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Agudath Israel of America
אגודת ישראל באמריקה

COMMISSION ON LEGISLATION AND CIVIC ACTION

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September 21, 1987

M E M O R A N D U M

TO: Members of the Senate Judiciary Committee

FROM: David Zwiebel, Esq., Director of Government Affairs and General Counsel

SUBJECT: The Bork Nomination

This memorandum is submitted on behalf of Agudath Israel of America in support of the nomination of Robert Bork to the United States Supreme Court.

Agudath Israel of America was founded in 1922. It is today the nation's largest grassroots Orthodox Jewish movement, with tens of thousands of members, chapters in 30 states, and 19 divisions operating out of headquarters in New York City.

Last week, against the backdrop of the ongoing confirmation hearings in the Senate Judiciary Committee, Agudath Israel's board met to discuss Judge Bork's nomination. Agudath Israel has never before taken a public position on any nomination to the Supreme Court, and several members of the board urged that the organization maintain its policy of neutrality on Supreme Court nominations. However, because the Bork nomination has elicited such broad public comment, and especially because so many Jewish groups have spoken out against the nomination and may thereby have created the misconception that "the

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Jewish community" is united in monolithic opposition to the principles for which Judge Bork stands, the majority of Agudath Israel's board concluded that neutrality would not be an appropriate response on this occasion.

The extraordinary debate surrounding the Bork nomination has really been a series of two debates: the first over whether Justice Bork's votes would likely lead to results that are "good" or "bad" on a host of controversial public issues; and the second surrounding the overall philosophy of judicial restraint so eloquently espoused by Robert Bork. As detailed below, Agudath Israel has strong views on both those debates.

Part I of the discussion below sets forth the reasons we think the votes Justice Bork would likely cast on a number of controversial issues will have a positive impact on society. Part II, in turn, focuses on that which we believe is even more fundamentally at stake in this nomination: our view that judicial restraint is ultimately in the best interests of all Americans, including minority communities like ours.

I. Judge Bork's Stance on Several Specific Public Policy Issues

From a purely utilitarian perspective, Agudath Israel believes that Judge Bork's presence on the Court could have a positive influence on some of the great public policy issues of our day. Following is a discussion of three of those issues: the First Amendment's prohibition against establishment of religion; "affirmative action" programs that create preferences on the basis of race or sex; and government's role in promoting public morality.

1. Rigidity vs. Flexibility in First Amendment Establishment Clause Jurisprudence: In a 1985 speech before the Brookings Institute, Judge Bork spoke out in support of "a relaxation of current rigidly secularist doctrine" in First Amendment jurisprudence. Agudath Israel agrees that such a relaxation would be a most welcome development.

The specific case that prompted Judge Bork's negative assessment of the Supreme Court's performance in this area was Aguilar v. Felton, decided in 1985, in which a 5-4 majority of the Court struck down a 20-year old New York City program that enabled needy nonpublic school students to benefit from on-premises delivery of the federal "Chapter 1" remedial education program. The Court's rationale, in a nutshell, was that permitting public school personnel to conduct classes on the premises of religiously affiliated schools constituted governmental "establishment of religion," in violation of the First Amendment. Commented Judge Bork: "This case illustrates the power of the three-part test [employed by the Supreme Court in cases alleging religious establishment] to outlaw a program that had not resulted in any establishment of religion but seems entirely worthy."

If Judge Bork's ascension to the Supreme Court will prompt a reevaluation of Felton and similar cases, it will be cause for celebration. As I testified earlier this year before the House Subcommittee on Elementary, Secondary and Vocational Education, the Felton decision has had a devastating impact on needy nonpublic school children across the country. Consider the situation in New York City. Comparing the program in 1985-86 -- the last school year in which nonpublic school children were being serviced on nonpublic school premises -- with

the situation that prevails today in the post-Felton era demonstrates that there is no comparison. In the Hebrew day schools, whose interests Agudath Israel represents, the number of children being serviced is way down. Our figures indicate that approximately 60% of the students serviced in 1985-86 were not serviced in 1986-87.

Lest anyone think that the minority who are being serviced are being serviced well, the fact is that the types of off-premises services that have been arranged for these children have proven far from an overwhelming success. Students who have to put on their coats and boots in the middle of the school day to traipse along to some off-premises site for remedial education suffer displacement, disruption and discomfort -- to say nothing of a special stigma that negates much of the benefit of the Chapter 1 program. Students are not the only ones suffering; many Hebrew day school principals have complained to us about the administrative and logistical problems these off-site arrangements have created. In sum, the children and schools who are receiving off-premises Chapter 1 services have ample reason to rue their "good fortune."

Felton's impact has been felt not only in the nonpublic school sector, which has failed to receive its Chapter 1 due; but even in the public schools, from which vitally important Chapter 1 dollars have been siphoned off to cover some of the administrative expenses incurred in developing costly alternative service-delivery approaches for eligible nonpublic school children. Once again, consider the situation in New York City. The City's Board of Education has leased 70 mobile units to service nonpublic school children, at an annual rental cost of $106,000 per unit, which comes to nearly $7.5 million for the 70. Those costs

were covered this past year by a special New York State allocation but were assumed by the City irrespective of the special allocation. Had the state not come up with the dollars, these administrative costs would have been borne by the Chapter 1 program as a whole, to the detriment of needy children in the public and nonpublic sectors alike.

Moreover, some of the efforts to provide alternative service-delivery methods to nonpublic school Chapter 1 students have engendered considerable inter-community strife and tension. The celebrated fiasco at P.S. 16 in Brooklyn, which pitted needy Chapter 1 eligible hasidic schoolchildren against elements of the local Hispanic and black communities, is still a painful memory. One of Felton's tragic ironies is that it has engendered precisely the types of "political divisiveness along religious lines" that Justice Brennan's majority opinion claimed it was designed to avoid.

These, then, are the problems created by Felton: decreased participation by nonpublic school students in the Chapter 1 program; academically and socially unsatisfactory off-premises alternate service delivery mechanisms for students who do participate; staggering administrative expenses necessary to implement such off-premises services; and heightened inter-community strife and tension. So long as Felton is the law of the land, these problems will not lend themselves to simple resolution -- and needy children will continue to suffer.

Felton is a dramatic illustration of the devastation that can be inflicted by an overzealous judicial reading of the First Amendment's prohibition against establishment of religion. In criticizing this decision and advocating for greater flexibility in the application of the establishment clause, Judge Bork

has articulated a more realistic approach to these sensitive issues of church and state. Agudath Israel would certainly welcome that type of approach on the Supreme Court.

2. "Affirmative Action." In an article published in the July 21, 1978 Wall Street Journal, then-Professor Bork criticized the race-conscious admissions policies endorsed in the seminal Bakke decision as offensive to "both ideas of common justice and the 14th amendment's guarantee of equal protection to persons, not classes."

Judge Bork apparently believes that the constitutional, statutory and common law rights of all Americans should be enforced on an equal basis, without regard to race, color, creed, sex or any other irrelevant characteristic. As I have testified before this Committee on another occasion, Agudath Israel shares this view. Ironically, this appears to be an unpopular stance among many who claim to speak on behalf of some of the very communities that historically have been victims of invidious discrimination.

The controversy over certain forms of "affirmative action" is by no means trivial. It is tied directly to competing viewpoints regarding the proper role of civil rights enforcement in this country. Essentially, the debate is over whether our civil rights laws require equal opportunity or equal results; whether they protect individual rights or create group entitlements; whether they demand color and gender blindness or insist on color and gender consciousness.

These are fundamental questions. Depending on the answers provided, the enduring struggle against discrimination will propel us either down a road leading to a society ordered along racial and sexual lines, where a person's

standing in the eyes of government turns on his or her color or gender; or, alternatively, down the principled path of neutrality, where the right to be free from government imposed discrimination inheres in all Americans.

Jews -- especially Orthodox Jews, whose dress, diet, and strict Sabbath and Holiday observance set them conspicuously apart from the majority and frequently make them easy targets for discrimination -- tend to be particularly sensitive to the evils of quotas. That sensitivity is borne of many years of bitter experience, in this country and abroad.

Quotas against Jews historically have been an outgrowth of the malignant disease of anti-semitism. Jews were denied education and employment opportunities because religious stereotypes replaced merit-based selection criteria. Of course, similar stereotypes have long served to exclude racial minorities and women from equal opportunity.

The debate today over quotas, concededly, is different. Contemporary calls for quotas are motivated not by venal concerns but by noble ones. The results, however, for the Jewish community and ultimately for all of society, are no less pernicious.

Judge Bork would likely approach the issue of race or gender conscious preferences from the perspective that equal opportunity ought not be sacrificed at the altar of equal results. We believe the Supreme Court would benefit from the addition of an articulate spokesman for that view.

