that have come before the Court during his brief tenure, it seems that Justice Kennedy is doing what Justice Bork was expected to do. Pertschuk and Schaetzel put the dilemma this way:

As [Kennedy's] staunchly conservative votes quicken the rightward march of Reagan appointees O'Connor and Scalia and Chief Justice Rehnquist, many liberals ask, "What, if anything, was gained by this victory?" What indeed? One thing that was gained, as Bronner notes, is that Kennedy, as a nominee, was wise enough to temper his statements before the Judiciary Committee, affirming his belief in a constitutional right to privacy—although he did not specify its dimensions—and sketching an admittedly abstract picture of a Constitution designed by its framers to grow as the needs of the country changed. (So did David Souter, learning from both of his immediate predecessors.) In that sense, Kennedy was a better politician than Bork. But is he also a better Justice? It is hard to see why any member of the Block Bork Coalition would think so. His votes, as it turns out, have been nearly every bit as "bad" as Bork's were expected to be. The difference is that nobody seems to think that Kennedy is a reactionary monster. The interesting question is: why not?

One reason, surely, is that Kennedy, unlike Bork, had no paper record at the time of his confirmation. This made it harder for the President to be sure that he would vote the right way, of course, but also made it harder for the Senate (or the activists who might otherwise have formed a Block Kennedy Coalition) to argue that he would vote the wrong way. If it is our plan every few years to try to predict the votes of Supreme Court nominees, then it is probably best that they have no record. That will certainly frustrate the business of prediction, but frustrating those predictions is a very fine idea.

More to the point, the reason that Kennedy cannot be dismissed as a monster is that one can hardly treat every Justice of the Supreme Court that way—a prudential consideration, to be sure, but one with a point. At least as explained to the public, the Block Bork campaign rested on a faulty premise. A single monster is not very dangerous, not when there

88. E. BRONNER, supra note 7, at 337-38.
89. See 136 CONG. REC. S 13909 (daily ed. Sept. 26, 1990) (statement of Sen. Pryor indicating that the confirmation hearings demonstrated that Souter treats the Constitution as a "living document which recognizes changing circumstances").
90. "None of the groups that had opposed Bork took a stand on Kennedy, except the National Organization for Women, which opposed him." E. BRONNER, supra note 7, at 337.
are lots of brave soldiers to keep it in check; that is why the Supreme Court has nine Justices. It takes a minimum of five to "turn back the clock" or "deny us our basic liberties" or any of the other colorful slogans that are available to characterize nominees whose predicted votes are inconsistent with a particular critic's desires. If Bork was really outside the mainstream—if no one so ideologically narrow had ever been nominated to the Supreme Court—then surely he would have made little difference if confirmed. The other eight Justices, well within the mainstream, would have ignored him.

But nobody believed that this would happen. The Block Bork Coalition assumed that a Justice Bork would join majorities bringing on the parade of horribles. The trouble was not that he would be an outlaw Justice; the trouble was that he would be one of five outlaw Justices. Thus the quarrel was not really with Bork at all; it was with the other Justices already on the Court. But because those other dangerous Justices had already been confirmed, in all cases but one by unanimous or near-unanimous votes, the battle to preserve the decisions that the Court was so near to overturning could hardly have been styled in terms suggesting that a Justice Bork would be just like a Justice Rehnquist or Scalia or O'Connor or White, even though that was probably close to the truth. But if Bork was like the rest of them, there would be no acceptable basis for rejecting him; if he was like the rest of them, the case against him would have to rest on decisions the Court was within inches of handing down. And this was unthinkable: nobody was prepared to say what everybody understood, that the battle was not with Bork but with the votes already accumulated. A Bork who was like half the members sitting on the Court could hardly be painted as a Justice to fear. So he had to be worse.

IV

But, for the sake of argument, let me now concede both points: first, that the campaign against Bork legitimately considered his judicial philosophy, and, second, that the Senate is competent to answer questions of constitutional theory. The remaining question, then—and the one to which Bork devotes the more interesting part of his book—is what Bork's judicial philosophy is, and whether there is anything wrong with it.

