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The Bork Nomination

Ronald Dworkin

President Reagan's nomination of Judge Robert Bork to succeed Justice Lewis Powell on the Supreme Court presents the Senate with an unusual problem. For Bork's views do not lie within the scope of the longstanding debate between liberals and conservatives about the proper role of the Supreme Court. Bork is a constitutional radical who rejects a requirement of the rule of law that all sides in that debate had previously accepted. He rejects the view that the Supreme Court must test its interpretations of the Constitution against the principles latent in its own past decisions as well as other aspects of the nation's constitutional history. He regards central parts of settled constitutional doctrine as mistakes now open to repeal by a right-wing court; and conservative as well as liberal senators should be troubled by the fact that, as I shall argue here, he has so far offered no coherent justifications for this radical, antilegal position.

It would be improper for senators to reject a prospective justice just because they disagreed with his or her detailed views about constitutional issues. But the Senate does have a constitutional responsibility in the process of Supreme Court appointments, beyond insuring that a nominee is not a crook or a fool. The Constitution is a tradition as well as a document, and the Senate must satisfy itself that a nominee intends in good faith to join and help to interpret that tradition in a lawyerlike way, not to challenge and replace it out of some radical political vision that legal argument can never touch.

The Senate's responsibility is particularly great in the circumstances of the Bork nomination. Bork is the third justice added to the Court by an administration that has for seven years conducted an open and inflexible campaign of ideological appointments on all levels of the federal courts, hoping to make them a seat of right-wing power long after the administration ends. Reagan made no effort to disguise the political character of Bork's appointment: he said that Bork is "widely regarded as the most prominent and intellectually powerful advocate of judicial restraint," and that he "shares my view" of the proper role of the Court. Conservative pressure groups are already raising money to support the nomination, and the right-wing New York *Post* has challenged liberals to "make our day" by opposing it.

Bork's appointment, if confirmed, promises to achieve the dominance of the right on the Supreme Court that Reagan's previous appointments failed to secure. For Justice Powell has been a swing vote, siding mainly with the right on issues of criminal law but with more liberal justices on other issues of individual rights, and he has provided the fifth and conclusive vote, one way or the other, on many occasions. If Bork votes as those who support him have every reason to expect he will, the Court will have lost the balance that Powell provided, and it will have lost the opportunity for cases to be decided one by one on the issues, rather than on some simple ideological test. So the Senate should not apply the relaxed standards it does when a president seeks merely to have his own constitutional philosophy represented on the Supreme Court. The Bork nomination is the climactic stage of a very different presidential ambition: to freeze that institution, for as long as possible, into an orthodoxy of the president's own design.

Few nominees, moreover, have so clearly and definitively announced their positions on matters they are likely to face if confirmed. Bork has declared, for example, that the Supreme Court's decision in *Roe* v. *Wade*, which limited a state's power to make abortion criminal, was itself "unconstitutional," that the Constitution plainly recognizes the propriety of the death penalty, and that the Court's long string of decisions implementing the "one man, one vote" principle in national and local elections was seriously mistaken. He has called the suggestion that moral minorities such as homosexuals might have constitutional

rights against discrimination legally absurd, and has doubted the wisdom of the constitutional rule that the police may not use illegally obtained evidence in a criminal trial. In a dissenting opinion on the Circuit Court, which the majority said contradicted strong Supreme Court precedent, he said that Congress cannot challenge in court the constitutionality of the president's acts.

The New York Times reports White House officials as confident, moreover, that Bork will support the administration's extreme position against affirmative action, which the Supreme Court has rejected in several close votes. And Bork has strongly suggested that he would be ready, as a justice, to reverse past Supreme Court decisions he disapproved of. ("The Court," he said, "ought to be always open to rethinking constitutional problems.") Nominees often decline to answer senators' detailed questions about their views on particular issues, out of a fear that public announcement would jeopardize their freedom of decision later. But Bork has given his own extreme views such publicity that senators need not scruple to ask him to defend them.

Most commentators have assumed that Bork has a well-worked-out constitutional theory, one that is evident and straightforward, though very conservative. The Constitution has nothing in it, Bork says, except what the "framers"—"those who drafted, proposed and ratified its provisions and various amendments"—put there. When a case requires the justices to fix the meaning of an abstract constitutional proposition, such as the requirement of the Fourteenth Amendment that government not deny any person "equal protection" of the law, they should, according to Bork, be guided by the intention of the framers, and nothing more. If they go beyond what the framers intended, then they are relying on "moral precepts" and "abstract philosophy," and therefore acting as judicial tyrants, usurping authority that belongs to the people. That, Bork believes, is exactly what the Supreme Court did when it decided the abortion case, the one-man-one-vote cases, the death penalty and affirmative action cases, and the other cases of which he disapproves.

Is that an adequate theoretical explanation of his radical constitutional positions? The idea that the Constitution should be limited to the intentions of the framers has been very popular among right-wing lawyers since Attorney General Meese proclaimed it the official jurisprudence of the Reagan administration. It has been widely criticized, in familiar arguments that neither Bork nor any member of the administration has answered.[1] I shall not pursue those arguments in this article, however, because I am interested, as I said, in a different issue: not whether Bork has a persuasive or plausible constitutional philosophy, but whether he has any constitutional philosophy at all.

In order to explain my doubts I must describe, in some detail, the way Bork actually uses the idea of original intention in his legal arguments. He offered his most elaborate account of that idea in an article written many years ago, discussing the Supreme Court's famous decision in *Brown* v. *Board of Education*, which used the equal protection clause to declare racial segregation of public schools unconstitutional.[2] The *Brown* case is a potential embarrassment to any theory that emphasizes the importance of the framers' intentions. For there is no evidence that any substantial number of the congressmen who proposed the Fourteenth Amendment thought or hoped that it would be understood as making racially segregated education illegal. In fact, there is the strongest possible evidence to the contrary. The floor manager of the bill that preceded the amendment told the House of Representatives that "civil rights do not mean that all children shall attend the same school," and the same Congress continued the racial segregation of the schools of the District of Columbia, which it then administered.[3]

When the Supreme Court nevertheless decided, in 1954, that the Fourteenth Amendment forbids such segregation, many distinguished constitutional scholars, including the eminent Judge Learned Hand and a distinguished law professor, Herbert Wechsler, had serious misgivings. But the decision has by now become so firmly accepted, and so widely hailed as a paradigm of constitutional statesmanship, that it acts as an informal test of constitutional theories. No theory seems acceptable that condemns that decision as a mistake. (I doubt that any Supreme Court nominee would be confirmed if he now said that he thought it wrongly decided.) So Bork's discussion of *Brown* v. *Board of Education* provides a useful test of what he actually means when he says that the Supreme Court must never depart from the original intention of the framers.

Bork says that the *Brown* case was rightly decided because the original intention that judges should consult is not some set of very concrete opinions the framers might have had, about what would or would not fall within the scope of the general principle they meant to lay down, but the general principle itself. Once judges have identified the principle the framers enacted, then they must enforce it *as* a principle, according to their *own* judgment about what it requires in particular cases, even if that means applying it not only in circumstances the framers did not

[1] The idea of an *institutional* intention is deeply ambiguous, for example, and political judgment is required to decide which of the different meanings it might have is appropriate to constitutional adjudication. (See my book, *Law's Empire*, Chapter 9.) And the original intention theory appears to be self-defeating, because there is persuasive historical evidence that the framers intended that their own interpretations of the abstract language they wrote should not be regarded as decisive in court. See H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review*, Vol. 98, p. 885 (1985).

[2] See Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal*, Vol. 47, pp. 12–15 (1971).

[3] See Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard University Press, 1977), pp. 118–119.

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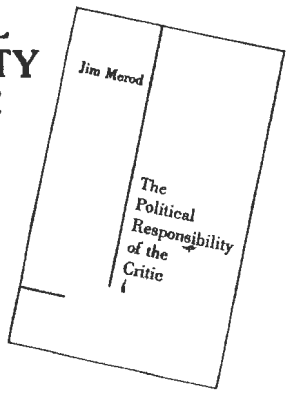

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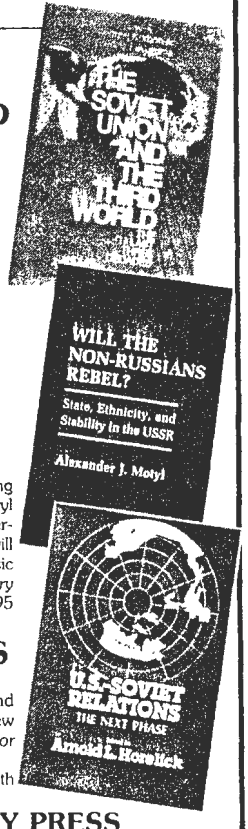

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contemplate, but in ways they would not have approved had they been asked.

Since the framers of the Fourteenth Amendment did not believe they were making segregated schools unconstitutional, nothing less than that expansive interpretation of "original intention" could justify *Brown* as a decision faithful to their intent. And Bork has made it plain on many other occasions that the expansive interpretation is what he has in mind. In a recent case in the DC Circuit Court of Appeals, for example, he joined a majority decision declaring that the First Amendment protected newspaper columnists from a libel suit brought by a Marxist political scientist after they had reported that he had no standing in his profession.[4] Bork's then colleague on that court, Antonin Scalia, who has since been promoted by Reagan to the Supreme Court, dissented, and chided Bork and the other members of the majority as being faithless to the intention of the framers of the First Amendment, who plainly did not suppose that they were changing the law of libel in the way the majority decision assumed. Bork replied, once again, by insisting that a judge's responsibility is not to the particular concrete opinions the framers might or might not have had about the scope of the First Amendment principle they created, but to that principle itself, which, in his view, required that the press be protected from libel suits in ways the framers would not have anticipated.

That seems right. If we are to accept the thesis that the Constitution is limited to what the framers intended it to be, then we must understand their intentions as large and abstract convictions of principle, not narrow opinions about particular issues. But understanding their intentions that way gives a much greater responsibility to judges than Bork's repeated claims about judicial restraint suggest. For then any description of original intention is a conclusion that must be justified not by history alone, but by some very different form of argument.

History alone might be able to show that some particular concrete opinion, like the opinion that school segregation was not unconstitutional, was widely shared within the group of legislators and others mainly responsible for a constitutional amendment. But it can never determine precisely which general principle or value it would be right to attribute to them. This is so not because we might fail to gather enough evidence, but for the more fundamental reason that people's convictions do not divide themselves neatly into general principles and concrete applications. Rather they take the form of a more complex structure of layers of generality, so that people regard most of their convictions as applications of further principles or values more general still. That means that a judge will have a choice among more or less abstract descriptions of the principle that he regards the framers as having entrusted to his safekeeping, and the actual decisions he makes, in the exercise of that responsibility, will critically depend upon which description he chooses.

I must illustrate that point in order to explain it, and again I can draw on Bork's own arguments to do so.[5] In his discussion of the *Brown* case, he proposed a particular principle of equality as the general principle judges should assign to the framers: the principle that government may not discriminate on grounds of race. But he might just as well have assigned them a more abstract and general principle still: that government ought not to discriminate against any minority when the discrimination reflects only prejudice. The equal protection clause of the Fourteenth Amendment does not, after all, mention race. It says only that government must not deny any person equal protection of the law. The Fourteenth Amendment was, of course, adopted after and in consequence of the Civil War, which was fought over slavery. But Lincoln said the war was fought to test the proposition that *all* men are created equal, and of course he meant women as well. In any case it would be preposterous to think that the statesmen who created the equal protection clause thought that official prejudice was offensive only in the case of race. They thought that official racial discrimination was outrageous because they held some more general principle condemning all forms of official prejudice. Indeed, their views about race would not have been *moral* views, which they plainly were, unless they held them in virtue of some more general principle of that sort.

Then why should judges not attempt to define and enforce that more general principle? Why should they not say that the framers enacted a principle that outlaws any form of official discrimination based on prejudice? It would follow that the equal protection clause protects women, for example, as well as blacks from discriminatory legislation. The framers apparently did not think that their principle had that range; they did not think that gender distinctions reflected stereotype or prejudice. (It took a later constitutional amendment, after all, to give women the vote.) But once we have defined the principle we attribute to the framers in that more abstract way, we must treat their views about women as misunderstandings of the force of their own principle, which time has given us the vision to correct, just as we treat their views about racially segregated education. That, in effect, is what the Supreme Court has done.[6]

But now consider the case of homosexuals. Bork called the suggestion that homosexuals are protected by the Constitution a blatant example of trying to amend that document by illegitimate fiat. But once we have stated the framers' intention as a general principle condemning all discrimination based on prejudice, then a strong case can be made that we must recognize homosexual rights against such discrimination in order to be faithful to that intention. The framers might not have agreed, even if they had examined the question. But once again a judge might well think himself forced, in all intellectual honesty, to regard that as another mistake they would have made, comparable to their mistakes about school segregation and women. Once again, as in those cases, time has given us the information and understanding that they lacked. Superstitions about homosexuality

[4] See Bork's concurring opinion in *Ollman* v. *Evans* 750 F2d 970 (1984).

[5] For more general discussions of the same point in different contexts, see my *Taking Rights Seriously* (Harvard University Press, 1977), Chapter 5, *A Matter of Principle* (Harvard University Press, 1986), Chapter 2, and *Law's Empire* (Harvard University Press/Belknap Press, 1986), Chapter 9.

[6] See, for example, *Craig* v. *Boren*, 429 US 190 (1976).

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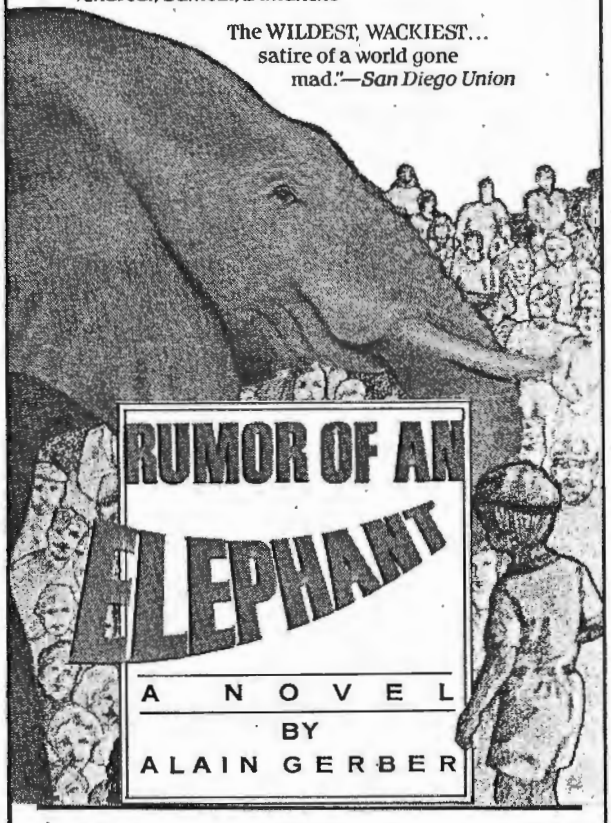

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have been exposed and disproved, many states have repealed laws making homosexual acts criminal, and those laws that remain are very widely regarded as now based on nothing but prejudice. I do not mean to claim that the argument in favor of homosexual rights would be irresistible if we accepted the broader reading of original intention that I described. But the argument would state a strong case that any opponent would have to answer in detail, not simply brush aside as Bork did.[7]

An appeal to the framers' intention, in other words, decides nothing until some choice is made about the right way to formulate that intention on any particular issue. If we choose the narrowest, most concrete formulation of original intention, which fixes on the discrete expressed opinions of the framers and ignores the more general moral vision they were trying to serve, then we must regard *Brown* as unfaithful to the framers' will; and that conclusion will seem to most people ample evidence that the most concrete formulation is the wrong one. If we assign to the framers a principle that is sufficiently general not to seem arbitrary and ad hoc, on the other hand, like the principle that government must not discriminate on grounds of prejudice, then many of the decisions Bork castigates as illegitimate become proper according to the standards Bork himself claims to endorse.