3. Social and Moral Issues: Judge Bork has on numerous occasions indicated his disagreement with the trend in Supreme Court jurisprudence to find newly protected spheres of activity on the basis of some unarticulated "penumbral"

right of constitutional privacy. The effect of this trend has been to remove from the arena of democratic debate the question of whether society should use the law to discourage certain types of "private" conduct. Here again, Agudath Israel thinks that our great nation would be even greater if the constitution were not read to protect activities that have a pernicious impact on social and moral values.

Agudath Israel believes that government is not a neutral actor in the field of morality. The law is a teacher. It conveys certain basic societal attitudes. There are a number of fundamental social values the law should be free to encourage -- for when it does not encourage those values, it inevitably undermines them.

Thus, to cite several examples: Agudath Israel generally would support laws that restrict the availability of abortion on demand (so long as they would permit abortion in situations where termination of pregnancy is required by religious law); laws that would promote traditional family values; laws that would limit the use of certain unnatural forms of birth technology; laws that would place some restrictions on the right of "unlimited personal autonomy" in the context of an individual's refusal to undergo certain life-sustaining medical procedures. When the constitution is read to place these types of issues beyond the purview of legislative debate, it promotes the notion that there is no such thing as public morality -- a notion that carries extremely dangerous implications for civilized society.

On the aforementioned issues and a host of others that touch upon fundamental moral concerns, Agudath Israel believes that Judge Bork's vote could lead to positive results for our nation.

Yet another reason we would hesitate to abandon our traditional policy of neutrality on Supreme Court nominations simply because of our expectation that Judge Bork's vote will make us happy more often than not is our recognition that Americans are deeply divided over many of the public policy issues that come before the Supreme Court. Indeed, it is no secret -- and should come as no surprise -- that even within the American Jewish community itself there are profound disagreements as to such questions as the role of religious values in public life, the propriety of race or gender conscious preferences, the state's authority to interfere with a woman's right to terminate her pregnancy at will. The absence of broad public consensus on many of these issues makes it somewhat presumptuous for any individual interest group to attempt to use the forum of a Supreme Court nomination solely to promote its particular policy views.

Finally, and most fundamentally, we believe that a Supreme Court nominee's view on public policy issues is only of secondary importance in considering the merits of the nomination. Assuming a nominee's competence and integrity, the critical inquiry Senators should make in discharging their "advise and consent" responsibility is not whether the nominee is likely to vote yea or nay in any given case, but whether the nominee has a proper appreciation of the judicial function in our constitutional system.

On that inquiry, we submit, Judge Bork stands tall. His judicial record and writings, as well as his testimony last week before the Judiciary Committee, demonstrate his recognition that the immense power of the judiciary is inherently non-democratic -- indeed, often anti-democratic -- and thus best exercised with extreme caution and restraint.

The framers of the constitution created an intricate and carefully calibrated system of government, dividing powers between the executive, legislative and judicial branches. Each of the branches has its own role to play. In our view, the careful allocation of powers among the three branches is what has made the Founding Fathers' experiment such an extraordinary and noble success.

It is said that the judiciary plays a vital role in protecting the minority against the tyranny of the majority. That is certainly true. We readily acknowledge that the Supreme Court has done much to ensure that minority communities across the United States -- like ours -- have the ability to flourish within a pluralistic society.

By the same token, though, tyranny is not within the exclusive domain of the majority. An all-powerful minority is capable of tyranny as well. When the judicial branch of government oversteps its bounds, and usurps the role of legislative bodies by interpreting the constitution or laws in ways that are at variance with the text and intention of the democratically elected representatives of the people, it acts without the benefit of public debate, without the input of public hearings, and without the legitimacy of public support. This is extremely dangerous.

There are occasions, obviously, when elected representatives legislate foolishly, and where a judicial decision striking down such legislation yields a result that -- at least in the short term -- is "good." The damage such a decision does to the long-term interests of our constitutional system, however, is immeasurable. Judge Bork understands that when a non-elected entity, consisting of a small number of appointed individuals, attempts to substitute its

own view of the common weal for that of the people's democratically elected representatives, society is faced with the most dangerous form of tyranny of all.

That is not to say that legislative bodies should have free reign to impose the majority's will upon the minority. Judges -- especially those to whom we accord the title "Justices" -- must be vigilant in safeguarding the fundamental values enshrined in our constitution, even to the point of invalidating laws enacted by democratic majorities. But exercising that responsibility should be done with great caution -- perhaps even trepidation -- lest the line between judiciary and legislature be obliterated entirely.

The community we represent is a minority community. We have had firsthand experience on the front lines in the battles against discrimination and hatred. No one can accuse us of insensitivity to the needs of minority groups in American society. It is precisely because we have been victims of tyranny that we have learned that a robust democracy practiced to its fullest is ultimately the most effective means of protecting minority rights. Our review of Judge Bork's record and testimony persuades us that he too knows that lesson well.

Agudath Israel of America supports the nomination of Judge Robert Bork to the United States Supreme Court.

THE WHITE HOUSE

WASHINGTON

September 30, 1987

MEMORANDUM FOR SENIOR ADMINISTRATION OFFICIALS

FROM: THOMAS C. GRISCOM

SUBJECT: Judge Robert H. Bork

As the confirmation hearings conclude, we enter a new phase of the debate about Judge Bork. During the next several weeks each of you has an important role to play in building support for this nomination.

Attached are materials that should be of assistance to you in framing your prepared remarks and answers to press questions. I ask that in the weeks ahead each of you notify in advance the White House Office of Public Affairs (456-7170) and the White House Office of Media Relations (456-7730) of any domestic travel plans. Those offices will provide you with up-to-date guidance and schedule interviews with local reporters as appropriate.

The President has seen statements many of you have made in support of Judge Bork. Your continued participation is essential.

September 30, 1987

KEY POINTS FOR THE WEEKS AHEAD

- Support for Judge Bork is a test of support for President Reagan.

- The American people have consistently stated they believe the President should appoint judges who will be tough on crime. President Reagan has done this. This in part explains why law enforcement groups favor Judge Bork, and the American Civil Liberties Union opposes him.

- Judge Bork enjoys support from across the political spectrum. His supporters include liberals and conservatives, Democrats and Republicans.

- The same cannot be said about opposition to Judge Bork, which comes primarily from the special interests -- individuals and groups who have long demonstrated they are outside the American political mainstream.

- These opponents have grown increasingly shrill in their attacks on Judge Bork. Many have resorted to distortions and misstatements in their attempts to undermine Judge Bork's impressive record. These tactics make the choice between the special interests and the American people's interest.

- Judge Bork is superbly qualified to be the next Supreme Court Justice. He has been forthcoming with the Senate and with the American people. He believes that a judge should interpret the law, not make the law.

JUDGE ROBERT H. BORK

THE PRESIDENT'S NOMINEE TO THE SUPREME COURT

Overview

- On July 1, the President nominated Judge Robert Bork to replace retiring Justice Lewis Powell on the Supreme Court. Judge Bork has served with great distinction on the U.S. Court of Appeals for the District of Columbia since 1982, when the Senate unanimously confirmed his appointment.

- Judge Bork is superbly well qualified to join the Supreme Court. The American Bar Association gave him their highest possible rating in 1981 -- "Exceptionally Well Qualified." Observers from across the political spectrum agree he is an outstanding intellectual, an impressive legal scholar and a premier Constitutional authority.

- Judge Bork is a mainstream jurist. He has been in the majority in 94 percent of the cases he has heard. Furthermore, none of his opinions has ever been reversed by the Supreme Court.

- The American people demand an effective, efficient government and they deserve prompt action on this nomination. Unwarranted delays in hearings and confirmation proceedings do a grave disservice to the Court and the Nation. The Supreme Court should have its full nine-member complement when it begins its October term.

- Ideology should have no role in the Senate's decision. The issue is whether the judges and the courts are called upon by the Constitution to interpret the laws passed by the Congress and the states -- the "judicial restraint view" -- or whether judges and the courts should write orders and opinions which are, in effect, new laws -- the "activist" view.

- Judge Bork believes that the Constitution requires law writing be left to legislative bodies. It is the role of the judiciary, in contrast, to interpret the laws which are enacted.

- Judge Bork deserves a fair hearing, and the Senate should ensure that he receives one.

JUDGE BORK IS SUPERBLY QUALIFIED

- Judge Robert Bork is superbly well qualified to serve on the United States Supreme Court. His legal career to date has been impressive. Taken individually, his achievements in private practice, education, the executive branch and the judiciary would have been the high point of a brilliant career; he managed all of them.

- In more than 100 opinions from the D.C. Circuit, no majority opinion written by Judge Bork has been overturned by the Supreme Court.