This is not the place for a detailed appreciation of his theory; this review is already long enough, and Bork's approach deserves an article of its own. Bork's theory is essentially an originalist one, but it is hardly as insensitive to the changes in American society as some of his critics
seemed to think. Bork’s approach, even if flawed, is sufficiently rich for me to commend a careful study of it to the reader with an interest in judicial philosophy. Still, it is useful to make a few very summary points about his theory—a theory, I might add, that is very much within the mainstream of contemporary constitutional debate.91

The first point that must be recognized is that Bork’s vision of originalism rests on a sensible (and, so far as I have seen, unrefuted) premise that judges must be bound to something relatively concrete or else judicial review becomes indefensible.92 The greater the judge’s interpretive freedom, the more difficult the case for an obligation to obey.93 Consequently, a system that provides relatively determinate answers is what the theorist concerned about judicial authority—as against power—should be seeking.

However, the need for determinacy does not by itself suggest that originalism is the only possible interpretive method. One might seek concreteness in many sources other than the original understanding; Mark Tushnet’s example of cabining judicial discretion by requiring judges to choose the interpretation that best furthers the goals of socialism is a good example.94 Indeed, whenever a constitutional theorist commits a book on the way that the Court ought to be interpreting the document, the subtext is that here, at last, is concreteness: when in doubt, the judge can simply ask the author! Originalism, however, possesses other virtues that the various sophisticated forms of fundamental rights theory generally do not.

As Bork recognizes, to say that a theory must provide for relative determinacy is not to insist that it must provide wholly unambiguous answers in every case.95 A constitutional theory need not point to a sin-

91. A colleague of mine has made the waggish suggestion that had Bork been nominated twenty years ago, when he was writing some of his most controversial stuff, he might have been outside of the mainstream, because in those days there were precious few originalists of any stripe in the academy. By 1987, however, Bork’s proponents could argue that he was a mainstream scholar. See Cutler, Judge Bork: Well Within the Mainstream, Wash. Post, Sept. 16, 1987, at A21, col. 2. Senator Simpson introduced the Cutler article into the Senate Record. See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary, 100 Cong., 1st Sess. 246 (1987) [hereinafter Bork Hearings] (testimony of Sen. Simpson).

92. See, e.g., Bork Hearings, supra note 91, at 103 (introductory statement of Robert H. Bork) ("The judge's authority derives from the fact that he is applying the law and not his personal views .... The judge ... must be every bit as governed by law as is the Congress, the President, the State Governments and legislatures, and the American people.").

93. I discuss this proposition more fully in a current work-in-progress, a book to be entitled The Dissent of the Governed: A Theory of Constitutional Obligation.


95. See R. Bork, supra note 1, at 163.
gle determinate answer in order to succeed, a point that is sometimes missed by critical scholars:

[I]f there is no single correct solution, there must be at least a limited range of outcomes that can be called correct. That, in turn, means that any theory worthy of consideration must both state an acceptable range of judicial results and, in doing that, confine the judiciary's power over us.96

But the resolution of the Madisonian dilemma97 necessarily implies limits on the range of judicial freedom to act; otherwise, there is no reason based in democratic theory for allowing the courts to trump the will of the legislature.98

The second point is that Bork's justification for choosing originalism as his limiting theory rather than something else is quite cogent and sensible. He mentions, but does not rely on, the circular argument that the Founders themselves envisioned originalist interpretation.99 Instead, Bork rests his justification for originalism on the notion that the Constitution is law. He argues his case more than one way. The most straightforward argument, and by far the strongest one, is that laws should be construed in accordance with a principle that assumes that those who enacted them knew what they were doing: "[w]hen lawmakers use