So everything depends on the level of generality a judge chooses as the appropriate one, and he must have some reason for his choice. Bork chooses a level intermediate between the two I just described.[8] He says that judges should assign the framers a principle limited to the groups or topics they actually discussed. If race was discussed during the debate over the equal protection clause, but neither gender nor sexual behavior was "under discussion," then the original intention includes the principle that government should not discriminate racially. It does not include the more general principle that the government should not act out of prejudice against any group of citizens, because that more general principle would apply to women and homosexuals, who were not discussed. The odd suggestion that we can assign no general principle to the framers whose application would extend to any group or topic not "under discussion" would of course sharply limit the individual rights the Constitution would protect. But it is flatly inconsistent with Bork's other opinions—the framers of the First Amendment did not discuss the law of libel, for example. And it has no jurisprudential or historical merit at all.

There is no more sense in assigning the framers an intention to protect only the groups they actually mentioned than in assigning them an intention limited to the concrete applications they actually envisioned, which Bork agrees would be absurd. The framers meant to enact a moral principle of constitutional dimensions, and they used broad and abstract language appropriate to that aim. Of course they discussed only the applications of the principle that were most on their minds, but they intended their discussion to draw on the more general principle, not eviscerate it. Perhaps they disagreed among themselves about what their principle would require, beyond the issues they discussed. And contemporary judges, with more information, may think it requires legal decisions few if any of the framers anticipated, as in the case of segregated schools and gender discrimination. But Bork's suggestion insults the framers rather than respects them, because it denies that they were acting on principle at all. It reduces a constitutional vision to a set of arbitrary and isolated decrees.

Bork defends this truncated view of original intention only by appealing to the platitude that judges must choose "no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly supports." That is certainly true, but unhelpful, unless Bork can produce an argument that his own, truncated conception meets that test; and he has not, so far as I am aware, produced even the beginning of such an argument. His conception yields narrow constitutional rules that protect only a few groups while excluding others in the same moral position. How can a discriminatory rule of that sort count as a fair interpretation of the wholly general and abstract language that the framers actually used when they referred to equal protection for all persons? Most lawyers think that the ideal of integrity of principle—that

[7] I might have used many other areas of constitutional law to illustrate the point I have been making about the idea of original intention. In the 1971 article I mentioned earlier, for example, Bork offered a theory about the original intention behind the First Amendment's guaranty of freedom of speech. He said that the framers intended to limit constitutional protection to politically valuable speech, and that the First Amendment therefore does not prevent legislators from banning scientific works they disagree with or censoring novels they find unattractive. He recently announced that he long ago abandoned that view, for the somewhat shaky reason that scientific works and novels may relate to politics (most of them do not). But he still apparently believes that the First Amendment has no application either to pornography or to what he regards as advocacy of revolution, on the ground that neither has any political value in his eyes.

He offers no justification, however, for attributing to the framers the relatively narrow principle that only political ideas deserve protection. No doubt they focused on political censorship, which was one of the evils they had fought a revolution against. But since Milton's *Areopagitica*, at least, it had been widely supposed that political speech must not be censored for a more general and abstract reason that applies to other forms and occasions of speech as well: that truth will emerge only after unrestrained investigation and communication. (A tract in favor of free speech published in 1800 argued that "there is no natural right more perfect or absolute, than that of investigating every subject which concerns us.") So once again the choice of which principle to attribute to the framers will be decisive. If we concentrate on their special concern about political speech, Bork's formulation seems more appropriate. If we look instead to the philosophical antecedents of that special concern, it does not. We need an argument to justify the choice, not a flat declaration that one formulation does and the other does not capture the original intention.

[8] He does so in a lecture to the University of San Diego School of Law on November 18, 1985, reprinted in the *San Diego Law Review*, Vol. 23, No. 4 (1986), p. 823. Bork attempted to reply, in that lecture, to an argument by Dean Paul Brest of the Stanford Law School which was apparently similar to the argument I have made here. Bork does not supply a reference to Brest's argument.

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fundamental rights recognized for one group extend to all—is central to the Constitution's structure. How, then, can Bork's narrow rules be recommended by any fair interpretation of that structure? Unless he can produce some genuine argument for his curtailed view of original intention, beyond the fact that it produces decisions he and his supporters approve, his constitutional philosophy is empty: not just impoverished and unattractive but no philosophy at all.

Judges in the mainstream of our constitutional practice are much more respectful of the framers' intentions, understood as a matter of principle, than Bork is. They accept the responsibility the framers imposed on them, to develop legal principles of moral breadth to protect the rights of individuals against the majority. That responsibility requires judgment and skill, but it does not give judges political license. They test competing principles in the interpretative, legal manner, by asking how far each fits the framers' decisions and helps to make sense of them, not as isolated historical events but as part of a constitutional tradition that includes the general structure of the Constitution as well as past Supreme Court and other judicial decisions. Of course competent and responsible judges disagree about the results of that exercise. Some reach mainly conservative results and others mainly liberal ones. Some, like Justice Powell, resist classification because their views are particularly sensitive to differences between different kinds of issues. Disagreement is inevitable, but the responsibility each judge accepts, of testing the principles he or she proposes in that way, disciplines their work, and concentrates and deepens constitutional debate.

Bork, however, disdains these familiar methods of legal argument and analysis; he believes he has no responsibility to treat the Constitution as an integrated structure of moral and political principles, and no responsibility to respect the principles latent in past Supreme Court decisions he regrets were made.[9] In 1971 he subscribed to an alarming moral theory in an effort to explain why.[10] He said that moral opinions were simply sources of what he called "gratification," and that "there is no principled way to decide that one man's gratifications are more deserving of respect than another's, or that one form of gratification is more worthy than another." Taken at face value, that means that no one could have a principled reason for preferring the satisfactions of charity or justice, for example, to those of racism or rape.

A crude moral skeptic is an odd person to carry the colors of the moral fundamentalists. Nevertheless, if Bork is still that kind of skeptic, this would explain his legal cynicism, his indifference to whether constitutional law is coherent in principle. If not, we must look elsewhere to find political convictions that might explain his contempt for the integrity of law. His writings show no developed political philosophy, however, beyond frequent appeals to the truism that elected legislators, not judges, ought to make law when the Constitution is silent. No one disputes that, of course; people disagree only about when the Constitution *is* silent. Bork says it is silent about gender discrimination and homosexual rights, even though it declares that everyone must have equal protection of the law. But he offers, as I have said, no argument for that surprising view.

He does suggest, from time to time, a more worrying explanation of his narrow reading of the Constitution, because he flirts with the radical populist thesis that minorities in fact have no moral rights against the majority at all. That thesis does recommend giving as little force to the framers' intentions as possible, by treating the Constitution as a collection of isolated rules, each strictly limited to matters that the framers discussed. But populism of that form is so plainly inconsistent with the text and spirit of the Constitution, and with the most apparent and fundamental convictions of the framers, that anyone who endorses it seems unqualified, for that reason alone, for a place on the Court.

There is very little else about political morality to be found in Bork's writings. He did declare an amazing political position long ago, in 1963.[11] He opposed the civil rights acts on the ground that forbidding people who own restaurants and hotels from discriminating against blacks would infringe their rights to liberty. He tried to defend that position by appealing to John Stuart Mill's liberal principle that the law should not enforce morality for the sake of morality alone. He called the idea that people's liberty can be restricted just because the majority disapproves of their behavior an idea of "unsurpassed ugliness."

His analysis of the connection between liberty and civil rights was confused. The civil rights acts do not violate Mill's principle. They forbid racial discrimination not just on the ground that the majority dislikes racists, but because discrimination is a profound harm and insult to its victims. Perhaps Bork realized this mistake, because in 1973 he declared, in hearings confirming his appointment as Nixon's solicitor general, that he had come to approve of the civil rights acts. But in 1984, without acknowledging any change in view, he disavowed Mill's principle entirely, and embraced what he had formerly called an idea of unsurpassed ugliness, the idea that the majority has a right to forbid behavior just because it thinks it morally wrong.[12] In a lecture before the American Enterprise Institute, in which he was discussing the liberty not of racists but of sexual minorities, he dismissed the idea that "moral harm is not harm legislators are entitled to consider," and accepted Lord Devlin's view that a community is entitled to legislate about sexual and other aspects of morality because "what makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives."[13] Perhaps Bork's convictions did shift so dramatically over time. But it is hard to resist a less attractive conclusion: that his principles adjust themselves to the prejudices of the right, however inconsistent these might be.

In any case, the Senate Judiciary Committee should try to discover, if it can, the true grounds of Bork's hostility to ordinary legal argument in constitutional law. It should not be satisfied if he defends his announced positions by appealing only and vaguely to the original intention of the framers. Or denounces past decisions he might vote to repeal by saying that the judges who decided them invented new rights when the Constitution was silent. For these claims, as I have tried to show, are empty in themselves, and his attempts to make them more substantial show only that he uses original intention as alchemists once used phlogiston, to hide the fact that he has no theory at all, no conservative jurisprudence, but only right-wing dogma to guide his decisions. Will the Senate allow the Supreme Court to become the fortress of a reactionary antilegal ideology with so meager and shabby an intellectual base? □

[9] In an earlier article (*The New York Review*, November 8, 1984) I contrasted Bork's methods, as exhibited in the *Dronenburg* case, with the methods more traditional lawyers would have used.

[10] Bork, "Neutral Principles," p. 10.

[11] Bork, "Civil Rights—A Challenge," *The New Republic* (August 31, 1963), p. 19.

[12] Bork, "Tradition and Morality in Constitutional Law," The Francis Boyer Lectures, published by the American Enterprise Institute for Public Policy Research.

[13] Bork did not, however, read Devlin very carefully. Devlin thinks the majority has a right to enforce its moral views only in unusual circumstances, when unorthodox behavior would actually threaten cultural continuity, and he does not think that his views would support making private homosexual acts between consenting adults criminal. See Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).

NJC

Hard Sell on Bork, Lavi Fallout

BY ALEXANDER WOHL

After President Ronald Reagan nominated **Judge Robert Bork** to fill the Supreme Court vacancy, many prominent Jewish groups were quick to oppose him. Now, as the president gears up for a hard-sell drive to confirm Bork, a *conservative* Jewish group is working diligently to give him all the help it can.

The National Jewish Coalition this week brought together 27 politically conservative rabbis to gather support and disseminate pro-Bork information to congregations around the country. The Coalition treated the rabbis to a morning briefing at the White House with talks by top administration conservatives such as **Secretary of Education William Bennett**. According to **Mark Neuman**, political director of NJC, Bennett spoke on a variety of domestic issues, including "value-free education."

Later, at a luncheon at the Washington Grand Hyatt, the group heard from **Deputy Attorney General** (and NJC member) **Arthur Burns**, who told the group that the descriptions of Judge Bork by Sens. **Edward Kennedy** (D-Mass.), **Joe Biden** (D-Del.) and the **AFL-CIO**, among others, were "grotesque caricatures" of the real Bork. If Bork were such a judge, Burns said, referring to those descriptions, "he would be way out of the mainstream, and should not be confirmed."

The deputy attorney general told the *Washington Jewish Week* that those Jewish groups that have opposed Bork's nomination are "grossly mistaken," and are "just looking to find fault. Perhaps the president is an idealist, but he just wants to take politics out of the [Supreme] Court. These groups are creating a false polarization."

Confusion in the Ranks?

For those liberals who find it difficult to stomach the notion that Bork is a moderate and that his appointment is not political, company suprisingly comes from the right as well.

Bruce Fein, visiting fellow for constitutional studies at the conservative **Heritage Foundation**, believes that it is "almost childish in naivete" to think that the appointment is not political. "Of course it's a political appointment. Ronald Reagan was elected with the public's knowledge that he might be able to add members to the Supreme Court. It's nothing to be embarrassed about."

Fein was also disappointed by the White House's portrayal of Bork as a moderate who will have little effect. This is simply misleading, Fein said. "Although the vast majority of the time he will be voting for the majority opinion, many times he will be deciding issues at the cutting edge such as affirmative action, abortion, church-state and First Amendment. On these issues, Bork will clearly make a difference."

Rabbinic Sentiment

Most of the rabbis who attended the conservative function seemed pleased to be there, if not completely satisfied with everything the speakers said. **Rabbi David Lincoln** of New York City found the White House outlook refreshing. "It's not fair to say there is a 'Jewish' stand on the gay community or abortion or many other political issues." Lincoln said that while he does not make an overt effort to put conservative politics into his sermons, he is sure his congregation is aware of his views. And considering that *Commentary* editor **Norman Podhoretz** is one member of that congregation, it might be well received.

Rabbi Richard Yellin of Newton, Mass., noted that although he is "officially neutral" in all of his pronouncements before his congregation, many of the things he says probably reflect his conservative thinking. Yellin says he finds the Republican Party more appealing because it "speaks to him as an American, while the Democrats treat him only in terms of his [illegible]ness."

[illegible]y Jewish organizations [illegible] achieve these ends for "egalitarian reasons, to instill these values in everyone taking away their choice."

Jews for Jesus

Perhaps the rabbis should have taken time out of their conservative agenda and hit the streets of Washington to do their preaching. They would have found some competition for the streetcorners in most parts of town from the **Jews for Jesus** (JFJ). In Georgetown, down K Street, on Pennsylvania Avenue, the JFJ members have been blanketing the streets with their message. No one is sure why the zealous missionaries have suddenly reappeared *en masse*, but one likely possibility is the opportunity to meet and greet the thousands of new and returning college students.

More Lavi Laborings

Now that the Lavi dilemma is over, the question of who won and who lost is being scrutinized. American newspapers have played up the switch by **Foreign Minister Shimon Peres**—opposing the Lavi (and the resulting cabinet decision to oppose it)—as a big victory for him, but those familiar with the situation caution not to count out **Prime Minister Yitzhak Shamir**. One reason is a possible backlash from irritated Israel Aircraft Industry (IAI) workers who are now burning tires and participating in other forms of civil disobedience. Shamir can cite his consistent stance in favor of the plane when trying to woo their support.

But the big plus for Peres is the potential enhancement of relations with the United States and subsequent options in aviation technology that may come with the Lavi's demise. Word around Washington is that Peres is too shrewd to have sacrificed the political benefits of the Lavi without getting anything in return. According to sources familiar with the negotiations, several options were included which not only made the decision more palat-

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chairman David Obey proposed minor cuts in aid from last year's levels for both Israel and Egypt—for Israel, $36 million out of a $3 billion total; for Egypt, $26 million out of $2.1 billion. He did it not for great and lofty policy reasons, not even particularly in the name of fairness, but, as he himself admits, in an old-fashioned effort to circumvent the congressional accounting rules and get a larger program for a smaller appropriation.

Some appropriations, including aid to Israel and Egypt, are spent relatively quickly, others not. Under the rules, Mr. Obey could appropriate more if he shifted money from fast-spending accounts to slow, and that's what he was proposing. The small amounts taken from Israel and Egypt, plus some other such maneuvering, would have translated into about $765 million more for other beneficiaries, he estimates. But the chairman says that 1) the administration balked and 2) so, as the word leaked out, did any number of congressmen, who begged him not to put them on the rack with his proposal, which he finally dropped. It was not an inspiring show.

Deregulated' Safety

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breakdowns of computers and concerns about the adequacy of airport facilities and air controllers all have justifiably fed passenger anxiety. Just recently, in a rare show of unity, the airlines and various other users of the aviation system came up with a set of proposals for addressing safety and efficiency. A chief concern is what the group considers to be a "broken promise" to use fees

LETTERS TO THE EDITOR

Wash. Post 8/17/87

The Meaning of Murder

Richard Cohen [magazine, July 19] claims that men of the U.S. Army air forces were murderers of civilians from the air. My Webster's New World (1960 edition) defines murder as "the unlawful and malicious or premeditated killing by another." As a pilot of B-24 bombers based in Italy, I flew 30 missions to targets in Austria, Germany, Yugoslavia and northern Italy. Our targets were largely railroad marshaling yards, oil refineries and factories producing war goods. No doubt civilians were killed, but equating these deaths with those in the German death camps, the rape of Nanking, the Bataan death march or other events is absurd. Mr. Cohen has rewritten history and defamed honorable men, living and dead.

SAMUEL F. STREET
Salisbury

'My Cheap Labor'

I am a former farm worker from Florida who has worked in picking citrus fruit and tomatoes. With regard to the article on the Eastern Shore migrant workers [July 25], I basically agree that worker housing in Virginia and other states is a disgrace, but I totally disagree that the taxpayer should have to subsidize agribusinesses with low-interest loans from state funds. Eastern Shore farm workers are the only workers I know of who have had a pay decrease in the last 10 years. We used to get paid 40 cents for each bucket we picked; now we're paid 35 cents.

We work very hard for our pay, harder than almost anyone. In most instances we are not even allowed the dignity of working directly for a company; instead we work for a parasite known as a labor contractor, while the company insulates itself from responsibility for our working conditions.