- Moreover, the Supreme Court adopted the reasoning of several of his dissents when it reversed opinions with which he had disagreed.

- Highlights of Judge Bork's legal career:

  -- Professor at Yale Law School for 15 years; holder of two endowed chairs. One of the Nation's foremost authorities on antitrust law and constitutional law. Author of dozens of scholarly works, including The Antitrust Paradox, a leading work on antitrust law.

  -- Phi Beta Kappa; honors graduate of the University of Chicago Law School and managing editor of its law review.

  -- An experienced practitioner and partner at Kirkland & Ellis.

  -- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.

  -- Unanimously confirmed by the Senate for the D.C. Circuit in 1982, after receiving the ABA's highest rating -- "Exceptionally Well Qualified" -- given to only a handful of judicial nominees each year.

  Mr. Bork...is a legal scholar of distinction and principle. . . . Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.

  --- Editorial
  New York Times, 1981

JUDGE BORK AND CRIMINAL JUSTICE

- Judge Robert H. Bork, the President's nominee for the Supreme Court, has demonstrated a clear understanding of the problems facing today's law enforcement professionals.

- President Reagan has described Judge Bork as a "tough, clear-eyed" jurist whose goal is "to assure real justice for all citizens, not to foster never-ending sparring matches between lawyers."

- "It's time we reassert the fundamental principle that the purpose of criminal justice is to find the truth -- not coddle criminals," President Reagan has said. "The constitutional rights of the accused must be protected, but so must the rights of law-abiding citizens."

- Nearly one-third of the Supreme Court's time is taken up with matters of criminal justice, and yet there has been little focus in the current debate about Judge Bork's views in this area.

- Judge Bork's nomination presents a crucial opportunity to continue our progress in the war against crime.

Record as Solicitor General

- From 1973 to 1977, Judge Bork served as the Solicitor General of the United States, the federal government's chief spokesman and litigator before the Supreme Court.

- Solicitor General Bork advanced commonsense readings of the Constitution that would help -- not hinder -- the search for truth in criminal trials.

- As Solicitor General, Judge Bork argued for a broad view of consent as a valid basis for a police search, and that the Exclusionary Rule should not apply where police officers reasonably believed they had consent (U.S. v. Matlock, 1974).

- In U.S. v. Edwards (1974), Judge Bork argued that the Fourth Amendment did not necessitate a warrant to search an individual who is already lawfully in custody.

- And in U.S. v. Watson (1976), Solicitor General Bork successfully argued that the Fourth Amendment's warrant requirement does not require police officers to obtain a warrant to make an arrest in a public place, so long as they have probable cause that the suspect has committed, or is committing an offense.

- Solicitor General Bork argued and won the major death penalty cases of the 1970s. In the 1976 case of Gregg v. Georgia, Bork argued in a "friend-of-the-court" brief that the death penalty was not a violation of the Eighth Amendment's prohibition of cruel and unusual punishments. The Supreme Court agreed, in a decision supported by Justice Lewis Powell.

- It is worth noting that those who employ the "balance" argument against Bork rarely mention the margin by which the death penalty has been held constitutional in recent years. Last term, for example, the constitutionality of capital punishment in cases of especially brutal murders was reaffirmed by a single vote -- that of Justice Powell, whose seat Judge Bork would fill.

As a Federal Judge

- As a member of the most important federal appeals court in the Nation since 1982, Judge Bork has built a strong record on criminal justice issues.

- For example, Judge Bork's opinion in U.S. v. James (1985), upholding a conviction for narcotics possession, held that the federal "knock and announce" statute allows the police to enter and prevent destruction of evidence in situations where the accused is well aware of the purpose of the police visit.

- In another decision, Judge Bork affirmed a conviction for possession of a controlled substance and held that the government had properly refused in a criminal trial to reveal the location of an undercover police surveillance post (U.S. v. Harley, 1982).

- While Judge Bork has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to escape justice, he has not hesitated to overturn convictions where constitutional or evidentiary conclusions compelled such a result.

Judge Bork Endorsed by Law Enforcement Groups

o Groups representing over 350,000 law enforcement professionals have endorsed Judge Robert H. Bork's nomination for the Supreme Court, including:

-- National District Attorneys Association;

-- International Association of Chiefs of Police;

-- National Sheriffs' Association;

-- National Association of Police Ogranizations;

-- Major City Chiefs association;

-- National Troopers Coalition;

-- International Narcotics Enforcement Officers Association; and

-- The Fraternal Order of Police.

It is in the best interests of the citizens of the United States and all law enforcement officers that Judge Bork be confirmed to the Supreme Court.

--- Fraternal Order of Police Resolution

BORK ON CIVIL RIGHTS

- In his arguments before the Supreme Court as Solicitor General, and as a member of the Court of Appeals, Bork has never advocated or rendered a judicial decision that was less sympathetic to minority or female plaintiffs than the position eventually taken by the Supreme Court or by Justice Powell. (This does not include cases challenging the constitutionality or permissibility of federal statutes or policies, where the Solicitor General is obliged to advocate the interests of the United States as a defendant.)

- In addition, in a significant number of cases, Bork has advocated a broader interpretation of civil rights laws than either Justice Powell or the Supreme Court was willing to accept.

Record as Solicitor General

- As Solicitor General, Robert Bork was responsible for the government arguing on behalf of civil rights in some of the most far-reaching civil rights cases in the Nation's history, sometimes arguing more expansive interpretations of the law than those ultimately accepted by the Court.

- Among Bork's most important arguments to advance civil rights:

  -- Bork urged a broad interpretation of the Voting Rights Act to strike down an electoral plan he believed would dilute black voting strength. The Court disagreed 5-3 (Beer v. United States).

  -- The Court agreed with Bork that race-conscious redistricting of voting lines to enhance black voting strength was constitutionally permissible (United Jewish Organization v. Casey).

  -- Bork argued in an amicus brief that discrimination on the basis of pregnancy was illegal sex discrimination. Six justices, including Justice Powell, rejected this argument. Congress later changed the law to reflect Bork's view (General Electric Co. v. Gilbert).

  -- Bork argued that even a wholly race-neutral seniority system violated Title VII if it perpetuated the effects of prior discrimination. The Supreme Court, including Justice Powell, ruled against Bork's argument (Teamsters v. United States).

-- Following Bork's argument, the Court ruled that civil rights laws applied to racially discriminatory private contracts (Runyon v. McCrary).

On the Court of Appeals

o As a member of the United States Court of Appeals since 1982, Judge Bork consistently upheld the rights of civil rights plaintiffs who had been victims of race and sex discrimination, frequently reversing lower courts to do so. For example:

-- Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act (County Council of Sumter County, South Carolina v. United States). He later held that the county had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

-- Bork voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system (Ososky v. Wick).

-- Bork reversed a district court's decision to dismiss a claim of racial discrimination against the U.S. Navy (Emory v. Secretary of the Navy). The district court had held that the Navy's promotion decisions were immune from judicial review. In rejecting the district court's theory, Bork held:

> "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is the role precisely of the courts to determine whether those rights have been violated."

Quotas in College Admissions

o While a law professor, Bork wrote an Op-Ed piece for the Wall Street Journal in 1979 in which he criticized the Bakke decision. Since then, however, the Supreme Court has issued many other decisions affecting this issue and Judge Bork has never indicated or suggested that he believes this line of cases should be overruled.

Public Accommodations

- In 1963, Bork wrote an article in the New Republic criticizing a proposal to outlaw discrimination in public accommodations such as restaurants and hotels. (This proposal eventually became part of the Civil Rights Act.) He claimed at the time that there was a significant distinction between discrimination imposed by law and discrimination practiced by private individuals.

- This 25-year-old article cannot fairly be used to criticize Bork's nomination. At his confirmation hearings for the position of Solicitor General, Bork repudiated the article:

> "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."
> --- Robert Bork, 1973

- His article, as does his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination," Bork said, "there need be no argument."

- The article, well known at the time of his confirmation hearings in 1982, was not even raised during his unanimous Senate confirmation to the D.C. Circuit.

JUDGE BORK AND CIVIL RIGHTS

"If I were a black man and knew my record as Solicitor General and a judge, I would not be concerned, because my civil rights record is a good one."
--- Judge Robert Bork
testimony, 9/16/87

"Segregation is not only unlawful, but immoral."
--- Judge Robert Bork
testimony, 9/16/87

- Judge Robert H. Bork, the President's nominee for the Supreme Court, will enforce the letter and spirit of America's civil rights laws.

Record as Solicitor General

- From 1973 to 1977, Judge Bork served as the Solicitor General of the United States, the federal government's chief spokesman in the Supreme Court. In this post, he presented the government's arguments before the Supreme Court in some of the most far-reaching civil rights cases in our history.