96. Id. at 141.
97. Bork defines the Madisonian dilemma as two opposing principles—majority rule and minority rights—that must be continually reconciled. Id. at 139.
98. For reasons that are unclear, Bork consistently refers to legislative acts as representing in some strong sense the will of the majority. See, e.g., R. BORK, supra note 1, at 17 (declaring that "[l]egislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment"). Public choice theory, and, for that matter, the theory of pluralism both teach that this is not necessarily so. See, e.g., Eskridge, Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 VA. L. REV. 275, 285 (1988) (describing the public choice model as treating legislation as an "economic transaction in which interest groups form the demand side, and legislators form the supply side"); W. WHITE, WHITE'S POLITICAL DICTIONARY 218 (1947) (defining pluralism as a political theory in which economic interests as well as political interests are represented in policy enactments). But the political philosophy of the Founders, in its contemplation of popular sovereignty, often made the same error as Bork, that is, to assume that the more representative branch of the Legislature would consistently act as its constituents demanded. The Constitution as Bork and the Founders understood it was designed to mediate the tension between the will of the majority and the rights of the minority; however, a better understanding in our current time is that it mediates the tension between the will of the legislative majority and the rights of the minority.
99. See R. BORK, supra note 1, at 153-55. It is well that Bork does not rely on it, because he cites only the weakest evidence: a few quotes from Madison's version of the secret proceedings of the convention, which were not available to the ratifiers who turned the Constitution into law, and a single line from the Federalist Papers. See id. at 154. The ratification debates, including those in the popular press, are of course far richer and more complex than this. He also does not deal effectively with such critics as H. Jefferson Powell and Thomas Grey, who have defended a version of the original understanding that allows for non-originalist judicial interpretation. See Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985); Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843 (1978).
words, the law that results is what those words ordinarily mean." So if judges try to make the law mean something else, then they are not interpreting the law as enacted by the lawmakers, they are instead making new law: "questions of breadth of approach or of room for play in the joints aside, lawyers and judges should seek in the Constitution what they seek in other legal texts: the original meaning of the words." For those unconvinced by this argument, Bork also offers a redactio suggesting that since it is plainly wrong for courts to construe statutes contrary to the intentions of the drafters, when override is easy, how much more wrong it must be for courts to construe the Constitution contrary to the intentions of the drafters, when override is very difficult.

Both arguments are difficult to refute, although over the years many smart scholars have tried. But even if Bork has made his case for originalism, that is only a very small part of the battle, a point that the hearings obscured. For once it is conceded that the Constitution is law and that text, structure, and history are the guideposts for interpretation, one still must figure out what counts as the original understanding. My third comment on Bork's effort to craft a theory is that it is here, on the issue of deciding what counts as the original understanding, that I fear that his theory begins to run into trouble—trouble, I might add, that any number of sensitive originalists, in a body of scholarship evidently unmined by Bork, have suggested ways to avoid.

The trouble is that for all Bork's efforts to be sensitive to the nuances of interpretation, he often sees the text and its history as far clearer than they sometimes are, thus making the task of judging seem more mechanistic than it actually is. Bork has no patience with any effort to determine and apply the value choice underlying the Constitution's language; he wants, he says, only to know what the words meant to the people who made them law. But putting the matter that way simply pushes the question back a step—after all, perhaps the words meant a value choice. More important, Bork demands of the document more determinacy than he is likely to find in it. Sometimes he is right: for example, there is nothing in the language or history of the commerce clause to support its transformation into the general federal police power that it

100. R. Bork, supra note 1, at 144.
101. Id. at 145.
102. Id.
103. See, e.g., Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 204-17, 238 (1980) (contending, inter alia, that original understanding is not a workable method of constitutional interpretation because there is no way to unearth how the Framers of the Constitution interpreted the document).
104. See R. Bork, supra note 1, at 144.
has become, and the Founders would have been astonished and very likely frightened at the breadth of power that is exercised by the modern national state. But to say that some clauses have clear language and history is not to say that all of them do. It may be that Bork really does find crystal clarity in the language and history of the Fourteenth Amendment's due process clause, but if he does, then I think that he is wrong. Or it may be that he recognizes that his theory requires concreteness and therefore imposes it even when it doesn't exist. The possibility that I fear he finally misses is the one that is suggested by his initial insight that absolute precision is not necessary to make originalism work—which is a good thing, as it is also impossible to achieve. I fear that Bork's style of originalism makes the originalist judge's task more difficult than it has to be, perhaps even impossible, because he wants to emphasize the expectation rather than the value choice.