I am tired of seeing the government subsidize an industry that gets

The Bork Nomination (Cont'd.)

It's a good thing I was there when Judge Robert Bork met with a group of clergy at a Brookings Institution dinner for religious leaders in September 1985, because if I had nothing but The Post's account of that evening [front page, July 28], I would draw entirely wrong conclusions about Judge Bork's views on church-and-state issues.

The Post's reporter was not present at the meeting. I was. As a rabbi with a strong commitment to the separation of church and state, I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from our constitutional guarantee of religious freedom and equality. I heard nothing of the sort.

In fact, the judge showed great sensitivity to the ambiguities and dilemmas of the First Amendment. During an extraordinarily long exchange with the assembled clergy, Judge Bork was cautious, yet candid and open-minded. He threw back at us as many questions as he answered—a Socratic approach I found most stimulating.

I do not recall the judge's ever stating how he would vote on matters such as prayer in public schools. Rather, I gained the impression that Judge Bork favors a pragmatic approach to the most controversial church-and-state issues, with all sides developing more flexibility. He sees a need to pull back from the growing polarization on these issues, which is highly damaging to the country and to religious bodies. He also sees a need to give some public recognition to the role of religion in our history and national life, short of promoting one or the other religious dogma or ritual under state auspices—a policy that is now advocated even by the staunchly liberal People for the American Way.

JOSHUA O. HABERMAN
Washington

■

The Post is to be commended for what appears to be a surprisingly evenhanded series of articles on Judge Bork by Dale Russakoff and Al Kamen [July 26, 27, 28].

I now understand better why there has been such rabid opposition to Judge Bork's nomination to the Supreme Court. The judge has apparently committed at least two cardinal sins: he kept an open mind as he grew older and matured, and he "converted" from liberalism/socialism/leftism to a philosophy reflected by the pragmatic old cliché: if you're not a socialist at 20, you don't have a heart; if you're still a socialist at 30 (or 40), you don't have a brain.

Judge Bork also apparently believes that if a law or the Constitution doesn't allow, or disallow, an action, then a judge should not give or take away. I find that hard to argue with. But then I have tried to keep my mind from closing.

WALTER M. PICKARD
Alexandria

The Real Roadblock on the Cab Commission

The Post's editorial "Cab Controls: A Breakdown" [Aug. 1] soundly trashed a majority of the panel on rates and rules of the D.C. Taxicab Commission, myself included.

The editorial concluded, "If the commission members insist on having tantrums and collecting per-meeting stipends for doing nothing, Mayor Barry has got to move in and set his appointees straight." I would heartily agree.

cation, Mr. Dixon faces no bureaucratic roadblock except himself. Any delay or stalling in adequate regulation of the industry can be attributed to him. Mr. Dixon refuses to acknowledge that if the D.C. Council had wanted a single commissioner, it would have said so in its legislation.

The dichotomy between the chair and this "obstructionist" didn't start yesterday. It started the day the com-

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RABBI PINCHAS STOLPER
Executive Vice President

September 15, 1987

Orthodox Union leader states that Bork appointment is not a "Jewish issue"

"Recent statements by several national Jewish organizations have given the impression that 'the organized Jewish community' has taken a collective position against President Reagan's nomination of Judge Robert Bork to the United States Supreme Court. This is not the case," stated Sidney Kwestel, President of the Union of Orthodox Jewish Congregations of America.

Mr. Kwestel continued that "the Orthodox Union has traditionally not taken a position on judicial nominees unless the nominee's stated views were perceived as a clear danger to our vision of the freedoms that mean so much to us as Americans and as Jews."

"The United States Senate has a constitutional obligation to examine Judge Bork's views and to vote on his nomination. We are disturbed by those who would pre-judge the Judge's suitability before he has had an opportunity to testify before the Senate Judiciary Committee. We urge all Americans to withhold judgement concerning this appointment until these Hearings have taken place. We particularly call upon the Senate Judiciary Committee to question Judge Bork concerning his views on the fundamental First Amendment guarantees that are the cornerstone of our national heritage of religious freedom."

Union of American Hebrew Congregations

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REFORM JEWISH MOVEMENT OPENS DRIVE TO DEFEAT NOMINATION OF JUDGE BORK

The Union of American Hebrew Congregations, representing nearly 800 synagogues in 50 states, announced this week the launching of a nationwide campaign to defeat the nomination of Judge Robert Bork to the Supreme Court.

Hearings on Judge Bork's nomination begin on September 15 in Washington, D.C.

Explaining the Reform Jewish movement's reasons for the drive, UAHC president Rabbi Alexander M. Schindler said that Judge Bork had "aligned himself against many of the Supreme Court's most important decisions protecting the freedom of all Americans.

"On issues of church-state separation and religious liberty, civil rights, women's rights, privacy and free speech," Rabbi Schindler said, "Judge Bork has a deeply disturbing record. When these issues come up again — as they inevitably must — his vote could turn the clock back on the recent years of progress."

The UAHC, Rabbi Schindler noted, "has supported efforts to protect and expand the rights of all our country's citizens. We cannot sit idly by," he added, "while so much for which we have worked and stood is at stake."

The UAHC campaign is being joined by its two affiliates — the National Federation of Temple Sisterhoods and the National Federation of Temple Brotherhoods.

Q. and A. on Bork Published

A centerpiece of the anti-Bork drive is an 11-page analysis, in question-and-answer form, detailing the source of the UAHC's opposition to the nomination. The analysis was sent to the rabbinic and lay leaderships of 782 Reform synagogues across the country by the Washington-based Religious Action Center of Reform Judaism.

"Why," it asks, "does the UAHC oppose Judge Bork's nomination?" The reply:

(more)

"Judge Bork has publicly aligned himself against most of the Supreme Court's landmark decisions of the past four decades protecting civil rights and individual liberties. The UAHC has actively supported the broad progress America has made in protecting and extending the rights of all its citizens. We cannot sit idly by while so much for which we have worked and stood is at stake.

"President Reagan has already appointed nearly 50% of the judges on the federal bench; he has appointed two people to the Supreme Court, and elevated one to Chief Justice. Now, as his Presidency comes to an end, he is seeking to leave behind a Supreme Court that will alter the course of our nation for many decades to come.

"The administration's views on abortion, school prayer, privacy, federal aid to parochial education and civil rights have been repeatedly rejected by the American electorate, the U.S. Congress and the federal courts. The right-wing knows that this is their last chance and they are launching a nationwide campaign to win Senate confirmation. Judge Bork's nomination represents their hope that they can judicially implement the part of the 'Reagan Revolution' that the American people have rejected. If Robert Bork is confirmed, the right will have won its most important battle and the Reagan era will last long beyond the end of this administration -- and we will spend the coming years fighting to protect what has already been painstakingly won in over 30 years of court and legislative battles."

The UAHC analysis also examines in some detail Judge Bork's record on racial discrimination, voting rights, free speech, privacy, church-state separation and judicial redress.

The analysis also tells how individuals and synagogues can express their views to members of the Senate and mobilize community support against the Bork nomination.

Rabbi David Saperstein, co-director and counsel of the Religious Action Center, is directing the campaign. "It is no accident that the period of the dramatic flourishing of American Jewry, which saw our people rise from the margins of American life to the very centers of economic and political strength, coincided with that period of enlargement of the grants of individual liberty, church-state separation and civil rights charted in large measure by the courts of the land," he said, adding:

"Judge Bork's vote on the Supreme Court may well rescind the expanded protections those decisions have provided to Jews and to all Americans."

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CHAI IMPACT

ANALYSIS September 1, 1987

The Nomination Of Judge Robert Bork:

Questions And Answers

a publication of the
RELIGIOUS ACTION CENTER
OF REFORM JUDAISM

The Religious Action Center pursues social justice and religious liberty by mobilizing the American Jewish Community and serving as its advocate in the nation's capital

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Harris Gilbert, Chairman
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Co-Director

Rabbi David Saperstein
Co-Director and Counsel

The Religious Action Center is under the auspices of the Commission on Social Action of Reform Judaism, a joint instrumentality of the Central Conference of American Rabbis and the Union of American Hebrew Congregations with its affiliates: National Federation of Temple Sisterhoods, National Federation of Temple Brotherhoods, National Federation of Temple Youth.

1. *Q: What are the major issues underlying the controversy over Judge Robert Bork's nomination to the Supreme Court?*

A: Two crucial areas of concern arise regarding this nomination. The first involves the impact Judge Bork may have in reversing a number of Supreme Court decisions in the area of constitutional rights. He asserts a narrow definition of which rights are protected by the Constitution, differing sharply from 30 years of rulings by the Warren and Burger Courts. On crucial Church-State, civil rights, women's rights, privacy and free speech issues, Judge Bork's vote may well rescind the expanded protections those decisions have provided to Jews and to all Americans.

Second, this nomination raises the question of whether the Senate should consider a nominee's philosophy in fulfilling its constitutional obligation to "advise and consent" on Presidential nominations to the High Court.

2. *Q: Why does the UAHC oppose Judge Bork's nomination?*

A: Judge Bork has publicly aligned himself against most of the Supreme Court's landmark decisions of the past four decades protecting civil rights and individual liberties. The Union of American Hebrew Congregations -- through its Biennial Convention resolutions and the work of its Religious Action Center -- has actively supported the broad progress America has made in protecting and extending the rights of all its citizens. We cannot sit idly by while so much for which we have worked and stood is at stake.

President Reagan has already appointed nearly 50% of the judges on the Federal bench; he has appointed two people to the Supreme Court, and elevated one to Chief Justice. Now, as his Presidency comes to an end, he is seeking to leave behind a Supreme Court that will alter the course of our nation for many decades to come.

The Administration's views on abortion, school prayer, privacy, federal aid to parochial education and civil rights have been repeatedly rejected

by the American electorate, the U.S. Congress and the federal courts. The right wing knows that this is their last chance and they are launching a nation-wide campaign to win Senate confirmation. Judge Bork's nomination represents their hope that they can judicially implement the part of the "Reagan Revolution" that the American people have rejected. If Robert Bork is confirmed, the right will have won its most important battle and the Reagan era will last long beyond the end of this administration -- and we will spend the coming years fighting to protect what has already been painstakingly won in over 30 years of court and legislative battles.

3. *Q: Should Senators weigh ideological considerations in "advising and consenting" on Supreme Court nominations?*

A: While experts are divided on this issue, the consensus is that it should.

For the past few decades, there has been an increasingly widely held assumption that Senators ought to defer to a President's discretion in nominating Supreme Court Justices and oppose a nominee only on the grounds of character, ability and competence.

The majority of constitutional scholars, however, assert that this notion of limited Senate responsibility is without foundation in constitutional history or national tradition. Experts on constitutional law -- liberals and conservatives alike -- have written in support of a co-equal role for the Senate.

In *God Save This Honorable Court*, Harvard constitutional scholar, Laurence Tribe wrote:

> Each Senator, as well as the President, should determine the outer boundaries of what is acceptable in terms of a potential Justice's constitutional and judicial philosophies -- a candidate's substantive views of what the law should be, and the candidate's institutional views of what role the Supreme Court should play.

Philip Kurland, a conservative law professor at the University of Chicago, has said, "It is not any more unfair for the Senate to have ideological grounds to oppose a nominee than for the President to nominate someone on those grounds." (*Washington Post*, 7/1/87). Grover Rees, formerly the chief of judicial selection for the Reagan Administration, wrote to a Senator that "social and economic philosophy, insofar as they reflect on a judge's likely position on constitutional issues, are legitimate bases on which Senators might vote to confirm or reject Supreme Court nominees." (Memorandum to Sen. John East, 9/1/81)

Thus, the President has a right to nominate someone in sympathy with his own view of the Constitution and the Senate has the right to reject such nominees on the same grounds. The framers of the Constitution intentionally divided the appointment power between the President and the Senate, just as, for example, they divided equally the power to make treaties. This sharing of power is the essence of our "checks and balances" system, which in the words of the late Senator Sam Ervin, made "the Senate's role ... plainly equal to that of the President," and was one of the many hard-fought compromises that made the Constitution possible.

4. *Q: Have Supreme Court nominees been rejected in the past for ideological reasons?*

A: The historical record supports the right of the Senate to oppose nominees on ideological grounds. In fact, almost 20 per cent of all Presidential nominees to the Supreme Court have been rejected by the Senate. Many of these nominees were rejected on substantive policy or

ideological grounds. George Washington's nominee John Rutledge was defeated for his opposition to the Jay Treaty. James Polk's nominee, George Woodward, was defeated because of his anti-immigrant attitudes. Herbert Hoover's nomination of North Carolina Chief Judge John Parker was defeated because of Parker's anti-union rulings and anti-black positions. In the 1968 debate over the nomination of Abe Fortas for Chief Justice, Senator Strom Thurmond, now the ranking Republican on the Senate Judiciary Committee, noted on the floor that:

> This is a dual responsibility. The President merely picks or selects or chooses the individual for a position of this kind, and the Senate has the responsibility of probing into his character and ability and into his philosophy, and determining whether or not he is a properly qualified person to fill the particular position under consideration at the time. (Congressional Record, Sept. 30, 1968, p. 28774)

5. *Q: What do most Americans believe the Senate's role should be in judicial nominations?*

   A: In a 1986 poll conducted by Peter D. Hart Research Associates among a representative sample of the American electorate, 86% of the respondents said it is "very important" or "quite important" for the Senate to play an active role in reviewing nominees for federal judgeships. By a margin of 78% to 16%, they endorsed the position that "it is important for the Senate to make sure that judges on the Supreme Court represent a balanced point of view," and rejected the position that the "Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent."

6. *Q: How clear is the dividing line between qualification and philosophy?*

   A: The line between competency and philosophy is not always as clear as it appears on the surface. Several times in the past, the UAHC has opposed Presidential appointments of right wing ideologues because their rigid political views interfered with their ability to function fairly and competently in their jobs.

   The Senate must satisfy itself that a Supreme Court nominee accepts the central doctrines of our constitutional tradition and intends to add to it in a lawyer-like, judicial manner -- not launch an ideological effort to repeal central principles of constitutional doctrines. The presence of ideological rigidity on the left or the right means that the Court diminishes its capacity to determine each individual case on its merits, substituting ideological litmus tests for judicial reasoning. The addition of a persuasive third ideological vote to those of Justices Rehnquist and Scalia, coupled with the conservative leanings of Justices White and O'Connor, will likely reverse well-settled constitutional doctrine on individual rights charted in the past decades.

   Therefore, while the UAHC believes that our profound differences of philosophy with Judge Bork are sufficient grounds for our opposition, **his rigidity, as discussed in detail below, also raises serious concerns about his capacity to function as a fair and open-minded jurist.** Indeed, Columbia Law School recently published a study indicating that Judge Bork was ideologically more rigidly conservative than almost any other Reagan judicial appointee.

7. *Q: If the Senate is concerned about the appointment of ultra-conservative justices to the Supreme Court, isn't it inconsistent to oppose Judge Bork when it approved the nomination of the equally conservative Anthony Scalia?*

   A: In determining its approval of a particular nomination, the Senate must weigh a number of

considerations. On the one hand, Senators do not wish to completely politicize the appointments process and seek, within limits, to accord the President substantial discretion. On the other hand, they may wish to preserve a certain balance on the Court and may feel differently about a justice who would likely be a deciding vote on the court as compared to one who maintains the status quo by replacing a like-minded justice. Justice Scalia replaced a like-minded conservative, Chief Justice Warren Burger, and did not alter the balance of the court. Judge Bork would replace Justice Lewis Powell, an open-minded conservative who nonetheless provided the crucial fifth vote on behalf of expanding First Amendment and other constitutional protections of individual rights. It is precisely because Judge Bork gives every indication that he would become the 5th conservative vote -- particularly on cases dealing with fundamental constitutional rights -- that many Senators and many organizations such as the UAHC, which did not feel that a fight should be made on Judge Scalia, believe that it is imperative to defeat the nomination of Judge Bork.

8. *Q: Hasn't history shown that no one can predict how a judge will rule after he is appointed?*

A: There is a myth that no one can predict what a Supreme Court justice will do. The truth is that over the past two centuries, most Supreme Court justices have run true to form. While the exceptions -- most notably Justice Earl Warren -- are frequently cited, constitutional scholars indicate that such exceptions are rare. In our own century, ideological appointments such as Justices Brandeis, Frankfurter, Burger, Rehnquist, and Scalia acted in accordance with expectations. Even Justice Hugo Black (a consistently liberal Supreme Court justice who had once been a member of the Klu Klux Klan), often cited along with Warren as symbolizing the unpredictability of appointments, had long changed his views before his ascendency to the High Court.