- The Solicitor General is ordinarily required to represent the federal government as a defendant when a federal law or policy is challenged. In these cases, defense of the government's position is the norm.

- Excluding these cases, the Supreme Court decided 19 substantive civil rights cases during Bork's tenure as Solicitor General. In these 19 cases, he had the option to argue the position indicated by his interpretation of the law. Solicitor General Bork sided with minority or female plaintiffs in 17 of those 19 cases.

- In the two cases in which Judge Bork argued a different opinion than that urged by the plaintiffs, a majority of the Court -- including Justices Harry Blackmun and Potter Stewart -- agreed with Bork. (Justice Lewis Powell supported Bork's position in one of the two cases and did not participate in the other.)

Record as a Federal Judge

- As a member of the most important appeals court in the country, Judge Bork has joined in or authored opinions that establish, for example:

  -- That Federal courts can review personnel decisions of the U.S. Armed Forces for unconstitutional discrimination, despite claims of exclusive authority by the executive branch;

  -- That female flight attendants must not be paid less than male pursers to do essentially the same job; and

  -- That the State Department's foreign service -- our government's diplomatic representatives abroad -- are subject to the Equal Pay Act.

- In all but 4 civil rights cases Judge Bork has heard as a federal judge, he has sided with the minority or female plaintiff raising a substantive legal claim of race or sex-based discrimination. In each of the 4 remaining cases, Judge Bork was joined by liberal members of the Appeals Court.

Selected Issues

- Poll taxes. Much has been made of Judge Bork's disagreement with the Supreme Court's decision in Harper v. Virginia Board of Education which struck down the use of poll taxes in all circumstances. In fact, the case had nothing whatsoever to do with racially discriminatory poll taxes. Judge Bork has consistently stated he believes poll taxes (and any other form of voter qualification) are unconstitutional if levied in a racially discriminatory manner.

- Literacy tests. Judge Bork has consistently affirmed the right of Congress to strike down literacy tests where there is a history of discriminatory use. His position on this issue is indistinguishable from Lewis Powell's.

  Judge Bork has criticized a Supreme Court decision that struck down a state's literacy requirements when there was no evidence to suggest discriminatory use or intent. In this decision, the Court departed from long-established precedent and conferred upon Congress the power to define the 14th Amendment. It was this unconstitutional abdication of judicial power to the legislature -- not its effect on literacy requirements -- that troubled Judge Bork.

- One man, one vote. Like Justices Potter Stewart, John Harlan, and Felix Frankfurter, and many prominent legal scholars, Bork criticized the rigid mathematical requirements set out in the Warren Court's "one-man-one-vote" decisions. However, Bork believes the Supreme Court can properly act to remedy any malapportionment that systematically frustrates the will of the majority.

  There is considerable evidence in Bork's public career to demonstrate his support for voting rights. In the mid-1970s, as a court-appointed referee, Judge Bork redrew Connecticut's state legislative districts. Bork's plan was so fair, in fact, that Connecticut Republicans were furious with him.

# # #

CHATTANOOGA NEWS-FREE PRESS
September 14, 1987

Vicious Smear Of Judge Bork

A man who is surely one of our country's most able judges, a man of clearly proved qualifications, is under smear attack for one reason: He is a conservative who has been nominated by President Ronald Reagan to become a member of the Supreme Court of the United States. He is Judge Robert H. Bork of the U.S. Court of Appeals.

You heard no disparaging word about Judge Bork until he received the nomination that was an honor to him and offered hope for improvement in the nation's highest court.

As a member of the sensitive Court of Appeals based in the District of Columbia, Judge Bork has written 106 decisions and joined in 395 others without having a single one of the 401 reversed by the Supreme Court. It's an amazing record. It should indicate that Judge Bork has been a very sound judge.

There was every reason for him to be. He is a brilliant man. He is a legal scholar. He is a former professor of law at Yale University. He served previously as solicitor general of the United States. On two occasions — before he became solicitor general and before he became a Court of Appeals judge — he was subjected to searching investigation and then gained overwhelming approval by the Senate.

With such a sound record as this, why is Judge Bork under attack today?

There is only one reason.

He believes strongly in upholding the Constitution of the United States as it is written and meaning only what it says.

That should be the highest qualification of all. But liberals and a variety of radical pressure groups do not want a sound justice added to the Supreme Court. They want someone who is a radical doctrinaire who will usurp power not belonging to the court under the Constitution. They want to get a justice who will help legislate a left-wing agenda that cannot be gotten through Congress and the president. Or failing that, they want to prevent the confirmation of a new Supreme Court justice who might swing the court away from liberal activism.

That Judge Bork has aroused the ire of such people is another recommendation for him.

Liberal presidents nominate liberals to be Supreme Court justices, and have a right to do so. Conservative presidents have an equal right to nominate conservative judges for the Supreme Court, and President Reagan has done so. There being no just reason for rejection of Judge Bork, he should be promptly confirmed.

Liberal Sen. Joseph Biden, D-Del., chairman of the Senate Judiciary Committee that must examine Judge Bork, first spoke favorably of Judge Bork's qualifications. But now running for president and appealing to radical pressure groups, Sen. Biden has indicated opposition to Judge Bork and imposed unconscionable delay in beginning hearings. He thus provided extra time, the longest for any Supreme Court nomination, for opponents to marshal their smear campaign and try to erect roadblocks.

And now, this week, Judge Bork's nomination must run the gauntlet of radical opposition. The nature of his critics indicates his great qualifications.

This will be a hard fight. The final vote in the Senate will be close. Judge Bork deserves to win. If he does, justice will triumph. He he does not, justice will have suffered a serious blow that should be of concern to every thoughtful American.

Biden's Spite

THE WALL STREET JOURNAL

THURSDAY, SEPTEMBER 24, 1987

Joseph Biden threw in the towel yesterday on his presidential race, having to admit plagiarism and lying on his presidential resume. He pledges to devote all his energies to the Supreme Court fight. But his admissions raise the question: Just who is Joe Biden to harangue Robert Bork?

For that matter, who is Teddy Kennedy? We're sure that TV viewers across the land need no reminder that his most extensive legal experience centers on the law of inquest. When Yale law professor Burke Marshall testifed against Judge Bork, though, viewers might have forgotten that he was the lawyer Senator Kennedy's staff called the night of Chappaquidick. When they listen to Senator Howard Metzenbaum's questioning, viewers might need to be reminded that he had to return a $250,000 finder's fee for a couple of phone calls putting together a hotel deal in Washington. When Pat Leahy casts stones, they might need to be reminded that he recently had to leave the Intelligence Committee for leaking classified national security documents.

We resurrect this dirt because there is no other way to put into perspective the spectacle unfolding before the nation's eyes: A spiteful and hypocritical demagoging of one of the handful of most distinguished Supreme Court nominees of the century. There is no other way to respond to, say, Senator Leahy badgering Judge Bork for failing to do pro bono legal work even though he had time to earn large consulting fees during two of the years he taught at Yale. Judge Bork tearfully said there was a special reason for this, but that he didn't want to go into it. Senator Gordon Humphrey set the record straight, explaining that the outside fees went to pay the huge medical bills from Prof. Bork's first wife's long losing fight against cancer. Senator Humphrey also noted that Judge Bork's time as a Marine, professor, solicitor general and judge came to 28 years in public service when he could have been making a fortune in law.

"I have watched these processes since I was a student in law school and I don't think there has ever been one with more hype and more disinformation than what I have observed in recent days," an outraged former Chief Justice Warren Burger testified yesterday. "If Judge Bork is not in the mainstream then neither am I."

Under Senator Biden's chairmanship, the spite extends not only to the witness but also to his many distinguished supporters. Our hats go off to William Saxbe, who walked out of the hearings on Monday after being one of four former attorneys general kept waiting for more than six hours so anti-Bork witnesses William Coleman, Barbara Jordan, Andy Young and Mr. Marshall would carry the hearings beyond the deadline for the evening news shows. By the time William French Smith and Edward Levi were called to support the nominee, they were already late for a plane.

Tuesday's star witness was Harvard's Laurence Tribe, a "consultant" to Senator Biden's pre-hearing report against Judge Bork. Mr. Tribe got three hours to warn of "chaos" on the court if Judge Bork is confirmed. Mr. Tribe claimed that Judge Bork would be the first justice to believe that legal rights must be found in the Constitution. University of Chicago law professor Michael McConnell was aghast, saying Mr. Tribe's claim was "obviously untrue." After this, nine chiefs of law enforcement agencies supporting Judge Bork were rushed through. Lloyd Cutler, the liberal Democrat who bravely supports Judge Bork, was punished with a long wait before being allowed to testify.