To see why this matters, let me make my fourth comment about his theory: Bork insists on stretching to reach results that his theory does not dictate. This is clearest in his discussion of Brown, which is, as I have already mentioned, the one case that reaches a result that scholars with serious ambition are not permitted to reject. Bork does not reject the result in Brown, although he doesn't think much of Chief Justice Warren's opinion.105 What he says about Brown, in fact, is most revealing. The original understanding, says Bork, is clear: "The inescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life."106 Given what Bork later says about being guided by the concrete understanding of the Founders,107 one might think that this is the end of the case. But it isn't. Says Bork: "The Court's realistic choice . . . was either to abandon the quest for equality by allowing segregation or to forbid segregation in order to achieve equality. There was no third choice. Either choice would violate one aspect of the original understanding."108

Suddenly we have the crux of the matter: there is more than one "aspect" of the original understanding of the equal protection clause. There is the abstract goal of achieving black equality, and there is the concrete expectation that schools are to remain segregated. According to Bork, the Court must choose the first.109 But this is just what Bork, in

105. See id. at 75 ("Brown was a great and correct decision, but it must be said in all candor that the decision was supported by a very weak opinion.").
106. Id. at 75-76.
107. See id. at 144.
108. Id. at 82 (emphasis added).
109. Id.
his general discussion of originalism, seeks to deny. Says Bork later in the book:

The role of a judge committed to the philosophy of original understanding is not to "choose a level of abstraction." Rather, it is to find the meaning of a text—a process which includes finding its level of generality, which is part of its meaning—and to apply the text to a particular situation, which may be difficult if its meaning is unclear.110

Under Bork’s version of originalism, I do not think that the "meaning" of the equal protection clause as applied to segregated schools is in the least unclear. For that reason, I would think that an originalist who, as Bork does, denies the interpreter the freedom to choose among competing levels of abstraction, should find the result in Brown indefensible. The expectation among those who drafted and ratified the equal protection clause that its guarantees did not apply to schools could hardly be clearer, and the changing role of education, and of race, does nothing to change that original expectation.111 The societal changes in the nine decades separating the Fourteenth Amendment from the Warren Court did, however, cast doubt on the rationale for the expectation that schools would be excluded. This is the point, I think, that Bork is trying to make in explaining why his theory can justify Brown on originalist grounds.

But that is precisely the stretch that he does not allow, for example, in the area of privacy. This seems a peculiar place to draw the line (although Bork is adamant about drawing it) because, unlike the case involving the equal protection clause, where we know that the authors meant to exclude schools, we don’t know for certain whether the Founders had a clear intention to exclude marital relations from constitutional protection. In the case of privacy, Bork wants to exclude protection because the authors did not imagine that it was covered;112 fair enough, on his theory. In the case of school segregation, however, he wants to allow protection even though the authors had a clear sense that it was not cov-

110. Id. at 149.

111. See generally R. BERGER, GOVERNMENT BY JUDICIARY 117-33 (1977) (chronicling the history leading up to Brown, the arguments presented to the Brown Court by both the advocates and the experts, and the aftermath of the Brown decisions); Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1, 59 (1955) ("If the fourteenth amendment were a statute, a court might very well hold, on the basis of [the legislative history] . . ., that it was foreclosed from applying it to segregation in public schools. The evidence of congressional purpose is as clear as such evidence is likely to be . . .").

112. See, eg., Bork Hearings, supra note 91, at 285-87 ("[O]ne of the problems with the right of privacy, as Justice Douglas defined it [in Griswold] . . ., is . . . that it does not have any rootings in the Constitution . . ."); R. BORK, supra note 1, at 113 (referring to the Court’s major privacy decisions as a “creation of new rights without support in constitutional text or history”).
This just doesn’t work. To be consistent with his sensible (but I think incorrect) approach to privacy, Bork must reject Brown.