President Reagan does not want Judge Bork on the Court because of his unpredictability but rather because of the tenacious consistency of his ultra-conservative views.

9. *Q: How legitimate is the widespread concern that Judge Bork's appointment to the Supreme Court would lead to far-reaching and damaging changes in the law of the land?*

A: What follows is an examination of the potential threat Judge Bork's appointment to the Court poses in a number of areas of constitutional rights.

Many of Judge Bork's positions cited here are based on articles written a number of years ago. Unless indicated to the contrary, these articles or speeches are the latest available expression of his views on the issues covered. There have been some cases in which Judge Bork has changed or redefined earlier positions -- these are clearly identified.

Discrimination:

Judge Bork finds insupportable the Court's 1948 ruling that judicial enforcement of racially restrictive covenants violates the 14th amendment (Shelley v. Kraemer; Bork "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 1, 15-17, 1971.)

Judge Bork opposed the Supreme Court's ruling in Katzenbach v. Morgan which upheld provisions of the 1965 Voting Rights Act banning the use of literacy tests under certain circumstances. (Bork, "Constitutionality of the President's Busing Proposals" pp 9-10 (American Enterprise Institute, 1972)). He also opposed the Supreme Court's Harper v. West Virginia Board of Elections decision which struck down the poll tax as unconstitutional. ("Senate Judiciary Committee hearing on confirmation of Robert Bork as Solicitor General," p.17 (1973)).

Judge Bork was one of only two law professors to testify in favor of the Nixon Administration's proposed legislation to curb remedies the Supreme Court had held were constitutionally necessary to cure violations of the 14th Amendment. (Hearings of the Sub-Committee on Education of the Senate Committee on Labor and Public Welfare on: Equal-Educational Opportunity Act of 1972). Nearly five hundred law professors signed a statement at that time saying that the legislation was unconstitutional.

Judge Bork's views apparently stem from his narrow interpretation of the equal protection clause, to which he refers in a 1971 article as the "Equal Gratification" clause. (Indiana Law Journal, 1971). Bork wrote that the clause requires "formal procedural equality" and that "government not distinguish along racial lines. But much more than that cannot be properly read into the clause." This is the basis of his strong opposition to affirmative action programs. By the same reasoning, Judge Bork would not apply the equal protection clause to other minorities or to women.

The only earlier ultra-conservative view in the area of discrimination which Judge Bork subsequently recanted was his opposition to the passage of the provisions of the 1964 Civil Rights Act barring discrimination in public accommodations. (Bork "Civil Rights- A Challenge," New Republic 8/31/63). In a letter written at that time, Judge Bork called the provisions "an extraordinary incursion into individual freedom...." Judge Bork has since changed this view, and the ability of people to change their views should be appreciated, but the Senate should not overlook the fact that at a number of pivotal points in history, when basic constitutional protections were about to be given the force of law, Judge Bork was outspoken in his opposition to such protections. He has changed his mind only infrequently and then only many years later.

"One Man -- One Vote:"

Judge Bork has expressed vigorous opposition to the Supreme Court's decisions establishing the rule of "one man -- one vote" (Baker v. Carr, Reynolds v. Sims) requiring Congressional districts to be apportioned on the basis of population. He wrote in the same 1971 article that Justice Warren was unable "to muster a single respectable supporting argument" for Baker v. Carr.

Free Speech:

Judge Bork has argued in the past that "constitutional protection should be accorded only to speech that is explicitly political," (*Indiana Law Journal*, 1971) thus excluding from judicial protection not only obscenity or pornography but even scientific, literary and other artistic expression. While he has recently indicated that he has modified some of these views, he has yet to make clear whether he believes artistic expression is protected.

Right to Privacy:

Judge Bork argues that the Constitution does not protect the right to privacy and that the entire line of Supreme Court decisions vindicating such rights is improper.

Much has already been written about Judge Bork's opposition to Roe v. Wade, the 1973 landmark case which struck down laws prohibiting abortion. While he has not made public his own views on the question of abortion, he has rejected the notion that the Constitution protects a woman's right to choose. In testimony before a Senate Judiciary subcommittee in 1981, Judge Bork said, "Roe v. Wade is, itself, an unconstitutional decision, a serious and

wholly unjustifiable judicial usurpation of state legislative authority...[The case] is by no means the only example of such unconstitutional behavior by the Supreme Court." But the implications of Judge Bork's views on privacy extend far beyond the politically sensitive issue of abortion rights. His rejection of any constitutional right to privacy encompasses the 1965 Supreme Court ruling in the Griswold v. Connecticut case that struck down a state law banning the use of contraceptives -- even by married people in their own home.

Church-State:

Judge Bork has made few rulings in this area. However, in several speeches he has stated that nothing in the Constitution prevents the government from providing non-preferential aid to religious institutions, including sectarian schools. In these speeches, Bork endorsed the Meese-Rehnquist view that the Framers of the Constitution intended to do no more in the First Amendment's establishment clause than prevent the establishment of a national church or preferential treatment of one religion over another. This view (which is the legal basis for the Religious Right's attack on the Supreme Court) is clearly in opposition to the Court's long-standing interpretation of the First Amendment.

Judge Bork's Church-State views indicate how his political agenda distorts his judicial theories. Thus, despite his oft-asserted belief that the "The Framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed," he is willing to disregard one of the most well documented instances of original intent when it disagrees with his views. The history of the First Amendment indicates that the intent of the establishment clause radically differs from Judge Bork's views. Indeed, four times on the opening day of Senate debate in 1789, amendments were introduced to drop or change the wording of the Establishment Clause, including wording reflecting Judge Bork's views, i.e. that the clause was limited to insuring that no religion could be established in preference to any other:

1. A motion was made to strike out the words "religion or prohibiting the free exercise thereof", and insert "one religious sect or society in preference to others." This motion was DEFEATED.

2. A second motion was made to strike out the amendment altogether. This motion was DEFEATED.

3. A motion was made to adopt the following instead of the words we have: "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society." This motion was DEFEATED.

4. A fourth motion was made to amend the amendment to read "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." This motion was DEFEATED.

Each time, changes in the wording and meaning of the First Amendment were rejected. They chose to keep the wording we have now calling for "no establishment of religion." And, as Justice Hugo Black said, "'no' establishment of religion means 'no establishment of religion.'"

Access to the courts:

By construing statutes and precedents as narrowly as possible, Judge Bork has limited access of those who seek redress from the courts. He has taken a particularly narrow view of the

rights of individuals, public interest groups, consumers, and environmental groups to litigate constitutional claims in the courts.

10. *Q: What are the effects of Judge Bork's adherence to the doctrine of "Original Intent" and "Judicial Restraint?"*

A: Judge Bork's two most widely discussed views of the Constitution are those of "original intent" i.e. judges should be restricted solely to applying the expressed intent of the Framers of the Constitution to cases before the Court, and "judicial restraint" i.e. the Supreme Court should allow the legislature's view of an issue to stand unless there is an explicit constitutional provision differing from it.

Most legal scholars reject both of these theories as delineated by Judge Bork. Some of those most critical of Judge Bork are conservative scholars such as Philip Kurland who believe that these theories are merely subterfuge: "Like 'strict construction,' 'original intent,' of course, is not a formula or a theory but only a slogan pursuant to which old decisions can be replaced by new ones."

The bottom line is that adherence to the doctrines of original intent and judicial restraint provides Judge Bork with an intellectual basis to justify overturning Supreme Court precedent with which he disagrees. Given this philosophy, it is likely that he would seek to restrict, if not overturn, decisions based on long-established individual rights, particularly the right of privacy and the guarantee of equal protection -- both of which he has publicly criticized, but which are today regarded as fundamental rights. Judge Bork's position would significantly limit the important role the judiciary plays as the independent third branch of our government -- protecting the rights of individuals and minorities against the majority.

Judge Bork's views ignore a fundamental tenet of our American constitutional system which (through the adoption of the Bill of Rights and the subsequent judicial expansion of its application in the light of changing circumstance and perceptions) took away from the legislative branches the right to legislate our basic freedoms and liberties. It regarded these rights as "inalienable" and "God-given" and not subject to the vagaries of popular opinion.

Judge Bork's attitude on the substantive and procedural issues of the Court becomes even more alarming in light of his view regarding "precedent" and the Supreme Court. As a lower court judge, he asserted his position that precedent (even where he did not like it) had to be given full force. As a Supreme Court Justice, however, he believes that "since the legislature can do nothing about the interpretation of the Constitution given by a court, the court ought to be always open to rethink constitutional problems." (Interview with *District Lawyer* magazine, May/June 1985). He has indicated that he will be an activist in seeking to overturn those earlier Supreme Court decisions which he views with displeasure.

11. *Q: Is Judge Bork's advocacy of "original intent" and "judicial restraint" a reflection of a consistent objective standard?*

A: The notion of Judge Bork as an objective apostle of these doctrines is a myth. We have already seen (*see* Church/State section of Question 8) that he ignores "original intent" on issues such as the establishment clause where it differs from his own thinking. While Bork invokes "judicial restraint" to support his positions against individual rights and liberties, he becomes a judicial activist on behalf of corporate, property, or governmental interests he favors. Judge Bork has made it plain in his writings that he would give very little deference to the legislative intent of Congress in enacting the anti-trust laws. He

prefers instead to uphold those legislative objectives to which he gives credence -- such as economic efficiency -- and to disregard those objectives which he opposes -- such as limits on overly concentrated economic power. Judge Bork has also ignored clearly defined Congressional intent in decisions on environmental and occupational safety regulations. (*See* the analysis of his cases in the next answer.)

12. *Q: Do Judge Bork's lower court opinions differ from his views as expressed in his articles and speeches?*

A: A thorough examination of Judge Bork's decisions on the D.C. Court of Appeals over the past few years in cases where there is a split vote (i.e. where the issues were not so clear as to generate a unanimous decision) reflects the same ideological rigidity expressed in his articles. They also indicate that his consistency is not on the basis of his oft-proclaimed "judicial restraint theory," but on whether the interests of either the executive branch of government or corporations are involved.

In split cases where the government was a party, Judge Bork voted against consumers, environmental groups, workers and individuals asserting constitutional rights against the government in 26 of the 28 such cases he heard during his tenure, including all of the six split decisions involving civil rights and civil liberties issues. In the two cases where he went the other way, one involved President Reagan as the plaintiff (who together with Senator Kennedy contested campaign funding restrictions imposed by the Federal Election Commission) and one involved a labor claim where, after upholding the government's discharge of a worker, he voted to send the case back to the Merit Systems Protection Board for a clearer articulation of why they upheld the government's position.

However, in the 8 such cases where a business interest challenged the government, he voted for business every time.

In the 14 split cases involving questions of access to the court or to administrative agencies, Judge Bork voted against access on every occasion. He rejected the right to litigate claims against the executive branch on the part of prison inmates, social security claimants, Haitian refugees, handicapped citizens, the Iranian hostages, the homeless and the Congress itself. This year, in the face of one such dissent, Judge Bork was admonished by his colleagues on the Court of Appeals: "He relied on an extraordinary and wholly unprecedented notion of sovereign immunity to uphold the Act's preclusion of judicial review...Judge Bork's view that Congress may not only legislate but also judge the Constitutionality of its own actions [would destroy the] balance implicit in the doctrine of the separation of powers...Any theory that would allow such a statute to stand untouched by the judicial branch flagrantly ignores the concept of separation of powers and the guarantee of due process. We see no evidence that any court, including the Supreme Court, would subscribe to the dissent's theory in such a case." (Bartlett v. Bowen 816 F.2d 695 (1987))

13. *Q: Can Judge Bork's nomination be defeated?*

A: Almost all political observers feel that the fate of this struggle is very much "up in the air" and that constituency pressure will determine the outcome. Republican Senate Minority Leader Sen. Robert Dole recently evaluated Judge Bork's chances, concluding: "I think he's a little better than 50-50." (*Washington Times* July 15, 1987.)

In addition, it should be understood that there are two ways to reject a Supreme Court nomination. The first is by a simple majority of the Senate voting against his confirmation. The second, however, is by a Senate filibuster which will delay the confirmation vote until the President withdraws the nomination or his term expires. (This was how conservatives defeated Justice Fortas' nomination to Chief Justice in 1968.)

One analysis of Judge Bork's nomination prospects applies the Senate's voting pattern during the recent nomination of William Rehnquist as Chief Justice of the Supreme Court to the Bork nomination. During the votes on Rehnquist, the opponents of the nomination received 33 of the 51 votes necessary to reject the confirmation and 31 of the 41 votes necessary to reject the cloture vote to stop the filibuster. Today, with the exception of Senator Eagleton, every Senator who voted against Rehnquist is still in the Senate. An additional 10 Senators who are more liberal than those they replaced in the last election, are likely -- with constituent mobilization -- to join the opposition. By this tally, the opposition to Judge Bork could expect to receive at least 42 of the 51 votes needed to defeat him and 40 of the 41 votes needed to reject the cloture vote. (In fact, the Washington Post on July 24th cited a count done by Majority Whip Sen. Alan Cranston, as indicating the tally was 45 leaning for, 45 leaning against, and 10 undecided. A more recent poll indicated 35 for, 35 against, and 30 undecided.)

There are several differences between the Rehnquist and Bork votes, however. On the one hand, some Senators expressed the view at that time that the Senate should give more consideration to ideology in the determining the selection of a Chief Justice who sets the agenda for the Court as a whole than it should in consenting on the appointment of a particular Justice. On the other hand, two factors contributed towards some Senate support for Rehnquist's confirmation that will not be present factors in the vote on Judge Bork. The first was a general belief from the beginning that Justice Rehnquist's nomination was assured. This is not the case with Judge Bork. The second was an attitude that the Rehnquist vote was largely a symbolic vote since it didn't change the make-up or balance of the Court. Today, Senators are very aware of the serious ramifications of Judge Bork's nomination. These factors have already prompted several Senators who supported Rehnquist to agree to oppose Judge Bork. Therefore, it is likely that, with significant constituent pressure, the additional votes necessary at least to sustain a filibuster and even to defeat the nomination outright can be secured.

14. *Q: How can a Senator justify opposing Judge Bork now when the Senate voted unanimously in favor of his appointment to the D.C. Court of Appeals in 1982?*

A: Three factors make Judge Bork's nomination to the Supreme Court different from his nomination to the Court of Appeals and provide a basis for Senators who supported Judge Bork's nomination to the Appeals court to oppose him now. The first is that since an Appeals Court decision can be overturned by the Supreme Court and thus is not necessarily final, Senators tend to give the President greater leeway in choosing lower court justices. Supreme Court decisions cannot be overturned and a number of Senators feel they have a greater responsibility to assert their own judgment on Supreme Court nominations.

The second factor is that Judge Bork's nomination to the Court of Appeals did not ideologically alter the balance of that particular court. Therefore, there was less need to consider the impact of his ideological perspective. Since the ideological balance of the Supreme Court is at stake today, Judge Bork's ideological perspective should be given significantly greater weight.

The final factor is that we now have several years of decisions indicating the alarming rigidity with which Judge Bork has applied his political views.

15. *Q: What are the "downside" risks to opposing Judge Bork's nomination?*

A: The one major risk is that by further eroding the view that ideological considerations ought not be part of the Senate's "advise and consent" function, it increases the possibility in

the future that a moderate or liberal President could face difficulty, based on ideological grounds, in appointing a moderate or liberal justice. This has to be weighed against the importance of this vote and the recognition that Senators have, in fact, taken into consideration the ideological perspective of a nominee in their decision to support or oppose confirmation. They are likely to continue to do so no matter what happens to Judge Bork. The risks of Judge Bork's confirmation far outweigh the downside loss of the myth of the President's prerogative.

It must be remembered that the Senate and the President are meant to act as a balance in reflecting the values and the mood of the nation. If there is a time when the mood of the nation is so predominantly conservative that over the course of the six years of elections for the Senate and the four year term of the President, conservatives control both the White House and the Senate, an ideological appointment reflecting this mood of the electorate would be approved. Similarly, if there should be a liberal Senate and President, a liberal candidate would be easily approved. Where the changing pattern of public opinion elects people with differing views to the White House and the Senate, appointments should reflect a more moderate and balanced view, acceptable to both parties. This has been, in fact, the pattern of Supreme Court appointments from the beginning of the nation and has served our constitutional democracy well.