Throughout all of this runs the blatant distortion of Judge Bork's views. He spent five days giving his views in unprecedented detail, parsing statutes and footnotes to give the nation a civics lesson in the proper, limited role for judges. Oblivious to this, Senators Biden and Kennedy repeatedly accused him of favoring poll taxes, literacy tests and police searching bedrooms for contraceptives. Judge Bork replied that it is "a regular form of rhetoric to say that if you would say a statute is *not* unconstitutional, that must be because you like the statute." He said, "The question is never whether you like the statute, the question is, is it in fact contrary to the principles of the Constitution?" This is the essence of the Bork philosophy, which his critics can answer only with venom.

We're sure, especially after listening to Senator Biden's unctuous withdrawal speech yesterday, that the Republic will not soon see the end of the poison. The Bork nomination provided the senator an excuse; he could profess to withdraw not because his own low character became evident to all, but for the higher purpose of dragging into the mud a nominee whose integrity and eminence is unchallenged. His meaning was clear: Having destroyed himself in his presidential bid, he would make his mark defeating Judge Bork. If all else fails, no doubt he will act out his spite by leading a filibuster to keep the Senate from voting its will.

Lloyd N. Cutler

Judge Bork: Well Within the Mainstream

WASHINGTON POST
September 16 1987

The book against Robert Bork is that he is "outside the mainstream" of contemporary judicial philosophy. To locate the "mainstream" for us, the bookmakers cite such recent and current paragons as Justices Hugo Black, John Harlan, Potter Stewart, Byron White, Lewis Powell and John Paul Stevens. They are portrayed as conservative moderates, in contrast to Bork the ideologue of the extreme right.

But there is something wrong with this picture. It is at odds with the recorded views of these distinguished justices themselves.

Let's start with Justice Stevens. He stated publicly this summer what he had already expressed privately at the request of the American Bar Association's Judicial Selection Committee, namely, that he welcomes Judge Bork's nomination. Stevens went on to say, after quoting from one of Bork's opinions, that Bork's judicial philosophy "is consistent with the philosophy you will find in opinions by Justice Stewart and Justice Powell and some of the things that I have written." This was hardly an off-the-cuff remark. During Stevens' years on the court he has reviewed many Bork opinions and heard him argue many government cases as solicitor general. It cannot be squared with the extravagant characterizations of Bork as a throwback to the era of Simon Legree and Dred Scott.

There is strong judicial evidence to support Stevens' view. Consider this list of the moderate justices, so rightly admired by Bork's present opponents, who dissented from the very Supreme Court opinions that Bork is now being attacked, for having criticized in his days as a law professor. For the most part, Bork's criticisms support what these moderate justices said in their dissents.

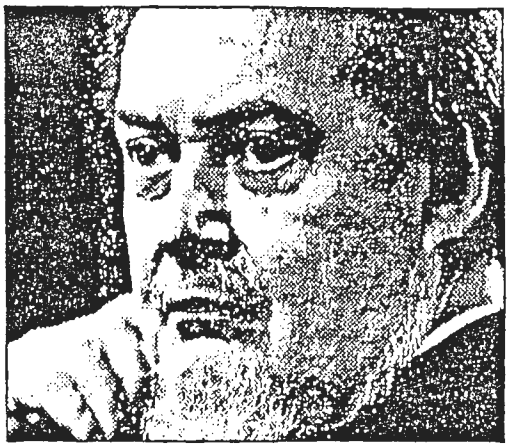
"His views were and are widely shared by justices and academics who are in the moderate center."

In *Harper v. Virginia,* the poll tax case, the dissenters included Black, Harlan and Stewart.

In *Griswold v. Connecticut,* the contraceptive right-of-privacy case, the dissenters included Black and Stewart.

In *Roe v. Wade,* which expanded the *Griswold* precedent to cover some abortions, the dissenters included White. Stewart, who wrote a concurring opinion in *Roe,* said he joined the majority only because he bowed to the majority precedent set over his dissent in *Griswold* seven years earlier.

In *Katzenbach v. Morgan,* the Puerto Rico voting rights case, the dissenters included Harlan and Stewart. Powell, who was not appointed until several years later, criticized the *Morgan* majority's rationale in *City of Rome v. United States.*



BY JAMES K.W. ATHERTON — THE WASHINGTON POST

In *Reynolds v. Sims,* the one-man, one-vote apportionment case, the dissenters included Black and Stewart.

In *Regents v. Bakke,* the university racial quota case, the four justices who read Title VI of the Civil Rights Act to exclude race as an admissions factor included Stevens and Stewart. Four years earlier, Justice William O. Douglas (who retired before *Bakke*) had expressed the identical view in *Defunis v. Odegaard.* Two years later, Stewart reiterated the same position in *Fullilove v. Klutnick.*

In *Reitnam v. Mulkey,* the state action case invalidating a provision of the California Constitution guaranteeing the freedom to sell property, the dissenters included Black, Harlan and Stewart.

In *Allen v. Wright,* the Supreme Court, with Powell and White concurring, cited Judge Bork's currently criticized dissent on standing to sue in *Vander Jagt v. O'Neill.* As for Bork's criticisms of the rationale of the unanimous 1942 Supreme Court opinion in *Shelley v. Kraemer,* striking down state court enforcement of private racial covenants, his view is similar to that expressed by Prof. Archibald Cox, Prof. Laurence Tribe and many other scholars nowhere near the extreme right.

There are a few instances, of course, where Bork's academic critiques of Supreme Court opinions were not joined either by moderate dissenting justices or by his academic colleagues. But as to most of the holdings he has criticized, his views were and are widely shared by justices and academics who are in the moderate center of the judicial spectrum, not the extreme right.

Judge Bork's views about these cases cannot reasonably be classed as outside the mainstream by the same opponents who put these moderate justices inside the mainstream. While Judge Bork is by no means the mirror image of these distinguished justices (who are by no means the mirror image of one another), neither is he their exact opposite. Whether or not one agrees with his or their views on particular cases, they are all well within the mainstream.

The writer, a Washington attorney, was White House counsel under President Carter.

ARIZONA REPUBLIC, September 13, 1987

Baker: A Vital Role To Play In War On Crime

BY HOWARD H. BAKER JR.

WASHINGTON — When President Reagan leaves office 16 months from now, he will leave behind a legacy of federal judges committed to winning the war on crime. The judges appointed by the president during his tenure have already made a difference. A recent study showed that the president's district court appointees were far less lenient toward criminal defendants than were judges appointed by former President Carter. Over the past seven years, in fact, federal criminal sentences have increased 30 percent overall.

The progress we have made in reducing crime must not be undone. In this regard, it is well to remember the critical role the Supreme Court plays in the administration of criminal justice at both the federal and state levels. Nearly one-third of all cases decided by the Supreme Court are criminal cases. This fact is often overlooked, yet it presents a compelling reason why Judge Robert H. Bork, the president's nominee for the court, should be confirmed.

"When it comes to crime and the safety of our citizens," Reagan said recently, "it is so important for our courts to take a tough, clear-eyed look at the Constitution's purpose to 'establish justice and ensure domestic tranquility.' " And Bork would be such a justice. Throughout his public career, he has expressed a keen understanding of the problems facing law enforcement professionals. He has consistently advanced common-sense readings of the Constitution that would help — not hinder — the search for truth in criminal trials.

From 1973 to 1977, Bork served as solicitor general, the Justice Department's chief litigator in all cases before the Supreme Court. During his tenure as solicitor general, he argued for a broad view of "consent" as a basis for a police search. In *US. vs. Edwards* (1974), Bork argued that the Fourth Amendment did not necessitate a warrant to search an individual who is already lawfully in custody. And in another case he successfully argued that the police were not required to obtain a warrant to make an arrest in a public place, if they have probable cause to believe that the suspect has committed or is committing a crime.

As solicitor general, Bork also argued and won the landmark case of *Gregg vs. Georgia*, in which the Supreme Court upheld the constitutionality of a state death penalty statute, thereby permitting the issue of capital punishment to be decided by the American people through their elected representatives. This case is especially important because the court's decision, following Bork's argument, stems directly from the Constitution. As he noted, the Constitution is not silent on the

"Nearly one-third of all cases decided by the Supreme Court are criminal cases. This fact is often overlooked, yet it presents a compelling reason why Judge Robert H. Bork, the president's nominee for the court, should be confirmed."

death penalty: in fact, it explicitly refers to capital punishment four different times.

Strict Adherence To Constitution

This capital punishment case is especially relevant to the debate over Bork's nomination because it illustrates his belief that the Constitution is not a blank slate upon which may be inscribed the personal preferences of any individual judge. The Constitution has meaning, he believes, which judges are bound to follow. As he has put it, "The judge who looks outside the Constitution looks inside himself and nowhere else." And in criminal justice, as in all areas of jurisprudence, Bork is guided by a principled interpretation of the Constitution and the law.