What is curious is that Bork so readily dismisses the only form of originalism that simultaneously solves all of his problems: it treats the Constitution as law, it is bound by the original understanding, it narrows the range of judicial choice, and it permits a judge to do what Bork wants to do with Brown, that is, to say that the preservation of the authors’ principal goal requires a disregard of their concrete expectations. I refer of course to an originalism focusing on the broad but clear values—sometimes called the postulates of ordered liberty—that the authors had in mind in writing the document. The question the originalist then asks is not What did the drafters expect to happen? but What were the drafters trying to accomplish? This approach readily accommodates Brown, because, although the value choice is still the same—the elimination of racial oppression—the society in which it is applied is a different one from the one the Framers understood. This approach, moreover, is entirely consistent with the rules for reading statutes, for it is a commonplace of statutory interpretation that every part of a statute shall be read in a way that gives effect to the legislature’s purpose. Bork’s approach, I fear, would lead to a Constitution that would slowly lose its significance, because the concrete expectations of its authors would so far diverge from the world in which their document must be applied. As an originalist, I do not believe that this was the original plan.

I emphasize that I am not suggesting a freewheeling “fundamental rights” jurisprudence. The judges in the version of originalism that I propose would have no freedom to pick and choose among the values they liked best. The values inherent in the original understanding still would be the only values that one might sensibly describe as found in the Constitution. Actually, although I know that Bork would give me an argument, this is an originalism that is more consistent with the original understanding on the nature of judicial power, and more consistent with our practice over the past 200 years. On the other hand, I do not really think it is inconsistent with any part of Bork’s argument. It is, I think, inconsistent only with his language.

What I hope that this brief summary makes clear is that Bork’s constitutional theory, while flawed, is sensible and well thought out. What it is not outside is the mainstream of constitutional thought, which was, to my way of thinking, the unfairest charge of all.
Having said this, I should add that reading Bork's book has left me with an ineffable sense of sadness. It is not the sadness of a booster, a partisan rah-rah, a meditation on the tragedy of a nation that has been denied his services. Nor is it the sadness of the measured, distanced observer who feels sorrow at the depths to which politics can sink. It is, rather, the sadness of one who has long attacked the Bork hearings as unfair, even though I am confident that a Justice Bork would have handed down many decisions that I would dislike. Having put aside the mantle of judge for the less certain status of media star, Robert Bork seems to be doing his best to convince his opponents that they were right—not that they were right in the often bizarre evidence that was presented against him, but that they were right in opposing him. The Bork we meet in *The Tempting of America* is not the thoughtful scholar for whom law, even on the Supreme Court, is an "intellectual feast." We meet, rather, a vengeful Bork, a man with a mission, whose rhetoric is not measured and whose analysis admits of no possibility of error. His style, moreover, is relentlessly partisan. Again and again, Bork tells us that he was done in by the left, by left-liberals, by left-liberalism, by unreconstructed 1960s-era radicals. "[T]he groups of left-liberalism," he sighs in the penultimate chapter, "came together in an enormous coalition to oppose me." 113 Sadly, that very brief chapter, entitled "Why the Campaign Was Mounted," reveals less a scholar than a polemicist. Bork tosses together, as though they are one group, the new left activists of the sixties, the leadership of public interest organizations, Marxists, and the "single-issue groups who attack American business through extreme forms of environmentalism, feminism, product safety, health concerns, and the like." 114 (Even a reader who shares some of Bork's own concerns must pause and wonder, *The like? What's the like? What have these in common?* Nothing, I fear, except that Bork himself finds each of them politically troubling.) He makes no specific identification of the groups with the campaign against him, but perhaps he feels that this is unnecessary, because he has already told us that the campaign was a creature of the elite left.

Because of Bork's choice to render so central a part of his book in this polemical style, an important part of his message is lost, swallowed up in the vitriol. With his stirring defense of majoritarianism, Bork is on to something vital. His book could so easily have been a measured call

114. *Id.* at 340.
for a return to the roots of democratic decision making, for a reasoned public debate over issues of moment. As Bork clearly sees, the glorious triumph of *Brown v. Board of Education*, joining the authority of judicial review to a social movement aimed at finally ending perhaps the greatest evil ever perpetrated by the United States, has misled too many of us into supposing that every evil has the same cure: letting the judges set matters right. The result is that talking about moral problems, except in terms of judicial action, has become more and more difficult. Ethan Bronner, in fact, makes the point more clearly and straightforwardly than Bork does. Notes Bronner:

If there was a tragic aspect to Bork's defeat, it lay in his failure to articulate appealingly a concern shared by many: Americans have grown accustomed to letting judges and bureaucrats make difficult social policy choices for them. They seem resigned to allowing courts and government agencies to take responsibility on issues that a self-governing people ought to work out in greater detail through the democratic process.\(^{115}\)

The point, of course, is not a new one. Lots of social theorists and academicians have made it before, myself among them. But Bork, because of his renown, had a rare opportunity to present this point in thoughtful and nuanced detail to a public eager to get his side of the story. Instead, and unfortunately, he chose the path of partisanship, writing a book, I fear, that only the right could love. The battle over his nomination becomes a microcosm for the culture war, and the culture war represents an effort by a handful of elite left activists to impose their vision by force (for what else is judicial power?) on a nation that repudiates them routinely at the polls. It is this zealous and immoderate left, and, evidently, no one else, that bears ultimate responsibility for his defeat.

Again, one wishes that the rhetoric were more measured, because there is a degree of substance to his criticism, if not of the society,\(^{116}\) then at least of the effort to block his confirmation. But taken as a whole, Bork's view of the forces marshalled against him represents a gross oversimplification. The forceful opposition of Philip Kurland, who teaches constitutional law at the University of Chicago Law School and who in the past has been anything but a partisan of the left, is omitted from the book. So is the stirring and nuanced testimony of William Coleman, a distinguished Republican and leader of the bar, no "left-liberal" unless one wants to dismiss as an elite fringe everyone who fought the battle for black freedom. These oversights are particularly startling because Kur-

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\(^{115}\) E. Bronner, *supra* note 7, at 351.

\(^{116}\) Of course, he might be on to something there, too, a proposition on which I here express no view.
land and especially Coleman play such major roles in other accounts of the hearings.117

The omission of any discussion of opposition from prominent conservatives obviously eases Bork's declared goal of proving that the left did him in. (Although why the left carries such clout in the Senate, if it is, as Bork insists, unable to win elections, is mysteriously left unexplained.) That is precisely the kind of shading of which his opponents accused him. Yet the omission is unnecessary to his case, for a statistical case rests on significant correlation, not on absolute identity. This point is missed, for example, by Pertschuk and Schaetzel, who argue that the opposition of Coleman and Kurland proves that it wasn't just the left that was out to get Bork.118 Whereas the truth, surely, is that initially it was virtually the left alone—mainly the educated and academic left—that opposed the nomination. As time passed, the opposition broadened. Bork puts this down to the distortions of his record. Undoubtedly there was a good deal of that, but, as I have already argued, it was ultimately the process, not his record, that was more distorted.

Indeed, it strikes me that Bork made a tactical error in the hearings that he repeats in his book. In the hearings, he invited dialogue about his views on the most controversial and difficult questions of constitutional law. In the book, he says that scrutiny of this sort is appropriate119 and goes on to argue at length that his views were misrepresented and misunderstood.120 But for reasons that I have already argued, Bork was wrong, as were his critics, to suppose that the confirmation hearings are the right place for a seminar on constitutional theory. The partisan cast of the discussion of the evidence adduced in the hearings might have been avoided, or at least reined in, had Bork admitted error on this proposition. Surely it would have been enough to say that on reflection he has decided that the distortion and confusion over his record help show why the political arena is the wrong place to assess anything so subtle and delicate as judicial philosophy. He might even have gone so far as to suggest that the prediction of how a nominee is likely to vote is not a proper subject for the President or the Senate to take into account.

But Bork couldn't say this, in large part because he disagrees with

117. See E. BRONNER, supra note 7, at 133, 148, 227-83; M. PERTSCHUK & W. SCHAEZTSEL, supra note 3, at 24, 26-27, 30-31, 162.
118. M. PERTSCHUK & W. SCHAEZTSEL, supra note 3, at 255.
119. See R. BORK, supra note 1, at 278-79 ("Most nominees are able to respond to substantive questions by saying something like 'I cannot discuss legal issues because such matters might come before me as a judge.' I could not take that line, because I had already discussed a great many such issues in print.").
120. See id. at 323-43.
it—he does think these matters proper for presidential or senatorial inquiry. He evidently sees nothing wrong with politicians offering campaign promises (and now and then even platform planks) on the methodological stances that they will expect of judges. This is true especially, he tells us, when a nominee has, as Bork admits that he did, raised many of these questions himself, albeit in other forums. 121 Although he decries what he sees as the Court's and the society's move away from the jurisprudence of original intent, he apparently is willing to accept a system in which constitutional meaning is determined, in effect, by plebiscite.