16. *Q: What can individuals and synagogues do to help prevent Judge Bork's appointment to the Supreme Court?*

A: **Constituents contacting their Senators will make all the difference in the effort to defeat Judge Bork's appointment.** Many Senators feel that this vote will probably have more far reaching consequences than any other they will ever cast. They are eager, therefore, to hear from concerned constituents and they will be tallying how many letters, telephone calls, visits, and telegrams they receive from supporters and opponents of Judge Bork's confirmation.

Most Capitol Hill observers believe that the Jewish community will play a pivotal role in the outcome of this public debate. Swing senators are looking to our community with particular interest. They reason that if the politically influential Jewish community (viewed as so deeply affected by those key issues of civil liberties and civil rights which Judge Bork is expected to influence most on the Court) is not calling for the nomination's defeat than they can take the politically expedient road and support the President.

The UAHC is urging all of its congregations to:

a) Arrange to visit one or both of your Senators in his or her local office when they are home on weekends or during a recess. If your Senator will not be in his or her local office before the vote, try to meet with the staff person in charge of the Judge Bork nomination.

b) If you plan to be in Washington schedule a meeting with your Senator(s).

c) Write or telephone your Senators at their local or Washington offices.

Write: The Honorable _____ Call: 202-224-3121
United States Senate
Washington, DC 20510

Some Senators have expressed particular interest in the mail tallies received in their home office on this issue. Please send copies of letters to the Senators' offices in your state.

In all of your contacts with your Senators express your deep concern about the effects of Judge Bork's appointment to the Supreme Court. If your Senators want to wait until the hearings are completed or until they have studied the issue further, then do not press them to commit to opposing Judge Bork. Rather, urge the Senator to keep your concerns in mind as he or she reaches a decision.

d) Undertake community education efforts on this nomination through community educational forums and letters and/or op-ed articles in your local newspapers.

17. *Q: What other organizations have so far opposed Judge Bork's nomination?*

A: 1) Jewish groups: American Jewish Congress, B'nai Brith Women, Jewish Women's Caucus, National Council of Jewish Women, Jewish War Veterans, Na'amat USA, and Hadassah. The National Federation of Temple Sisterhoods and the National Federation of Temple Brotherhoods are also opposing Judge Bork's nomination. (So far, no Jewish organizations are supporting the nomination.)

2) Other groups: Leadership Conference on Civil Rights, National Education Association, NAACP, People for the American Way, AFL-CIO, Children's Defense Fund, United Auto Workers of America, Common Cause, American Association of University Women, Americans for Religious Liberty, National Council of Senior Citizens, Americans United for Separation of Church and State, National Black Leadership Roundtable, National Abortion Rights Action League, NAACP Legal Defense and Education Fund, Americans for Democratic Action, National Gay and Lesbian Task Force, Center for the Study of Responsive Law, Youth for Democratic Action, Alliance for Justice, National Women's Political Caucus, Planned Parenthood Federation of America, National Federation of State, County, and Municipal Employees, American Federation of Teachers, American Humanist Association, Business and Professional Women, Catholics for a Free Choice, Disability Rights Education and Defense Fund, Federation of Women Lawyers, Mexican American Legal Defense and Education Fund, National Association of Social Workers, National Black Caucus of State Legislators, National Legal Aid and Defenders Association, National Organization for Women, National Urban League, National Women's Law Center, 9 to 5 National Association of Working Women, Organization of Chinese Americans, Project on Equal Education Rights, NOW Legal Defense and Education Fund, Project Vote!, Public Citizen, Republican Black Caucus, United Church of Christ, United Food and Commercial Workers International Union, United Methodist Church, Women's Legal Defense Fund.

Note: This is a list in progress. Many groups which are almost certain to oppose the nomination have not yet announced formal positions.

THE WHITE HOUSE

WASHINGTON

September 2, 1987

Dear Friend:

Enclosed is a copy of a speech, with two short addenda, by Arnold Burns, Deputy Attorney General. The speech covers all the issues that have been raised in connection with the Bork nomination. I think it is "must" reading.

Sincerely,

Max Green
Associate Director
Office of Public Liaison

Department of Justice

ADDRESS

OF

THE HONORABLE ARNOLD I. BURNS
DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE NATIONAL JEWISH COALITION

WEDNESDAY, AUGUST 26, 1987

THE GRAND HYATT HOTEL
WASHINGTON, D.C.

Thank you for the invitation to speak before this group on a very important question -- the confirmation of Robert Bork to be the next Associate Justice of the Supreme Court of the United States.

I stand here before you to tell you I am dead opposed to the confirmation of Robert Bork -- that is --the grotesque caricature of Robert Bork that is being served up to the American public.

At the same time, I am unabashed in my support of the confirmation of the Robert Bork I know and admire --the brilliant student; partner in one of America's great law firms; holder of, not one, but two distinguished chairs at the Yale Law School; one of the nation's foremost authorities on antitrust and constitutional law; Solicitor General responsible for handling hundreds of cases before the United States Supreme Court; and, finally, a respected judge for five years on the Court of Appeals for the District of Columbia, a court often described as "the second highest in the land." My job here today -- and your job if you decide to join me -- is to destroy the fictional Robert Bork and let the nation know about the real Robert Bork.

I

Let us begin our efforts at clarification by considering the words Senator Kennedy has used to portray Judge Bork:

> 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, schoolchildren could not be taught about evolution, writers and

> artists could be censored at the whim of the government and the doors of the federal courts would be shut on the fingers of millions of citizens.

I am dead opposed to the Robert Bork described by Senator Kennedy. Such a judge would be way out of the mainstream of American judicial opinion and should not be confirmed. But I ask you to compare this purely fictional Judge Bork with the Judge Bork that was unanimously confirmed by the Senate for the D.C. Circuit after receiving the ABA's highest rating -- "exceptionally well qualified" -- which is given to only a handful of judicial nominees each year. His five-year record reveals him to be a judicial craftsman of the first order, a jurist whose opinions command widespread admiration. It is a measure of Judge Bork's success that not one of his more than 100 majority opinions has been reversed by the Supreme Court -- think of it, not one. No appellate judge in the United States has a finer record. Indeed, not one of the over 400 majority opinions in which Judge Bork has joined has been reversed by the Supreme Court -- think of it, not one.

Judge Bork's occasional dissenting opinions have also shown distinction. I must emphasize, however, that in five years on the bench, during which Judge Bork heard hundreds of cases, he has written only 10 dissents and 7 partial dissents. He was in the majority 94 percent of the time, and only rarely parted company with other so-called "liberal" judges on the D.C. Circuit, such as Ruth Bader Ginsburg and Abner Mikva. For

example, Judge Bork and Judge Ginsburg have agreed on 90% of the cases before them. But even his occasional dissenting opinion was enough to mark him as a highly capable and respected judge. In Sims versus CIA, for instance, Judge Bork criticized a panel opinion which had, in his view, impermissibly narrowed the circumstances under which the identity of confidential intelligence sources could be protected by the government. When the case was appealed, all nine members of the Supreme Court agreed that the panel's definition of "confidential source" was too narrow and voted to reverse.

So much for the notion of Judge Bork being outside the mainstream. No wonder retired Chief Justice Warren Burger recently opined that Judge Bork is the most qualified nominee for the court in the last fifty years.

II

Consider next Senator Biden's claim, that:

> We can be certain that . . . had he been Justice Bork during the past 30 years and had his view prevailed, America would be a fundamentally different place than it is today. We would live in a very different America than we do now.

I am dead opposed to the phantom, the specter of a Judge Bork that Senator Biden describes. The Biden version of Judge Bork is belied by what I have just told you about Judge Bork's never having been reversed by the "balanced" Supreme Court Senator Biden admires.

Moreover, the notion that one justice, or even the Supreme Court itself, can change America is more than wrong. It reveals a dangerous bias in favor of the omnipotent judge, at the expense of the democratic branches of government. The problem is that many of the opponents of Judge Bork regard the Supreme Court as a policy-making entity, a super legislature if you will, where they have gone to see their pet policies recognized or protected when they have found congress or the state legislatures unavailing. This is a dangerous view of the Supreme Court, fundamentally elitist and undemocratic. It makes the Supreme Court yet another political branch, a body expected to decide questions of law based on value preferences untethered to the written law.

Enthusiasts for an activist judiciary (usually carrying the liberal label) have become so accustomed to urging the courts, indeed relying on the courts, to render political judgments that it may be only natural for them to assume that President Reagan wants to use the courts for the same purposes. And there are in fact a goodly number wearing the conservative label who want this; they, too, paint a distorted picture of Robert Bork. But the President simply wants to get the Supreme Court to cease being political and to perform its constitutional role of interpreting and construing the laws made by others.

III

But allow me to continue to dispel confusion: This is the AFL-CIO leadership's Robert Bork:

> He is a man moved not by deference to the democratic process, nor by allegiance to any recognized theory of jurisprudence, but by an overriding commitment to the interests of the wealthy and powerful in society. . . . He has never shown the least concern for working people, minorities, the poor or for individuals seeking the protection of the law to vindicate their political and civil rights.

I am dead opposed to that Robert Bork. But the AFL-CIO's Bork is an imposter, and a not-too-effective one at that. It is gross mischaracterization of Judge Bork's record to say that he does not follow a "recognized theory" of jurisprudence. To the contrary, Judge Bork is universally recognized as one of the nation's leading exponents of judicial restraint, a doctrine which has as its foundation "deference to the democratic process", to quote the AFL-CIO again. He has consistently and fairly applied this philosophy in his role as a judge, emphasizing that a judge's view of what is desirable as a matter of policy has no place in the judge's decision of what the law means.

In interpreting a law, a judge must start somewhere, and the real Robert Bork begins with the text of the law, and proceeds to consider its history and structure, if necessary. This of course, is what all judges should do. Not every excellent judge will necessarily arrive at the same answer, but every judge

should apply the same set of rules -- the same methodology of judging.

A judge that interprets the law in this fashion will render some decisions in favor of, to quote the AFL-CIO again, "working people, minorities, and the poor," and will render some against them. It is enough to disprove the AFL-CIO's improbable thesis -- that Judge Bork simply computes the net worth of litigants to determine who should win the case -- to point to a couple of decisions.

Judge Bork authored an opinion holding that the Mine Safety and Health Administration had improperly excused a mine operator from complying with mine safety standards that were promulgated to protect miners. Judge Bork has also joined or authored numerous decisions that resulted in important victories for labor unions. In the private sector, these decisions include cases involving arbitration disputes, secondary boycott claims, and private settlements of unfair labor practice charges. In the public sector, they include cases involving employer attempts to withhold information from a union, employer misconduct in collective bargaining negotiations, employer obligations to grant official time to employees who negotiate labor agreements, procedures to ensure adequate labor protective arrangements in mass transit systems, judicial review in arbitration decisions, and government personnel regulations covering reductions in the labor force.

The false Robert Bork being portrayed by the AFL-CIO is a judge who bends the rules, or does not follow them, in order to reach a particular result. This portrait is the antithesis of everything for which Robert Bork has consistently stood over the last thirty years. Throughout his entire professional career, Robert Bork has inveighed against result-oriented judges.

IV

Consider next the national women's center's effigy of Robert Bork:

> [Judge Bork] would leave women defenseless against governmental sex discrimination. . . . Judge Bork's views reflect america of the 18th and 19th century, where under the law women stood behind men -- not by their side.

I am dead opposed to that Robert Bork -- because I am against the confirmation of any judge who intends to ignore the Constitution and the many laws we have on the books that prohibit discrimination on the basis of sex. But Judge Bork's record in the area of sex discrimination is hard to fault, even if we consider only the results of these cases rather than the facts and the law, which apparently is the mode of analysis of some of these groups.

But at the heart of this particular caricature is the notion that Judge Bork is a rigid, wooden judge, who clings desperately to "eighteenth century" notions in the face of twentieth century problems. Judge Bork's opinions paint quite a different picture.

The most notable example is his opinion in Ollman v. Evans. The case centered on allegedly defamatory statements by columnists criticizing a marxist history professor. Judge Bork wrote a concurring opinion, refusing to apply a "rigid doctrinal framework ... Inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press." Instead, wrote Judge Bork, we must be concerned that "in the past few years, a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment would most certainly prohibit." Thus, Judge Bork refused to take a narrow view of the first amendment, observing that "it is the task of a judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know ...."

Libel lawyer Bruce Sanford has observed that "there hasn't been an opinion more favorable to the press in a decade." But what I want to emphasize is not the result in this particular case, for a number of highly respected lawyers disagree with Judge Bork's expansive press protection. The important point for purposes of determining Judge Bork's fitness for the Supreme Court is that the real Judge Bork's Constitutional theory is not at all like the horse and buggy, eighteenth century parody that his opponents have created.

V

Representative Conyers, spokesman for the Congressional Black Caucus, said last week that Judge Bork would "set back race relations more than 25 years." I am dead opposed to that Robert Bork. I am against the confirmation of any judge out to achieve such mischief because the ending of racial and religious intolerance has got to continue to be among our highest priorities. But the Robert Bork I know has given full sway to the Constitutional and statutory guarantees against discrimination. While Solicitor General, Robert Bork several times advocated a construction of the civil rights laws broader than that which the Supreme Court adopted! And as a judge he has authored some very important opinions in the civil rights area.

But rather than talk about words written by Judge Bork in opinions and legal briefs, I want to give you a true picture of the man by sharing with you an incident from early in his professional career. According to the Washington Post, when Robert Bork was a young associate at a major Chicago law firm, the application of an outstanding University of Chicago law student -- Howard Krane -- was briefly considered and then rejected. One associate overheard a partner saying that Krane was passed over because he was Jewish, and mentioned this to Bork. Even though only an associate, Bork went to see several senior partners and said, according to one of his colleagues, "We have a larger stake in the future of this firm than you do. We

want this man considered on his merits." The partners agreed to take a second look, and today Krane is managing partner of the firm.

VI

In sum, then, Judge Bork is the embodiment of an almost perfect judge -- he is brilliant, he is dispassionate, he decides cases on their facts and the law, not on his personal predilections. Why then do I say that he is "almost perfect." The answer is simple -- because we have lost cases in front of Judge Bork, including some big ones. And, as an occasionally disgruntled litigant, I would have a hard time describing the author of those opinions as "perfect." But we know that Judge Bork has always given us -- and all other litigants in his courtroom -- a "fair shake", or, to recite the words inscribed above the steps to the Supreme Court, "equal justice under law." With your help, I am sure that Judge Bork will soon climb those steps and become one of history's greatest justices.

SOME CRITICS OF JUDGE BORK HAVE RAISED THE ISSUE OF ABORTION, CONFIDENTLY PRONOUNCING THAT JUDGE BORK WILL VOTE THIS WAY OR THAT ON ABORTION ISSUES. THESE CRITICS MUST HAVE A FULLY-OPERATIVE CRYSTAL BALL IN THEIR POSSESSION, BECAUSE WE DO NOT HAVE SUCH A GIFT OF PROPHECY. NEITHER THE PRESIDENT NOR ANY OTHER MEMBER OF THE ADMINISTRATION HAS EVER ASKED JUDGE BORK FOR HIS PERSONAL OR LEGAL VIEWS ON ABORTION. AND IN 1981, JUDGE BORK TESTIFIED BEFORE CONGRESS IN OPPOSITION TO THE PROPOSED HUMAN LIFE BILL, WHICH SOUGHT TO REVERSE ROE VERSUS WADE BY DECLARING THAT HUMAN LIFE BEGINS AT CONCEPTION. JUDBE BORK CALLED SUCH A STRATEGEM AN "UNCONSTITUTIONAL" DEFIANCE OF A SUPREME COURT DECISION.