As a member of the U.S. Court of Appeals since 1982, Bork has continued to oppose expansive interpretations of court-created procedural rules that would enable criminals to escape justice. But the constitutional rights of the accused must be protected, and Bork has ruled in favor of defendants when the law requires it. In *U.S. vs. Brown* (1987), for example, he joined in a panel decision overturning the convictions of members of the "Black Hebrews" sect, on the ground that the trial court erred in dismissing a certain juror — thereby violating the defendants' constitutional right to a unanimous jury.

Bork will be a tough Supreme Court justice, yet he will be fair. His record demonstrates that he will rule as the law requires him to. He will rule in favor of law enforcement when the law requires; but he will not hesitate to overturn convictions where the Constitution compels such a result.

Impressed by Bork's impressive record and his principled approach to all areas of the law, groups representing nearly 350,000 law enforcement professionals have endorsed his nomination. The National District Attorneys Association, the Fraternal Order of Police, the International Association of Chiefs of Police, the National Sheriffs Association, the National Troopers Coalition, the International Narcotics Enforcement Officers Association and other law enforcement groups agree that Bork's outstanding overall record merits swift confirmation for the nation's highest court.

The assessments of the police officers in the streets have been seconded by Bork's colleagues in the legal community. Former Chief Justice Warren Burger has praised Bork as the most qualified nominee in 50 years. Justice John Paul Stevens has hailed Bork as "very well qualified and a very welcome addition to the court." The American Bar Association, for the second time in five years, has given Bork its highest recommendation.

By selecting Bork, the president has found an outstanding replacement for retiring Justice Lewis Powell. The Supreme Court needs a full complement of nine justices when it reconvenes the first Monday in October. The Senate should act without additional delay to ensure that the ninth justice is Robert H. Bork.

DETROIT NEWS
September 14, 1987

Hysteria Surrounds Bork Nomination

Thomas Sowell

Look for a lot of hysteria to be whipped up as the nomination of Judge Robert H. Bork to the U.S. Supreme Court comes before the Senate for confirmation. This hysteria has nothing to do with Judge Bork's qualifications. It has been many years since a man of such commanding intellectual and legal qualifications has been nominated to the Supreme Court. Bork will undoubtedly leave his mark on American legal history — if the politicians don't sabotage him first.

To understand why the politicians and the organized special interests are so afraid of this man, you have to go back to what has been happening in the American legal system over the past 30 years. Many of the drastic social policy changes of the past generation — legalizing abortion, banning prayer in school, creating sweeping new "rights" for criminals, the imposition of job quotas, etc. — were never voted by any Congress. They were imposed by judges.

Whatever the merits or demerits of these policies, they were never products of the democratic process. Nor were they ever written into the Constitution. Only by judicial make-believe (lying, if you prefer plain English) were these called "constitutional rights."

ORGANIZED SPECIAL interests who got what they wanted didn't worry themselves about where these policies came from. Pro-abortion groups, racial lobbies and numerous other special-interest organizations took what they got and looked forward to more.

> Opposition arose against this judicial adventurism.

Ordinarily, you might expect Congress to resent and resist the courts' taking over their job of creating laws and policies. That is the whole point of the separation of powers. But the liberals in Congress knew that there was no way they could dare to vote for the kind of extremist liberal policies that unelected judges were imposing.

Liberal politicians therefore joined the chorus cheering for judges who imposed adventurous social policies — policies almost invariably opposed by the general public. Courts became the favorite way of doing an end-run around the democratic process and imposing the ideas of the anointed.

Over the years, two kinds of opposition arose against this judicial adventurism — opposition to the particular policies and opposition to the whole idea that judges should be creating "rights" out of thin air to suit their own political ideology. The most dramatic recent example of this revulsion against power-grabbing judges was California voters' 1986 rejection of Rose Bird and other members of the state Supreme Court who had dreamed up a long series of phony reasons why death penalties could never be carried out.

FEDERAL JUDGES, of course, are not elected. They are appointed for life. They are therefore the prime hope of liberals to continue promoting liberal policies, even when the voters are sick of them.

How does Judge Bork fit into all this? During a long and distinguished career as a law professor and as an appellate judge, Bork has steadfastly argued that the judge's role is to enforce the laws passed by others — not to make up his own laws, policies and "rights." If Bork gets his way on the Supreme Court, those liberals in Congress who believe in abortion, busing and other unpopular policies will have to stand up and vote for them, instead of having judges do their dirty work for them.

Naturally, during Bork's confirmation hearings no one is going to admit that the real issue is how to keep on circumventing the democratic process and depriving the voting public of the right to control its own destiny. Instead, the liberal politicians will pick over every word that Bork has ever spoken to find something that can be lifted out of context to smear him.

Meanwhile, special-interest organizations have already begun a media campaign to depict Bork as a monster. Before the hearings are all over, Bork may even get stern moral lectures from Ted Kennedy, the hero of Chappaquiddick.

The purely political nature of the opposition to Judge Bork has been made embarrassingly clear by the inconsistent statements of Sen. Joseph Biden, chairman of the Senate Judiciary Committee, which will hold hearings on the nomination. Last year Biden said that he would have to vote for Bork if he were nominated to the Supreme Court, even though special interests would be angered. This year, after Bork was in fact nominated and the special interests put the heat on Biden, the senator reversed himself and now says he will vote against Bork.

This is the man who will be in charge of the hearings. Even some members of his own party are embarrassed that his verdict was announced before the hearings began.

But, however phony the issues raised and however farcical the posturing of politicians during these hearings, what is at stake is deadly serious for the future of this country. They are deciding whether you are to live under laws of your own choosing or continue to be used as a guinea pig by the social experimenters. A letter to your senators can let them know how you feel about it.

NEW YORK TIMES
September 27, 1987

That Was the Real Bork Who Testified

By Joseph Goldstein

NEW HAVEN

Who is the real Robert H. Bork? This is the question "all of us are asking," Senator Edward M. Kennedy said after listening to 27 hours of Judge Bork's testimony. I believe I know the answer.

I know Judge Bork well. I have been a member of the Yale Law School faculty for more than 31 years, and was a colleague of his during during his entire tenure at Yale. I served with him on faculty committees and audited sessions of the seminar he offered with Alexander M. Bickel.

During the last 10 years I have devoted most of my time to teaching constitutional law. I have been a registered Democrat for all of my voting life and, for many years, I have supported the work of the American Civil Liberties Union, the N.A.A.C.P. and the Planned Parenthood Association.

Joseph Goldstein is professor of law at the Yale Law School.

I take Senator Kennedy's question to mean that he and other Senators who publicly committed themselves in advance of the hearing are prepared to change their minds if they learn they have wrongly assessed the nominee.

In essence, the Senator is asking these questions:

"Is the real Robert Bork the person I have described as racist, sexist and an opponent of individual liberty and equal justice, who will disregard Supreme Court precedent, roll back the clock and uproot decades of settled law in order to write his own ideology into law?"

Or, "Is the real Robert Bork the person whose testimony before the committee and whose record as Solicitor General and as court of appeals judge demonstrates that he is sensitive to the rights of minorities and women, understands that every person is entitled to the equal protection of the law, recognizes the importance of precedent, even if developed in a manner contrary to his judicial philosophy, and strongly believes there is no place for a personal political or social agenda in the way Justices must carry out their work?"

The real Robert Bork is the latter. Any U-turns have not been his — but will have to be made by supporters and detractors who brought to the hearing prematurely drawn portraits of how Judge Bork will behave if he becomes Justice Bork.

Judge Bork was not disingenuous in his testimony. He was for the first time in his career publicly addressing as more than hypothetical the question, "How will I carry out the work of a Justice of the Court that has the final say?" This is also the question the Senate Judiciary Committee is asking of him and that he has forthrightly sought to answer.

Judge Bork has faithfully performed each of his previous jobs in accord with its distinctive purpose. He has explained how he intends to carry out the special responsibilities of a Justice of the Supreme Court. He recognizes, and he asks the Senate to recognize, the differences between the classroom and the courtroom; between article, speech, brief and judicial decision; between teacher, Solicitor General and court of appeals judge. What he may have said or done in carrying out his duties in other settings must not be confused with what he will say or do as Justice Bork.

Judge Bork appreciates the awesome burden that comes with being a Justice on the highest court. Thus, he can say with conviction that he will go to the Court with open eyes and ears, eager "to read the briefs and discuss things with counsel and discuss things with my colleagues." He speaks with a commitment to the rule of the Constitution, to constructions of it by the Court and to the rule of law.