My view, as I have already argued, is that this is wrong, dangerously so. It is wrong not only because public argument over constitutional theory inevitably misses the nuances that truly matter, but also because it represents a threat to judicial independence. I have said it before and I will say it again: "For the scholar who believes in the possibility of constitutional theory, the collapse of the nomination and confirmation process into a battle over concrete results carries the potential for disaster." 122 The disaster that I have in mind is the seemingly settled right of a majority of the American people 123 (let's give the Coalition members their due: the polls show they had the public on their side) to admonish their representatives to reject judicial candidates who will vote the wrong way.

If I am wrong—if assessment of constitutional theory, mislabeled as judicial philosophy, is an appropriate subject of inquiry for President or Senate—then we have come to a peculiar pass in the evolution of judicial review. The reason that judges are insulated from political pressure, so we teach school children, is to allow them to make their decisions without regard to public will. But when one side proclaims the right to enshrine its constitutional views because it has won the presidential election and another proclaims the right to enshrine its own because it controls the Senate, what is happening is an effort to fill the Court with Justices who are expected to reason and vote in accord with each side's conception not of the public good but of the public will. That sounds less like selecting disinterested judges than selecting representatives of the people. Maybe Robert Bork would have made a poor representative; certainly the vitriol in his book confirms the impression that he is no politician. He seems insensitive to—disinclined to be influenced by—popular will.

121. See id. at 278-79.
122. Carter, supra note 56, at 1193.
123. Immediately following Bork's confirmation hearings, opinion polls indicated that the American public was against Bork's confirmation. See E. Bronner, supra note 7, at 308.

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So it might be just as well that Bork is not in the Congress. But it remains unclear to me why the fact that someone will not do what the people want done is a reason to keep that person off a court, even (especially?) the Supreme Court of the United States. Some of us are still teaching our constitutional law students that opposing the popular will is one of the things that the Supreme Court is for.

There is a troubling point here. The genie, I fear, may not go back into the bottle. No one is likely to deny that the Court, and the Constitution that it enforces, work together as a counter-majoritarian brake on the exercise of popular will. The essence of constitutional theory is discovering the limits of the judicial function. Constitutional theory, however, is no longer the domain of scholars and judges alone; like much else in our democracy, it has come to belong to the people. It seems, then, that it is the popular will that decides how the Constitution is to be read. If "We, the People of the United States," want to ordain and establish a Constitution with particular rights protected, there is no need for a convention or even an amendment. Our constitutional mythos is, as W.E.B. DuBois wrote of a different subject, haunted by the ghost of an untrue dream—the dream of judicial independence promised by Publius in Federalist No. 78124 and taught in our civics classes to this day. But judicial independence is, in the nomination and confirmation of Justices, no more than a pleasant fantasy. What we have instead is judicial philosophy by popular decree.

Oh, well—I am, as I have said earlier, a dinosaur. My ideas about the Constitution are old-fashioned, hopelessly out of step. I know that. So let me propose a more radical one. If the nomination and confirmation process has truly evolved into a contest for selecting popular representatives, then I for one will cheerfully go on the public record as opposing judicial review. Really. Top to bottom. If the role of President and Senate is to appoint Justices who will, they hope, vote the way that the appointers want them to, then to grant those Justices life tenure and make their judgments unreviewable is, in a constitutional democracy, an unforgivable excess. Remembering your e.e. cummings? there’s a hell of a good universe next door, let’s go?

Good enough. Let’s scrap article III and think of something better.

124. See The Federalist No. 78, at 469-70 (A. Hamilton) (C. Rossiter ed. 1961) (arguing that the constitutional safeguards of life tenure and removal only for lack of good behavior would ensure the independence of the federal judiciary).