IN THE PAST, JUDGE BORK HAS ONLY QUESTIONED WHETHER THERE IS A RIGHT TO ABORTION IN THE CONSTITUTION. QUESTIONS ALONG THIS LINE HAVE BEEN RAISED BY MANY, IF NOT MOST, CONSTITUTIONAL SCHOLARS IN THIS COUNTRY, INCLUDING HARVARD LAW PROFESSOR ARCHIBALD COX AND STANFORD LAW SCHOOL DEAN JOHN HART ELY. BUT HE HAS NEVER SAID THAT THE ROE DECISION OUGHT TO BE OVERRULED. INDEED, GIVEN HIS OFTEN EXPRESSED VIEW OF THE GREAT IMPORTANCE OF PRIOR DECISIONS -- STARE DECIS AS IT IS REFERRED TO BY LAWYERS -- IT IS NOT AT ALL CLEAR WHAT HIS VOTE WOULD BE IF A CASE CHALLENGING THE DECISION CAME BEFORE THE SUPREME COURT. WE DO KNOW ONE THING, HOWEVER: JUDGE BORK WOULD DECIDE SUCH A CASE

CAREFULLY, DISPASSIONATELY, ON THE LAW AND THE CONSTITUTION. THAT IS WHY THE PRESIDENT NOMINATED HIM FOR THE POSITION.

CONCERNS HAVE BEEN RAISED IN SOME QUARTERS ABOUT JUDGE BORK'S VIEWS ON THE RELIGION CLAUSES OF THE FIRST AMENDMENT. THESE CONCERNS ARE MANUFACTURERED OUT OF WHOLE CLOTH AS WELL. JUDGE BORK HAS NOT HAD OCCASION TO PASS ON MANY RELIGION ISSUES IN THE D.C. CIRCUIT. JUDGE BORK WAS NOT INVOLVED, FOR INSTANCE, IN THE RECENT CASE CONCERNING THE APPLICATION OF AIR FORCE HEADGEAR REGULATIONS TO THE YARMULKE. INDEED, JUDGE BORK HAS DECIDED ONLY ONE RELIGION CLAUSE CASE WHILE ON THE BENCH -- A CASE WHICH INVOLVED A CHALLENGE TO THE PAYMENT OF GOVERNMENT FUNDS FOR THE SERVICES OF A LEGISLATIVE CHAPLIN. IN DISMISSING THE CHALLENGE, THE D.C. CIRCUIT SIMPLY NOTED THAT THE SUPREME COURT HAD SPOKEN ON THE ISSUE AND HAD HELD THAT PAYMENT OF SUCH FUNDS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

SO WE ARE LEFT TO RELY ON JUDGE BORK'S DECISIONS IN OTHER CASES -- CASES WHICH DEMONSTRATE THAT HE FAIRLY AND DISPASSIONATELY REVIEWS THE LAW AND THE CONSTITUTION TO REACH HIS CONCLUSIONS, FAITHFULLY APPLYING PRIOR SUPREME COURT PRECEDENTS IN THE AREA. NO ONE NEED BE CONCERNED ABOUT A RADICAL SHIFT IN THE COURT'S RELIGION CLAUSE JURISPRUDENCE FROM THE APPOINTMENT OF A JUSTICE WHO DECIDES CASES IN THIS FASHION. TO SUGGEST OTHERWISE IS NOTHING OTHER THAN PURE DEMAGOGUERY.

B.H.

southern politicians who only a short while ago were defending laws that enforced racial segregation. There seem to be few who favor racial equality who also perceive or are willing to give primacy to the value of freedom in this struggle. A short while back the majority of the nation's moral and intellectual leaders opposed all the manifestations of "McCarthyism" and quite correctly alerted the nation that the issue was not whether communism was good or evil but whether men ought to be free to think and talk as they pleased. Those same leaders seem to be running with the other pack this time. Yet the issue is the same. It is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them. This time "stubborn people" with "ugly customs" are under attack rather than intellectuals and academicians, but that sort of personal comparison surely ought not to make the difference.

The trouble with freedom is that it will be used in ways we abhor. It then takes great self restraint to avoid sacrificing it, just this once, to another end. One may agree that it is immoral to treat a man according to his race or religion and yet question whether that moral preference deserves elevation to the level of the principle of individual freedom and self-determination. If, every time an intensely-felt moral principle is involved, we spend freedom, we will run short of it.

Civil Rights—A Reply

The New Republic's commentary on civil rights over the years should make it obvious that the editors disagree emphatically with Mr. Bork's thesis. Yet his fears about the proposed legislation are shared by many Americans, including many readers of the *New Republic*, so they deserve both a forum and an answer.

In discussing the law we share Justice Holmes' preference for appeals to experience rather than logic. In the light of recent American experience Mr. Bork's argument seems to have several defects.

First, Mr. Bork speaks about the "freedom of the individual" as if the owners of hotels, motels, restaurants and other public accommodations were today legally free to serve whomever they please. This, as everyone knows, is seldom the case. For centuries English common law obligated innkeepers to accommodate any well-behaved traveller, and his horses. Most states have today embodied this tradition in public accommodation statutes. In the North, these statutes generally require a restaurant, hotel or motel to accept all sober and orderly comers, regardless of race. In the South, Jim Crow legislation enacted at the end of the nineteenth century until recently required the owners of public establishments to segregate their facilities. The Supreme Court has now declared the Jim Crow statutes unconstitutional, but even today the owner who wants to serve both Negroes and whites is likely to have difficulty exercising his newly acquired "right" in many areas. Mr. Bork would presumably deplore the whole tradition that "public accommodations" must provide public service as well as private profit. But he cannot maintain that new legislation in this field would mean a sudden increase of government intervention in private affairs. The Administration's civil rights bill would simply extend to the national level principles and practices long employed locally.

Experience also argues against Bork's equation between the distress caused by having to serve a Negro and the distress caused by refusing to serve him. Both exist, and both deserve consideration, but no amount of rhetoric about freedom can give them equal weight. Despite what Mr. Bork says, the "loss of freedom" caused by having to serve Negroes is in most cases pecuniary, not personal. If personal freedom were to be protected we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not. The fact is, however, that such people must serve whomever their employer tells them to serve, and refuse whomever he tells them to refuse. The right to segregate is, as everyone but Mr. Bork admits, a right deriving solely from title to property. It is neither more nor less sacrosanct than other economic privileges. It can be regulated in the same way that the right to build a restaurant on one's residential property is regulated.

There are, of course, some owners of public establishments who have personal contact with the clients – the much debated case of Mrs. Murphy's boarding house. Perhaps such establishments should be exempt from the proposed public accommodations law. But even here the claims of private freedom must be weighed against the claims of public convenience.

Government without principle ends in shipwreck; but government according to any single principle, to the exclusion of all other, ends in madness. Mr. Bork's principle of private liberty is important, and his distrust of public authority often justified. But to apply this principle in disregard of all others would today require the repeal of the industrial revolution. Perhaps, however, that is what Mr. Bork wants.

THE EDITORS

NOMINATIONS OF JOSEPH T. SNEED TO BE DEPUTY ATTORNEY GENERAL AND ROBERT H. BORK TO BE SOLICITOR GENERAL

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

NOMINATIONS OF JOSEPH T. SNEED, OF NORTH CAROLINA, TO BE DEPUTY ATTORNEY GENERAL AND ROBERT H. BORK, OF CONNECTICUT, TO BE SOLICITOR GENERAL

JANUARY 17, 1973

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Senator TUNNEY. You would have advised the court against it or——

Mr. BORK. I would have—it is a little hard to speak without putting it in a constitutional context. If it were that kind of an important case I am sure the Solicitor General would confer with other members of the Justice Department about it. In that kind of conference I would have advised against urging a "one man, one vote" position. I would also have wished, whether my advice were accepted or not, to explain to the court that there were the following options, kinds of roads the court might take, and try to explain to the best of my ability what I considered to be the benefits or costs or detriments to each such option.

Senator TUNNEY. And that despite the fact that the Attorney General requested you to argue in favor of "one man, one vote?"

Mr. BORK. I think I would say to the Attorney General at that time, "I will do so." I also would advise that we explain to the court, since we have an obligation to the court that a private litigant does not always have, that we explain to the court what some of the problems with that approach may be and what alternative approaches there might be.

Senator TUNNEY. Well, if a "one man, one vote" case should arise while you are the Solicitor General, would you file an amicus brief attempting to limit the doctrine of "one man, one vote" as enunciated by the court?

Mr. BORK. I have not made any decision about it, Senator, in fact had not even thought about it. I do not think it is likely to come up because the court has on its docket this term reapportionment cases from all over the country, and I think it is a good guess that they intend to review that entire field. Whether they will confirm "one man, one vote" or move to some other position, I do not know.

Senator TUNNEY. Do you think that you could sign a brief that was inconsistent with your personal views?

Mr. BORK. I think I can, Senator, and I know that I have.

Senator TUNNEY. I have other questions but I do not want to take the time if there are others who have questions.

Senator HRUSKA. Go ahead.

Senator TUNNEY. In an August 1963 New Republic article you opposed the enactment of the then proposed Interstate Public Accommodations Act. In a subsequent letter, you stated:

> The proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

In light of this statement of your beliefs, I would like to ask you a few questions about enforcement of the Civil Rights Act.

Mr. BORK. Senator, may I——

Senator TUNNEY. Yes.

Mr. BORK. I should say that I no longer agree with that article and I have some other articles that I no longer agree with. That happens to be one of them. The reason I do not agree with that article, it seems to me I was on the wrong tack altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and

I do not see any problem with the statute, and were that to be proposed today I would support it.

Senator MATHIAS. Would the Senator from California yield for just a minute in the light of his previous generous offer.

Senator TUNNEY. Yes.

Senator MATHIAS. I, unfortunately, have to leave the committee in a few minutes and I have just two or three very brief questions.

Let me say, first of all, that I was considerably encouraged and pleased by the colloquy between you and Senator Hart in which you stated your conviction, which is a conviction I share, that the Congress is still the repository of the power to decide the issue of war and peace. It is an important statement on your part and one that I welcome and applaud.

You said that this was just a general constitutional conviction on your part, not one that you had thought out in its tactical aspects and how it would be implemented. I would like to offer one possible means of implementing it, one that I certainly hope we will never resort to, one that I hope that the lubricant of goodwill that has kept the Government working for so long will prevent us from ever resorting to, but it is the simple act of one Chamber of the Congress, either the House or the Senate, failing to concur in an appropriation bill to supply the funds to continue hostilities.

It would seem to me, and I would like to ask you what your attitude would be, that this would simply be the end of it, if either the House or Senate did not approve an appropriation bill or did not act on it one way or the other.

Mr. BORK. Senator, I must say I really have not studied this aspect of the question at all. What we have, what the Senator had there, is that I was a discussant on a panel, and the panel was about the Cambodian incursion, and I was merely suggesting the range of powers that I thought the Constitution suggested were appropriate to the President, on the one hand, and the Congress, on the other, and I am afraid that is about as far into that field I have gone. Ultimately, I think, war or peace is for the Congress. I have not really thought about how, in varying situations, the Congress makes its will known if it wishes to.

Senator MATHIAS. I feel that as you enter the field you are on the right path and I walk with you.

I have only one other question to ask and it is are you currently of counsel in any active litigation?

Mr. BORK. I am currently an attorney for two plaintiffs in antitrust cases in New Haven. I intend, if confirmed, to wind up my participation in those cases altogether very shortly.

Senator MATHIAS. Either to resign as counselor or——

Mr. BORK. In fact, I have filed a motion in one case to withdraw as counsel. The judge asked that I stay in for a while longer, and I thought it was proper to do so until confirmation or something of that sort occurred, because it is a case I started and had been the prime mover in it.

Senator MATHIAS. It would seem to me that it might be helpful to you for your protection as well as being of help to the committee to give us some official notice of the title of those cases, not at this point, but to supply it for the committee at some point.

Note on Judge Bork's 1963 New Republic Article,
"Civil Rights--A Challenge"

In 1963 Judge Bork, then a new member of the Yale Law School faculty, wrote an article in the New Republic criticizing proposed public accommodations legislation that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior. This twenty-five year old article cannot legitimately be cited as a reason not to confirm Judge Bork.

Ten years later, at his confirmation hearings for the position of Solicitor General, Judge Bork acknowledged that his position had been wrong:

> I should say that I no longer agree with that article....It seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today, I would support it.

The article was not even raised during his unanimous confirmation to the D.C. Circuit ten years later, in 1982.

Judge Bork's article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument...."

VF- BORK

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INDIANA LAW JOURNAL

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NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS*

ROBERT H. BORK†

A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic. The result, of course, is that courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes. In the present state of affairs that expectation is inevitable, but it is nevertheless deplorable.

The remarks that follow do not, of course, offer a general theory of constitutional law. They are more properly viewed as ranging shots, an attempt to establish the necessity for theory and to take the argument of how constitutional doctrine should be evolved by courts a step or two farther. The first section centers upon the implications of Professor Wechsler's concept of "neutral principles," and the second attempts to apply those implications to some important and much-debated problems in the interpretation of the first amendment. The style is informal since these remarks were originally lectures and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced and thorough presentation, for that would result in a book.

THE SUPREME COURT AND THE DEMAND FOR PRINCIPLE

The subject of the lengthy and often acrimonious debate about the proper role of the Supreme Court under the Constitution is one that preoccupies many people these days: when is authority legitimate? I find it convenient to discuss that question in the context of the Warren Court and its works simply because the Warren Court posed the issue in acute form. The issue did not disappear along with the era of the Warren Court

* The text of this article was delivered in the Spring of 1971 by Professor Bork at the Indiana University School of Law as part of the Addison C. Harris lecture series.

† Professor of Law, Yale Law School.

THE NEW REPUBLIC
JULY 27, 1987

BORK'S BITE

The nomination of a Supreme Court justice is invariably accompanied by a certain amount of jockeying for rhetorical position. The nominee's champions deliver encomiums to the brilliance of the candidate's mind, the breadth of his scholarship, the consistency of his judicial philosophy—as though it never occurred to them to look at the decisions he rendered in particular cases. And his detractors prognosticate gloomily about the dark days that lie ahead if the nominee is confirmed, as though for years the only thing standing between us and anarchy or repression was the very justice—now suddenly the personification of judicial moderation and integrity—who is being replaced.

This script was followed to a T last week when U.S. Appeals Court Judge Robert H. Bork was nominated to the seat vacated by the retiring Lewis Powell. Having made a nomination that has politics written all over it, President Reagan expressed the hope in his weekly radio address that senators would have the decency to keep politics out of the confirmation process. And the administration's most ardent supporter on the Judiciary Committee, Senator Orrin Hatch, explained that: "When you have a man of this caliber, I think it's just terrible to try and make an ideological battle out of it." Liberal groups, led by Senator Edward M. Kennedy, voiced their opposition to Bork by raising the spectacle of "back-alley abortions . . . segregated lunch counters . . . rogue police," and worse.

There are two points to be made here. The first is that philosophical disagreements are perfectly legitimate grounds on which to reject the Bork nomination. The second is that if Bork really is the judge his supporters paint him to be, liberals may find him preferable to a number of other candidates President Reagan might have proposed.

There is no reason for senators who oppose Bork on ideological grounds to feel compunctions about voting against the nomination. They might reflect that in the history of Supreme Court appointments, nearly one in five presidential nominations (including one of George Washington's) has been rejected by the Senate, and that in most of those cases a political test was applied. They might further reflect that the constitutional phrase "advice and consent" does not, on either a strict or a broad construction, suggest that it is the Senate's job simply to provide a high-level security check for candidates the president sends up. And they might note (as we did last year during the confirmation hearings for Justices Rehnquist and Scalia) that two authorities on record in support of a political construction of the advice and consent clause are Strom Thurmond ("The Senate, as representatives of the people, is entitled to consider [judicial nominees'] views, much as voters do with regard to candidates for the presidency") and William Rehnquist ("The Senate has every right . . . to ask the president to maintain on the Supreme Court a balance between liberal and conservative opinion").

The confirmation of a candidate for the Court is an archeological excavation, and the digging at the site called Robert Bork has barely begun. Among the antiquities to be examined is the story of the firing of Archibald Cox, the Watergate special prosecutor. As a legal matter, President Nixon was within his rights to fire Cox, and Bork was within his rights to execute the order. As a matter of principle, though, shouldn't Bork have made public protest against a request that was so clearly improper? Bork has maintained that after carrying out Nixon's order he offered to follow Elliot Richardson and William Ruckelshaus and resign from the Justice Department, but that Richardson persuaded him to stay. Senators may wonder whether Richardson's advice was justification enough for Bork to act as he did.

Senators will be interested, too, in hearing what Bork makes today of some of his own earlier pronouncements. His 1963 article in THE NEW REPUBLIC, "Civil Rights—A

Challenge," in which he argued against enforced desegregation of public accommodations, has already achieved some notoriety. So has an article in the *Indiana Law Journal* in 1971, in which he asserted that the First Amendment's protection of speech applies only to "explicitly political speech," defined rather narrowly, and "does not cover scientific, educational, commercial, or literary expressions as such."