That is his agenda — and it is the only proper agenda for a Justice of the Supreme Court. The political and social agendas of his supporters or detractors must not be tagged to him. Some of these seem not to have understood that Judge Bork has been trying to respond to questions he has never before addressed publicly — how he will go about his work as a Justice of the Court. Judge Bork will not forget, as Justice John Marshall stressed in McCulloch v. Maryland, that his task will be to expand a written Constitution — "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

He will be what he is — a thoughtful, decent human being who understands and will take seriously the duties of his office.

U.S. Department of Justice
Washington, D.C. 20530

A RESPONSE TO THE CRITICS

OF

JUDGE ROBERT H. BORK

Office of Public Affairs
September 12, 1987

EXECUTIVE SUMMARY

A detailed analysis of recent critical reports on Judge Bork shows a pattern of distortion and error that cause them seriously and systematically to misstate his record and views.

- o The statistical reports exclude his unanimous decisions -- more than 85% of his cases -- concentrating on a small, unrepresentative sample.

- o The reports ignore that Judge Bork has been in the majority in 95% of the cases he has heard.

- o The reports dismiss Judge Bork's perfect record of nonreversal in the Supreme Court: not one of the more than 400 opinions that he has authored or joined has ever been reversed. They claim it is "uninformative" because the Supreme Court has never reviewed an opinion he has written. But:

  - -- The Supreme Court has reviewed opinions he has joined and and has always affirmed them;

  - -- The Supreme Court has reviewed six of the 20 cases in which Judge Bork filed dissenting opinions, and agreed with Judge Bork's dissent in all six.

  - -- The Court's repeated rejection of petitions to review Judge Bork's other opinions shows his consistent excellence, since the Court grants review principally to correct error.

- o The reports employ an arbitrary and misleading methodology, use evidence in a highly selective manner, and tend distressingly toward inflammatory mischaracterization. The reports persistently and flagrantly distort the small sample of cases they address:

  - -- Public Citizen describes one case in which Judge Bork ruled for a labor union and against a federal agency as "pro-business," because unions are "in the business" of representing workers.

  - -- Judge Bork's important and expansive decisions upholding First Amendment freedom of the press cases are caricatured as "pro-business" because newspapers, radio stations, and other media are "businesses."

  - -- Public Citizen describes a particular vote by Judge Bork in one section of its report as "pro-business" because the plaintiff's home was a ranch, but in another section as evidence of Judge Bork's slamming the courthouse door on the fingers of the same plaintiff's assertion of individual rights.

-- The reports twice characterize as "pro-business," cases in which Judge Bork was merely voting to shift costs among businesses.

-- The reports criticize him as being motivated by his own political agenda. Yet Judge Bork neutrally applies the law. For example, in a significant First Amendment opinion, Judge Bork voted against a conservative political action group.

o Failing to heed Democratic appointee Judge Harry Edwards' admonition that "efforts to tag judges as 'liberal' or 'conservative' are fundamentally misguided," the reports insist on pinning labels on him. These reports also ignore the fact that Judge Bork has agreed with each of his Democratic appointed colleagues on the court between 75% and 91% of the time.

o Even the skewed and truncated sample of nonunanimous cases show that Judge Bork is a fair, mainstream judge:

-- Judge Bork was in the majority in fully 70% of those cases (39 of 56 decisions);

-- Judge Bork voted with a Democratic appointee in 47% of these cases (26 of 56 cases); and if one excludes his 14 panel dissents, he voted with a Democratic appointee 62% of the time;

-- In en banc cases, Judge Bork voted with Democratic appointees 92% of the time.

o Analysis of Judge Bork's entire record presents a more accurate picture:

-- The AFL-CIO finds Judge Bork "opposed to the claims of . . . labor," but ignores the fact that in 46 cases involving labor and workplace safety in which the outcome was unambiguous he voted for the union or employee 74% of the time (34 cases);

-- The ACLU says that if Bork is confirmed, "civil liberties in this country would be radically altered," but fails to note that in 7 of 8 civil rights cases Judge Bork voted for the claimant -- 88% of the time;

-- The Biden report refers to Bork's "extremely restrictive" view of the First Amendment, but doesn't mention that in the 14 First Amendment cases with unambiguous outcomes, Judge Bork voted for the party seeking First Amendment protection 43% of the time (6 cases).

- Justice Scalia, unanimously confirmed last year by the Senate and widely acknowledged to be "in the mainstream of our society" (Senator Kennedy), voted with Judge Bork 98% of the time in the 86 panels on which they sat together on the appeals court.

  -- On one of the two occasions on which they disagreed, Judge Bork voted to afford greater constitutional protection than Judge Scalia; that case was Ollman v. Evans, the celebrated First Amendment case, in which Judge Scalia criticized Judge Bork for his liberal reading of the Constitution.

  -- Many of the Bork opinions most criticized in the reports as "extreme," like Vinson v. Taylor, Cyanamid Co., and Dronenburg v. Zech, were joined in full by Judge Scalia.

  -- Not one of the studies explains why Judge Scalia is in the mainstream, but Judge Bork is not.

- Even Justice Powell's distinguished and fair-minded record on the Supreme Court can be manipulated and misrepresented as "extreme" by the defective statistical analysis employed by the studies:

  -- Using the spurious techniques employed by the reports, (1) over his career Justice Powell is seen to have voted against civil rights plaintiffs in 79% of all non-unanimous decisions decided while he was a member of the Court, and (2) in favor of business interests in 78% of nonunanimous cases during the past five years.

  -- This shallow statistical treatment of Justice Powell's record obviously obscures and distorts his evenhanded administration of justice over a long and distinguished career. But precisely the same is true of the distorted and misleading treatment by the studies of Judge Bork's record.

- The Biden report erroneously claims that the Supreme Court disagreed with Judge Bork in Vinson v. Taylor, a sexual harassment case brought under Title VII.

  -- The Supreme Court in fact agreed with Judge Bork that evidence could be introduced to determine if the advance was "welcome."

  -- The Supreme Court also agreed with Judge Bork that the employer was not strictly liable for the conduct of its employees.

  -- Judge Bork assumed, and did not question, the applicability of Title VII suits to claims for sexual harassment.

- The Biden report claims that Judge Bork's opinion in Dronenburg represents "a novel approach to lower court constitutional adjudication."

  -- The report neglects to mention that the Supreme Court, in an opinion joined by Justice Powell, subsequently agreed with Judge Bork's conclusion that homosexual conduct is not constitutionally protected under a substantive due process rationale. See Bowers v. Hardwick.

- Justice Powell has stated the fundamental principle that judges hear no case that exceed "the proper -- and properly limited -- role of the courts in a democratic society." Yet the reports attack Judge Bork for denying access to parties who ask the courts to violate this constitutional limit on the judicial power.

- Judge Bork respects the law as a neutral set of rules, impartially applied to all people. In contrast, the special interests evaluate judges precisely the way that they rank politicians -- according to the number of times they deliver results desired by a particular special interest to further a political goal.

- Judge Bork's jurisprudence demonstrate his fairmindedness, commitment to the principle of judicial restraint, and respect for established legal precedent. The portrait of Judge Bork that emerges is that of an exceptionally able jurist in the mainstream of American legal tradition.

SUMMARY OF SIGNIFICANT STATISTICS

(1.) Of over four hundred cases in which he has been in the majority, Judge Bork has never been reversed by the Supreme Court. Thus in every such case, the Supreme Court has been content to leave intact Judge Bork's position as the law of the D.C. Circuit.

(2.) Judge Bork has been in the majority in over 95% of the 416 cases in which he has participated.

(3.) Of Judge Bork's 20 dissenting opinions, the Supreme Court has reviewed six and has adopted Judge Bork's position in each. The D.C. Circuit sitting en banc has reviewed one case in which he dissented, and the full court adopted his position.

(4.) In all but 14 of the 416 cases in which Judge Bork participated, or 96% of the time, at least one other appellate judge agreed with him.

(5.) Judge Bork has agreed with his liberal colleagues on the D.C. Circuit in a high percentage of cases.

(a.)	Ruth Bader Ginsburg	91%;	(b.)	Abner J. Mikva	82%;
(c.)	Patricia M. Wald	76%;	(d.)	Harry T. Edwards	80%;
(e.)	J. Skelly Wright	75%			

(6.) Justice Powell has agreed with the position taken by Judge Bork in nine out of ten, or 90%, of the instances in which opinions written or joined by Judge Bork have been reviewed by the Supreme Court.

(7.) The 56 nonunanimous cases examined in the Public Citizen Study amount to only 14% of the total cases in which he has participated. Of those 56 cases, Judge Bork was in the majority 70% of the time and he voted with a Democratic appointee 47% of the time. Excluding his panel dissents, Judge Bork voted with a Democratic appointee 62% of the time in nonunanimous cases.