Bork has made some effort recently to distance himself from those positions. But what is most significant about them is not their politics. It is the very peculiar relation in which those articles stand to the judicial philosophy that Bork's supporters have commended to us as the hallmark of his integrity. Judge Bork, we are told, is the great champion of judicial restraint and strict constructionism. He opposes the creation of rights that have not been explicitly enumerated in the Constitution, whether those new rights would support liberal or conservative social policies. And he believes that judges should adhere to the letter of the Constitution, whatever result that adherence might lead to in particular cases.

But it seems that Bork is not beyond enumerating rights of his own when it suits him. On the one hand, he has argued, in the TNR article and elsewhere, that it gives the equal protection clause of the 14th Amendment much too broad a reading to apply it to house deeds or hotels or lunch counters. But on the other hand, he based his opposition to the Civil Rights Bill on a vague, extraconstitutional entitlement called the "freedom of association," which gives people the right to serve at lunch counters, if they choose, only persons of their own race. The article is not a judicial opinion, of course; it is a policy argument. But it is revealing that when Bork disapproves of a policy, he is prepared, in the judicial tradition he deplores, to trump it

THE ZEITGEIST CHECKLIST

BY CHARLES PAUL FREUND

This Week		Last Week	Weeks on Chart
1.	GARBO TALKS	2	30
2.	HERE COMES THE JUDGE	—	1
3.	BLAND TRUST	*	5
4.	ALL IN THE GAMES	1	3
5.	BEAU TIE	*	14
6.	THE PRIDE IS SLACK	—	1
7.	ROCK IN A HARD PLACE	—	1
8.	A MAN A PLAN A CANAL	—	1
9.	FAST-FORWARD	—	1
10.	CUTTER'S WAY	—	1

1. GARBO TALKS

Iranamok. Part of the contentiousness between North and the committee was due to the legislators' fear of North as a telegenic force. They were anxious to curtail his performance and pre-empt another empathetic outbreak. Further, Reagan is now utterly defanged, and the committee's interest in moving the investigation closer to him is revived.

2. HERE COMES THE JUDGE

Bork. The early Bork debate reveals a national confusion. There's uncertainty about the Senate's role, and no consensus about an appropriate basis of judgment. Indeed, there seems to be a desire to find (or not find) yet another simple "smoking gun" of some sort: an article, a decision, etc. The culture's love of the concrete has reduced national judgment to a process of forensics.

3. BLAND TRUST

Meese. The facts in the latest Meese story—his "blind trust" actions weren't illegal—are less significant than the coverage he got. The administration is portrayed in full flight from him, even protecting the Bork nomination from pollution by association. Meese has now fully metamorphosed as a media bogeyman, another Regan-like stand-in for muddled Uncle Reagan.

4. ALL IN THE GAMES

South Korea. South Korea's capitulation to democracy, if that's what's happened, is playing like a miracle. But the "villains" in this piece, the insiders with all the power, may well win the elections. It will be tough to squeeze a lesson out of such a morality play, unless it is to schedule all future Olympics in societies to whom face-saving is paramount.

5. BEAU TIE

1988. The Democratic contenders, in the wake of their "debate," have a problem. An aggregate comic line on them has formed, and it's preventing any of them from looking like a serious individual. It is actually preferable to be unannounced. The exception isn't really an exception at all. Paul Simon's Truman-corny image (ZC, May 11) stands out, but it is still a media stereotype.

*Item resurfaces in the Zeitgeist after at least one week's absence.

6. THE PRIDE IS SLACK

Chrysler. There goes Iacocca's presidential campaign. Chrysler's odometer scandal revived a familiar problem: Americans fear they are being taken for a ride whenever they buy a product from a big U.S. firm, which is why so many companies put attractive leaders into their advertising. The huge worker-safety fine Chrysler had to pay the next week didn't help either.

7. ROCK IN A HARD PLACE

Rock 'n' Roll. Forget Tipper Gore. Forget "I Want Your Sex." Allan Bloom's view of rock music as mind-rotting has made him the anti-comics Fredric Wertham of the '80s. Bloom is helping to rescue rock from a threat presented by the controversy over Nike's commercial use of the Beatles' "Revolution." Rock thrives when perceived as an outsider genre; to canonize it, as the protectors of "Revolution" were doing, is to smother it. It needs Blooms, outspoken experts who don't know what they're talking about.

8. A MAN A PLAN A CANAL

Panama. So who is Noriega? The U.S. media, uniquely among those of world powers, show no continuing interest in places where the U.S. has had a profound impact. Events in Panama may as well be occurring in Outer Slobovia. As soon as the Canal debate was concluded, Panama virtually ceased to exist.

9. FAST-FORWARD

TV News. The post-network TV news coverage may be even less substantive than it is now. CNN already has a "headline" service, *USA Today* is coming to TV (which seems redundant), and Fox is experimenting with a show featuring 30 stories in 30 minutes. Nobody ever went broke underestimating the attention span of the American public.

10. CUTTER'S WAY

Circumcision. There's been a debate over circumcision for decades, with almost nobody paying attention. This year, anti-circumcisionists have figured out the way into the U.S. consciousness: weird stories. Awards have been given to prominent couples who have left their sons "intact," and research has established that newborn boys don't much like it. Both stories made the national press.

with a right. Similarly, Bork does not believe that people have a right to engage in private sexual practice without government regulation because he can find no textual support in the Constitution for a such a notion. But he has argued that the First Amendment, a piece of writing in which the word "political" does not appear, protects only political speech.

Bork has made a reputation over many years as a critic of judges who allow personal tastes and values to inform their reading of the Constitution. It seems to us that he now has some explaining to do on his own behalf. It is customary for nominees to the Court to decline to answer questions about decisions they might reach in cases likely to come before the Court. Here is a situation in which those questions deserve answers. For what the committee needs to know is just how result-blind Bork's judicial philosophy really is.

If the coming Judiciary Committee hearings establish that Judge Bork is not only an advocate but a genuine practitioner of judicial restraint, how should liberal senators vote? There are good reasons, we think, for voting to confirm. There are plenty of conservative jurists waiting in the wings who pose a far greater threat to liberal policies. There is nothing inherently liberal about judicial activism: conservative judges can discover rights just as readily as liberal judges. One has only to look at two cases in the most recent Court term in which decisions were justified by reference to "property" and "ownership" rights of dubious constitutional provenance. We have long argued that the day would come when liberals would be forced to eat their expressions of enthusiasm for judges who boldly go where no legislature has been before.

With the retirement of Justice Powell, that day may have dawned. For a long time, liberals have looked to the Court to undo legislation they deemed illiberal, or to provide protections where legislation did not exist. For a long time, indeed, progress on social issues required a strong and active Court. But dependence on the judiciary to find a rights umbrella for every policy has become an addiction. If the Court is destined to become dominated by more conservative justices, it will be better for liberals if those justices prefer restraint to activism. And if liberals have to learn to persuade democratically elected legislatures of the merits of their social policies, that will be better for liberalism too.

NOTEBOOK

□ "YOUR ACTIVITY SO FAR in international life as a diplomat and foreign minister, as well as your activity in the United Nations, was always dedicated to the securing of peace among all countries." Thus the pope to a visiting head of state last month. Nothing remarkable, except that the visiting head of state's "activity so far in international life" began with his role in the deportation of Greek Jews to Auschwitz, his "professional life experience" included savage reprisals against anti-Nazi partisans in Yugoslavia, and the "peace" that he "secured" for many people his first time out was the peace of the dead. To anyone fair-minded, the evidence against Kurt Waldheim seems incontrovertible. For that reason the Austrian president has been barred from entering the United States, and has been refused meetings with the heads of all the European states. Waldheim's isolation is one of the more impressive moral achievements of the West in recent decades. It strikes a blow for memory and for decency. Pope John Paul II, however, has advanced the cause of forgetting, and of indecency. The outrage is compounded by its historical context. The Vatican averted its gaze from Nazi war crimes as they were carried out. The indifference of Pope Pius XII to the fate of the Jews under Hitler has been definitively documented. And the indifference of the Vatican to the Holocaust was succeeded by its indifference to the State of Israel, to which it continues to deny full diplomatic relations. John Paul II has already met with Yasir Arafat. And he never misses a chance to, well, pontificate to Israel about its sovereignty over Jerusalem, though the pope never hectored Jordan when it occupied Jerusalem for years prior to 1967. "The pope is convinced that you either understand events at a moral level or you don't understand them at all," said a Vatican spokesman. We agree.

□ DIFFERENT PAPERS, SAME DAY:

Agreement Nearing On Ethics Bill

—*Newsday*, June 30

Tempers in Albany Flare on Ethics Bill With No Agreement

—*New York Times*, June 30

(thanks to Tom Tisch, New York City)

□ SAME PAPER, SAME DAY, SAME PAGE:

Reagan Hails W. German Support Of Missile Cuts as Signal of Unity

—*Schenectady Gazette*, June 5, page one

Bonn's Move to Keep Nukes Could Kill Superpower Accord

—*Schenectady Gazette*, June 5, page one

(thanks to Greg Moore, Schenectady, New York)

□ NEW RECORD!! SAME PAPER, SAME DAY, SAME ARTICLE:

Zimbabwe's whites pessimistic and hopeful

—*Boston Globe*, June 28

(thanks to Sean F. Heneghan, Boston, Massachusetts)

□ HOW MANY BUCKLES HATH THE RUSTBELT?

". . . Partly as a result, Cleveland seems to be experiencing something of a turnaround. Although its population has fallen to 535,000 from 914,000 in 1950, the city once called

THE NEW REPUBLIC
OCTOBER 5, 1987

THE CASE AGAINST BORK

The controversy over President Reagan's nomination of Robert Bork for the Supreme Court is a rebuke to those—including this journal—who are wont to complain that the American political dialogue is cheesy and trivial. In the bicentennial year of the Constitution, we are enjoying an astringent debate over first principles: the allocation of power between branches of government, the meaning of the Bill of Rights, the tension between majority rule and individual freedom.

Robert Bork is a victim of this development. Few any longer maintain that such philosophical questions are irrelevant to his confirmation by the Senate—that he should be judged on "competence" alone, a test he would pass with ease. Bork is a victim, as well, of his own intellectual exertions: a lifetime of earnest and honest reflection on basic questions, expressed with admirable provocative swash. As a result, he is being judged by standards that did not apply to Sandra Day O'Connor or Antonin Scalia.

But the Equal Protection Clause of the 14th Amendment (as Judge Bork would surely agree) doesn't guarantee equal treatment of Supreme Court nominees. "More than any nominee in recent decades," writes Stuart Taylor in the *New York Times*, "Judge Bork is the representative and leader of a school of thought. He has worked out an overarching legal and constitutional philosophy that he says should govern all judicial decision-making." Reagan nominated Bork because of this philosophy, and senators have the right and duty to decide whether they share this philosophy in voting on his confirmation.

In contrast to the demeaning White House campaign to portray its nominee as "open-minded" and "unpredictable," TNR wishes to pay Bork the compliment of taking his philosophy seriously. While we admire Robert Bork as a man and as a thinker, we do not share his judicial philosophy and do not wish to see him on the Supreme Court. This is true although we ourselves have had occasion to complain about the liberal fixation with "rights" and the over-reliance on courts to invent and enforce them. We agree with Bork's critique of some judicial excesses, especially the *Roe* v. *Wade* abortion decision. But we do not agree that intellectual consistency therefore requires us to renounce much of postwar constitutional jurisprudence.

The development of Robert Bork's thought can be traced in a series of now thoroughly pawed writings, beginning with a 1963 article in these very pages. In that TNR essay (later recanted), Bork denounced the public accommodations provision of the incipient Civil Rights Act—outlawing racial discrimination by commercial establishments—as "legislation by which the morals of the majority are self-righteously imposed upon a minority." The notion that "a majority may impose upon a minority its scale of preferences," Bork wrote, is "a principle of unsurpassed ugliness."

Unsurpassed ugliness, perhaps, but not unconstitutional. In 1971, in the *Indiana Law Review*, Bork used the moral relativist's credo as the foundation for his philosophy of judicial restraint. "Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups." Since "[t]here is no principled way to decide that one man's gratifications are more deserving of respect than another's," the majority's wishes must prevail unless "constitutional materials . . . clearly specify" otherwise. A married couple's wish to use contraception has no greater claim against the majority will than a utility company's wish to pollute the atmosphere. Constitutionally, "[t]he cases are identical."

By this basic reasoning, Bork has written in 1971 and since that the Supreme Court was wrong to prevent states from enforcing racial restrictions in real estate deeds; wrong to invalidate the poll tax; wrong to require "one-man-one-vote" for state legislatures; wrong to apply the 14th Amendment to discrimination against women or any other non-racial group; wrong to ban sterilization of crimi-

nals and prayers in schools; wrong to find any right of privacy in the Constitution; and so on.

The 1971 article also focused on freedom of speech. Constitutional rights, Bork argued, are of two sorts: those explicitly mentioned in the text and those that "derive . . . from governmental processes" in the Constitution. Free speech, he said, is of the second sort. "The Framers seem to have had no coherent theory of free speech," and judges therefore "are forced to construct our own theory." Bork's theory was that "governmental processes" only require protection of political speech. Speech on non-political subjects and speech advocating violation of the law, he argued, can be censored or punished without constitutional constraint.

Despite its professed view that one moral value is as good as another—the premise of its narrow reading of the Constitution—Bork's 1971 article took special aim at pornography, noting that it could be seen as "a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution." By 1978, in a speech on the First Amendment at the University of Michigan, Bork had decided that "the consequences of such 'private' indulgence may have public consequences far more unpleasant than industrial pollution." He criticized "the shopworn slogan that the individual should be free to do as he sees fit so long as he does no harm to others" because advocates of this formula recognize only "physical or material injury" and not moral harm to the community. In 1984, in a Washington speech on "Tradition and Morality in Constitutional Law," Bork argued that the "community is entitled to suppress . . . moral harms" in general. He condemned the "privatization of morality which requires the law of the community to practice moral relativism."

Two other Bork writings of recent years amplified and/

THE ZEITGEIST CHECKLIST

BY CHARLES PAUL FREUND

This Week		Last Week	Weeks on Chart
1.	BORK BARBECUE	*	6
2.	POPE ON A ROPE	3	2
3.	LA GUERRE EST FINIE	*	10
4.	NUNN OF THE ABOVE	5	18
5.	LOOK BACK IN ANGST	7	4
6.	PUFF THE MAGIC DRAG	*	8
7.	VOODOO ECONOMICS	—	1
8.	YOU COULD LOOK IT UP	—	1
9.	THE CHILDREN'S HOUR	*	6
10.	MUDD IN YOUR EYE	*	2

1. BORK BARBECUE

Bork. Bork's a moderate, the administration now says, while the ubiquitous Senator Hatch insists that Bork's (mainstream) actions speak louder than his (conservative) words. What does this mean? That, in a p.r. battle, conservative ideas on domestic issues must be disguised. U.S. social thought has long been liberal, something that may have been obscured by Reagan's personal popularity.

2. POPE ON A ROPE

Papal visit. Never mind the sex lives of white Catholics. John Paul II's U.S. tour revealed Church-related controversies that had gone ignored: the changing ethnic character of the U.S. Church, the Church's role in anti-Semitism, alleged Church racism, and even alleged Church genocide against Indians. The pope's own statements on the sanctuary movement only politicized the journey further.

3. LA GUERRE EST FINIE

Contras. To keep *contra* aid alive, Daniel Ortega must now actually invade Harlingen, Texas. The president so misplayed his peace plan smoke screen that even movement conservatives have joked publicly about his intelligence. Moderate pro-*contra* support has evaporated, and the mainstream press is characterizing remaining support as rear-guard zealotry.

4. NUNN OF THE ABOVE

1988. With Nunn out, the South's Super Tuesday becomes a potential Democratic disaster. There's no strong Southern white candidate, and though the party can't afford a strong Jackson candidacy, it can't afford to stop him. Meanwhile, on the local level, ad pros are predicting another season of negative political spots. Why? A lack of defining issues.

5. LOOK BACK IN ANGST

Arms control. Shevardnadze's White House visit has played behind numerous other stories. Yet this is, supposedly, a major act in Reagan's big chance at History. The truth is, Reagan's arms control gambit, whether or not it succeeds, faces significant hurdles of opinion. First, his foreign policy competence has been questionable, at least. Second, when you think, Historically, of Nixon, do you think of the China opening, or of something else?

6. PUFF THE MAGIC DRAG

Smoking. Where there's no smoke, there's fire anyway. Announcement of an almost smokeless cigarette—sharply attacked by anti-smoking forces already—coincides with new figures indicating there are fewer U.S. smokers than ever. By the way, except for expensive stogies, cigar smoking is rapidly disappearing.

7. VOODOO ECONOMICS

Haiti. Just as Arthur Schlesinger Jr. tried to scold the U.S. into helping post-Duvalier Haiti, the *Economist* has identified it as the first certifiably hopeless economy. In fact there are many hopeless economies. What's interesting here is the abandonment of traditional Western optimism concerning development, and presumably the expensive benevolence that has gone with it.

8. YOU COULD LOOK IT UP

Language. Anglophones can feel smug at the recent Francophone conclave in Quebec; after all, the French are trying to stem an irresistible English tide. But what are *we* doing to English? Random House's latest unabridged edition contains *tens of thousands* of new entries. English's malleability is a sign of its vitality, but American lexicographers may be deserting their role of providing a conservative language force.

9. THE CHILDREN'S HOUR

Post-network TV. Kidvid producers and toy makers have found a way around the networks when their pilots are turned down: repackage the same concept for home video. Most kidvid has long been a charade aimed at ancillary toy sales. Releasing the heavily promoted "shows" via cassette further encourages the developing two-tier TV audience, creating probable upscale-only fads.

10. MUDD IN YOUR EYE

Dan Rather. Can people meters tell CBS if Dan Rather is feeling OK? In recent weeks Rather's changed his "hot" style to a valiumized approach, changed it back, suggested that Charles Glass was a phony, and left the network feedless. Given Rather's enormous visibility, and the degree to which CBS's prestige is in his hands, this is, uh, remarkable behavior. Courage indeed.

*Item resurfaces in the Zeitgeist after at least one week's absence.

or modified his views on strict constructionism and judicial restraint. In 1984, as a circuit judge, he concurred in the First Amendment dismissal of a libel action against the columnists Evans and Novak. Even though there's no evidence that the Framers intended to restrict libel suits, he argued, a broader interpretation of their design is needed: "There would be little need for judges . . . if the boundaries of every constitutional provision were self-evident. They are not. . . . It is the task of the judge in this generation to discern how the Framers' values, defined in the context of the world they knew, apply to the world we know." In a 1985 pamphlet published by the conservative Center for the Study of the Judiciary, Bork contended that there is a principled middle ground between blind literalism—which would doom the Constitution to irrelevance as times change—and irresponsible free-lancing.

NO ONE, of course, admits to making up rights and blithely sticking them in the Constitution. Everyone in this debate claims to be honoring the intentions of its authors, if only their intention to be broadly interpreted. Is Bork's analysis so compelling that less stinting views must shudder and give way? We think not.

Bork's intellectual progress, surveyed above, contains more than one anomaly. For example, moral relativism led him to conclude that the principled derivation of broad individual rights from the language of the Constitution was a hopeless task. Since then, he has abandoned moral relativism with a vengeance. Yet he clings to the belief that the task is hopeless. Now that he has concluded that his own moral values can be more than just a series of random "gratifications," why won't he extend the same courtesy to the authors of the Bill of Rights?

Bork defends his narrow reading of the First Amendment's freedom of speech on the contradictory grounds that the purpose of free speech is to facilitate the political debate, and that society has the right to protect its own moral values. Moral values are a central political question. But Bork apparently believes that current moral values are beyond permissible challenge. Remember, we are not talking about public displays here. The "moral harm" society is entitled to "suppress"—a harm Bork analogizes to pollution—derives entirely from the effect on individuals of their own voluntary private decisions about what to read, see, and hear. The same logic could apply just as easily in many areas other than speech. This may not be "a principle of unsurpassed ugliness," as Bork once described the imposition of majority values on minorities, but it is rather unattractive—and ominous.

Bork's paradigm of legitimate judicial creativity is the 1967 Supreme Court decision defining electronic surveillance as a "search and seizure" under the Fourth Amendment. The Framers didn't know about electricity. If they had, they probably would have wanted the people to be protected from bugging as well as from physical police intrusion. Well, sure. That one's easy. But Bork himself realizes it's not always so easy. In his *Evans and Novak* opinion, he struggles to explain why it's OK for the Supreme Court to read restrictions on libel suits and segregated schools into the Constitution, even though both of these practices were known to the Framers and apparently not disapproved of. It seems that in these cases the Court was "applying an old principle according to a new understanding of a social situation." *A new understanding?* That gives the game away. Bork is entitled to claim that his new understanding is superior to others', of course. But he is not entitled to assert that he has discovered the philosopher's stone that converts original intent into modern meaning, and that broader "understandings" than his own are inherently unprincipled.

Bork's intellectual history is a series of wild ideological fusillades followed by midcourse corrections. This, in itself, is unobjectionable. Foolish consistency and all that. Still, there is something unnerving about Bork's pattern of conveniently mellowing his harsh principles. He has never satisfactorily explained how he, the strictest of strict constructionists, can defend *Brown* v. *Board of Education*, the great school desegregation decision. In his 1971 law review article, he babbled about "psychological equality" in a way that would do any liberal sociologist proud.

Bork now says he would define "political speech"—protected by the First Amendment—to include a broad "spectrum" of moral, scientific, and literary expression. He now says his exclusion of speech advocating illegality might not apply to advocacy of civil disobedience such as the civil rights sit-ins. In recent years he has been complicating his views on original intent, and has argued for expanded First Amendment protection of the press. His views on when to overrule precedents have noticeably softened in just the past few weeks. According to Michael Kramer in *U.S. News and World Report*, Bork has even told senators in his pre-confirmation rounds that he is willing to reconsider whether there is a constitutional right to abortion, "that just because he hasn't found it doesn't mean it's not there"—as if constitutional law were an Easter egg hunt and there might be some obscure provision he's overlooked in his years of scholarly searching. Is this "open-mindedness" reassuring? Or is it all a bit too facile for someone hungry for a lifetime appointment that would put his views beyond the need for further calibration?

AFTER THE *Roe* decision in 1973, this journal commented (in an editorial written by Robert Bork's mentor, Alexander Bickel): "[T]here is no answer that moral philosophy, logic, reason, or other materials of law can give to this question [of abortion]. That is why the question is not for courts, but should have been left to the political process." *Roe* implausibly found in the Constitution a detailed regulatory scheme dividing pregnancy into trimesters, with illogical and hypocritical rules for when and how the state could interfere during each period. TNR has long maintained that *Roe* was actually a disaster for liberals. It cast a retrospective shadow of illegitimacy over all the important cases of the Warren era. It short-circuited a political process that was rapidly legalizing abortion anyway. It reinforced the liberal addiction to court-imposed

rather than democratic solutions to social problems. Meanwhile, as liberals grew complacent, *Roe* politicized a generation of social-issue conservatives. The right-to-life movement became a major building block of the "New Right," now a powerful reactionary political force.

But if some liberals fail to see the difference between finding a ban on abortion in the Constitution and finding a ban on real estate racial covenants, Judge Bork suffers from the same astigmatism. He believes that—with the exception of *Brown*—virtually all the most prominent postwar Supreme Court cases expanding individual rights against the state were wrongly decided.

Bork's views on freedom of speech are the scariest and least supportable, in our view. Although a "strict construction" of the First Amendment ("Congress shall make no law . . . abridging the freedom of speech. . . .") would seem to invite a fairly active judicial role in preventing state censorship, Bork characteristically sees that role as quite limited. And yet the limits he draws would give judges far more leeway to impose their own personal "gratifications" than the simple, broad right of free speech we enjoy today. Is this play politically relevant? Will this book undermine the reader's moral values? Has this protester crossed the line between acceptably challenging the law and unacceptably advocating its violation?

Bork's professed radical majoritarianism has some peculiar exceptions. He believes that congressional limits on presidential power such as the War Powers Act and the special prosecutor law—laws passed by a majority of both houses and signed by the president himself—are unconstitutional. He has criticized the line of Supreme Court cases, beginning with *Bakke*, that permit some forms of governmental affirmative action—every conservative's least favorite exercise of judicial restraint.

The most troubling shadow on the constitutional horizon is the rebirth of "economic due process": right-wing activist courts overturning zoning laws, safety regulations, and other governmental interference in the economy. Bork has been very cautious to dissociate his constitutional philosophy from his own staunch free market views. Bork's economic views are generally sound, but they're not in the Constitution any more than our own views on abortion. The *Wall Street Journal* published a revealing debate on September 14 between two conservatives, one complaining about Bork's failure to be an economic judicial activist and the other reassuring that he is "persuadable on economic rights." At the least, Bork needs to be grilled on this point during the Senate hearings, to make sure he's not "persuadable."

LIBERAL INTEREST GROUPS stand accused, justly, of spreading hysteria about Robert Bork. Even if he got his way and all the Supreme Court precedents he objects to were overturned, we would not return immediately to a land of back-alley abortions, forbidden contraceptives, and racially restricted neighborhoods, because the majority view on these issues has changed and the laws the Court overturned would not be put back on the books. But the telling point is that laws banning contraceptives and enforcing racial deeds, now so unthinkable, existed and were enforced only 20 or 30 years ago. Who's to say for sure they won't return? More fundamentally, who knows what manifestations of the majority will today will seem similarly unthinkable 20 or 30 years from now?

The Bill of Rights and the institution of judicial review are frankly anti-majoritarian. If we did not want to have unelected judges overruling democratically enacted laws, we would not need a Constitution. It's an odd arrangement. Yet every time the Senate votes on a Supreme Court nominee, the majority through its elected representatives is repeating the remarkable act of democratic self-abnegation that created the Constitution in the first place. Why? Partly because every member of the majority knows he or she is also a potential minority. The power we therefore give to judges is easy to abuse. Judges need enormous intellectual integrity. But they also need vision. By the definition of their constitutional role, they must see things the majority doesn't see. In 1971 Robert Bork saw the wisdom of *Brown* v. *Board of Education*. By then, so did most people. Would he have seen it in 1954?

For decades Ronald Reagan has been inveighing against the Supreme Court and demanding a sea change in constitutional law. Now, preposterously, the administration insists that its nominee would actually have very little impact. But the tedious statistical debate about how often Bork's lower-court opinions have or have not been reversed by the Supreme Court is beside the point. So is the fact that this or that distinguished jurist may have shared Bork's disagreement with this or that Supreme Court ruling. The president and his present nominee could not be clearer about the kind of Supreme Court they want. It is up to the Senate—which, unlike the president, was elected by majorities in *all 50* states—to decide whether it wants the same thing.

NOTEBOOK

□ NOT BRIGHT: Senator Joe Biden plagiarized a speech from British Labor Party leader Neil Kinnock in Iowa on August 23. "I started thinking as I was coming over here, why is it that Joe Biden is the first in his family ever to go to a university? Why is it that my wife [ditto]?" Kinnock had posed the same question in a widely praised TV commercial during last spring's British election. Were Kinnock's ancestors "thick"? Were Biden's "not bright"? Nonsense. Kinnock's "could sing and play and recite and write poetry" and "could work eight hours underground and then come up and play football." Biden's "read poetry and wrote poetry and taught me how to sing verse" and—even more impressive—"worked in the coal mines of northeast Pennsylvania and would come up after *twelve* hours and play football for four hours." And so on. The differences between the two speeches are as interesting as the similarities, illustrating—compare "thick"

THE REAL REASON FOR BORK'S DEFEAT

NORMAN PODHORETZ

THE more I think about the virulent campaign against Robert Bork, the more convinced I become that the main reason he has been singled out for such abuse by the liberal community is that he is so brilliantly qualified to sit on the Supreme Court.

Of his qualifications there can be no doubt. In fact even those most hostile to him stipulate that he is one of the leading legal minds in this country and that his moral character is spotless.

Of one other thing there can be no doubt, either: in rejecting Bork, as it is all but certain to do, the Senate is not acting as the "world's greatest deliberative body," which it complacently congratulates itself on being. Instead what we see is a group of cowardly politicians responding to a combination of organized political pressures.

No wonder, then, that so many of the senators who have come out against Bork are reportedly feeling "uneasy." They know very well that Bork was right when, in his magnificent statement last week explaining why he decided not to withdraw, he said that "when judicial nominees are assessed and treated like political candidates, the effect will be to chill the climate in which judicial deliberations take place, to erode public confidence in the impartiality of the courts and to endanger the independence of the judiciary."

All this a majority of those now sitting in the United States Senate are doing, to their eternal shame and disgrace.

But while the senators are the most of it in the sense that they are following rather than giving the orders here. And the orders they are following are ultimately coming from the liberal community.

that only they have the power to confirm or reject Bork's nomination, they are also the least of it in the

For it is by smearing Bork as a racist, a sexist and an enemy of individual rights that the liberal community has frightened enough voters to sway a critical number of senators, including most of the Southern Democrats and the "moderate" Republicans who had been expected to support his nomination.

for the decision of the liberals to go all-out against Bork is the fear that he would tip the balance of the Supreme Court in a conservative direction. I have no quarrel with this as an explanation. But consider the implication of using it as a justification for opposing an otherwise qualified nominee.

What this "ideological balance" argument says is that that three or even four conservatives may be permitted to sit on the Supreme Court (hence the easy confirmation of Antonin Scalia last summer, though he is, if anything, more conservative than

He represents the liberals' biggest fear: a conservative who can think

Bork), but that the other five or six justices must always be people who accept the expansive liberal view of constitutional interpretation.

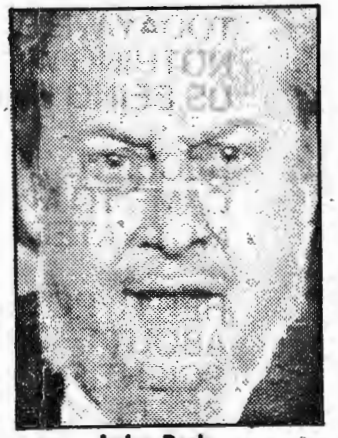
Indeed, Prof. Laurence

Law School has even gone so far as to declare in effect that it would be unconstitutional for the court to have a conservative majority.

Incredible though Tribe's argument is, liberals both in the Senate and out have taken it as a license to fight openly against Bork on ideological grounds alone. Yet this is something that up to now they have been reluctant to do with judicial nominees, if only because ideology is an axe that can just as easily be wielded against liberals as against conservatives (and it will be, it will be, thanks to Tribe and his troops).

Of course the "balance" argument would apply to any nominee who believes that the job of a Supreme Court justice is to interpret the Constitution and not to read his own political preferences into it. But there has been a special ferocity to the war against Bork which derives from the fact that he is so intellectually powerful an exponent of this philosophy of judicial restraint.

In general, and not only where constitutional issues are involved, serious conservative intellectuals (especially when,



Judge Bork

liberals themselves) always drive the liberal community wild.

Liberals like to think that conservatism is based on nothing more than wealth, greed and bigotry. They like to think that (as the critic Lionel Trilling famously put it back in 1950) "liberalism is not only the dominant but even the sole intellectual tradition" in America. They like to think that conservatism has no solid intellectual foundation and that conservatives are capable of expressing themselves (again in Trilling's words) "only in action or in irritable mental gestures which seek to resemble ideas."

Then along comes Ro-

liberals in the debate over the proper principles of constitutional interpretation, he provides a living example of how much things have changed since 1950. As Bork demonstrates, now it is the conservatives who are intellectually dominant and it is the liberals who have replaced them as (to borrow the tag applied to the Tories in 19th Century England by John Stuart Mill) "the stupidest party."

Of this reversal of roles the liberals have also provided a living example by making such generous use of the techniques of character assassination to which the "stupidest party" always resorts when confronted with an opponent whose arguments it cannot answer.

The polite form of this ugly assault on Bork has been to rule him by definitional fiat out of the "mainstream." As Bork's record since becoming a judge shows, it is a ludicrous charge. But if the liberals mean by it that Bork is not one of them, then for once they are telling the truth about him.

Indeed Bork is not one of them. Unlike them, he has a decent respect for the text of the Constitution. Unlike them, he cares about the separation of powers. Unlike them, he cherishes the independence and impartiality of the judiciary. And unlike them, he is able to make a case for his judicial philosophy without recourse to lies, demagogy and hysteria.

These are the real reasons they hate him so much and why they are so determined to deny him a seat on the Supreme

Bok