(8.) Applying Public Citizen's spurious methodology, Judge Bork took the "liberal" position over 40% of the time in nonunanimous cases.

(9.) Judge Bork voted for the civil rights claimant in 7 of 8 substantive civil rights cases, or 88% of the time.

(10.) Considering all Judge Bork's cases using Public Citizen's techniques, Judge Bork voted in favor of unions or employees 74% of the time in 46 cases in which there was a clear outcome for either the union/employee or the employer. Judge Bork voted in favor of the first amendment claimant 43% of the time in the 14 cases decided unambiguously for or against a first amendment claim.

(11.) Under Public Citizen's spurious methodology, Justice Powell's fine record can be manipulated to show that, in the past five Supreme Court Terms, he voted for the business interest fully 78% of the time in nonunanimous cases, and that, during his entire career, he voted against the civil rights claimant 79% of the time in nonunanimous cases.

B/H To appear in Commentary

To the Editor of Commentary:

Walter Berns provides some of the strongest reasons for believing that those who most fervently oppose the confirmation of Robert Bork to the Supreme Court will be some of the greatest beneficiaries of his confirmation. He shows how our Constitutional guarantees of liberty and the protection of rights rest on the fundamental political and moral principle of self-government. In action, this principle has contributed to a moderating of the extremism that is so dangerous to the rights of the various "minorities" that comprise the so-called "civil rights community."

The principle of self-government means that laws are based on the consent of the governed. We consent to the laws that are promulgated because they are created by people who re-present our interests. Our legislators, our elected officials, are supposed to reflect our collective interests.

Legislative politics, the politics of interests, require that coalitions be created around common interests. In this kind of politics, not all interests will be satisfied at all times. There are always winners and losers. Those who lose face the challenge of finding ways of becoming part of the next legislative majority. But people with one similar interest may not share other interests. In fact, they can differ widely on other issues. This means that coalitions force people with interests to be moderate in their demands. If they are not moderate, their coalitions could collapse and they wouldn't be able to get what they're interested in. The advantage of legislative politics is that all parties with interests are

forced to tolerate differences.

But since legislatures make laws by majority votes, there is always a danger that minorities will need protection against those majorities that want to tyrannize them. To prevent majority tyranny, the Constitution provides a separation of powers. Among other things, it provides The People with certain rights that cannot be denied in the name of any collective interests. One of the roles of the courts is to protect the rights of minorities.

The politics of rights, however, creates disunity rather than unity. Experience with the debates over rights shows that issues can easily be framed in the most extreme terms. Often groups demanding that their rights be protected tend to be unwilling to share those rights with others. Differences of opinion tend to be intrepreted as signs of evil intention. They then treat Constitutional protection questions as matters of war, producing an atmosphere of intolerance, not based on differing interests, but on the fear of losing at any time, over any issue. Losers begin to believe that what may have been their interests are now their rights, and that in losing , their rights have been violated. Once people interpret every loss as a threat to their rights, they begin to lose their sense of "belonging" to the government to which they have historically consented. Such people are more likely to consider lawless responses because they believe they have no recourse to the legislatures to protect their losses.

This applies to everyone. When a "minority" perpetually

fears majorities and constantly complains its rights are being violated, it isolates itself even further from the majority. It sooner or later begins to hate majorities and acts as though all its interests are rights that need protection against the principles of majority rule and consent of all the governed. Similarly, the majority begins to despise those whose rights were protected by the Courts. They will be inclined to consider disobedience, leaving minorities more vulnerable than they were in the past.

These circumstances create an unhealthy polarity. Every loser, in every political competition thinks the sky is falling and immediately accuses the winners of having evil intentions lurking underneath their concrete interests. The conflicts created over such issues as abortion and affirmative action affirm this.

They also affirm the premise that no matter what the Court does, ultimately, a successful political effort on behalf of rights requires the consent of the losers. No matter what people claim "ought" to happen, the fact is that the key to democracy is self-government and the key to this is consent of the governed.

This is why those who have opposed Judge Bork's nomination to the Court by portraying him as an extremist have totally misstated the case. Bork's concern with limiting the degree to which the Supreme Court should solve all problems indicates his sensitivity to the difference between the politics of interest and the politics of rights. His concern that the Supreme Court not confuse the two signals his sensitivity to two issues: 1) that at bottom a successful democracy rests on the consent of the

governed; and 2) when issues produce such intense conflicts, the process of developing consent rests on forcing competing parties with competing interests to turn to legislative politics and to promoting consent. This is the only true method of producing toleration.

There may be reasons for disagreeing with the specific positions of Judge Bork has taken in the past. But when his more extreme "moralistic" critics object to him because his "ideology" would be harmful to "minorities" they are in error. By confusing the politics of interest with the politics of rights, they fail to recognize that his positions reflect a set of principles aiming to promote greater toleration and moderation.

For showing us the way to this kind of political thinking about the Bork nomination, Walter Berns ought to be thanked, even by those who are most likely to judge him in the same negative light as they view Judge Bork.

Martin J. Plax
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Government by Lawyers & Judges

Walter Berns

WE CALL it judicial review, and while the point has frequently been disputed, sometimes fiercely, there is really no question but that the Framers intended federal judges to exercise the power to invalidate laws that they consider unconstitutional.

To be sure, under the provisions of Article III, the judges are not directly authorized to declare laws unconstitutional. The only power given them is to decide certain designated "cases" and "controversies." The power to declare laws unconstitutional derives from the necessity to decide a case or controversy in which one party is relying on the law and the other party is relying on the Constitution, and where the law and the constitutional provision are in conflict. This was said by Chief Justice John Marshall in 1803 in the celebrated case of *Marbury* v. *Madison* and has been settled doctrine ever since.

It could hardly be otherwise. It would certainly violate the most fundamental of republican principles were federal judges given political power, in the sense of deciding on the wisdom or desirability of proposed legislation. Federal judges serve for life. Because they never have to submit themselves to public scrutiny, they have no right to decide public or political questions. And they were given this independence from the voters precisely because they were expected to make decisions respecting private rights. The judges were expected to stay out of the one area, and the public was expected to stay out of the other.

Marshall drew this distinction in his opinion for the Court in the *Marbury* case. "The province of the court," he said, "is, solely, to decide on the rights of individuals. . . . Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

Federal judges were denied the power to decide questions about the public good because, under the terms of republican government, such questions can be decided legitimately only with the consent of the governed. The public and their representatives were denied the power to decide questions about private rights because such questions can be decided legitimately only by some impartial body. When deciding questions about the public good it is relevant—indeed, in most cases it is essential—to exercise discretion and to weigh consequences; but discretion and the weighing of consequences may not properly enter into decisions respecting private rights. A court will have to decide whether the right exists—in the Constitution or in a statute—and, if so, what it is; but at that point inquiry ceases. What a person does with the right—for example, how he worships, what he says, or how he uses the money he earns or inherits—is none of the public's business (unless, of course, what he does is "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community," to quote *Federalist 10*).

In short, the public good describes that area where the judges may not intrude, the area where what is done may be done *only* with the consent of the governed. Private rights describe that area where the public may not intrude, the area where what is done may be done *without* the consent of the governed.

The situation is confused today because the judges, and more precisely the Supreme Court Justices, have taken upon themselves the authority to *create* rights, and with every right created they have narrowed the range of the public or political area. The constitutional right to privacy, for example, was not written into the Constitution; it was created by being discovered in 1965 in "penumbras, formed by emanations" from the First, Third, Fourth, Fifth, and Ninth Amendments. Eight years later, although not sure whether this "fundamental" right was located in the Ninth or the Fourteenth Amendment, the Court said it was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." By creating rights—and, moreover, by acting as if this were a traditional prerogative of the judiciary—the Supreme Court

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narrowed the range of public questions over which the public might exercise its authority.

It did more than that. It began to treat the Constitution in the way the currently most fashionable literary critics treat a work of literature, as a text to be "deconstructed" and then, in a way, "reconstructed," but not interpreted because it has no "determinate" or "decidable" meaning; or better, as a text that can be interpreted but not misinterpreted. In this view, the job of the Supreme Court is not to expound the meaning of the Constitution but to provide it with meaning. Its highest function, so the argument goes, is a political function: to keep the Constitution up to date or in tune with the times. "The genius of the Constitution," says Justice William J. Brennan, Jr., "rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs"; and the Court is in charge of this adaptation.

Although Brennan, like many others, wrongly claims that this notion can be traced back to John Marshall, it is in fact the Fourteenth Amendment, adopted immediately after the Civil War, that has given rise to the extraordinary growth of judicial power he is at such pains to justify.

"WHO," James Madison had asked at the beginning, "are to be the electors of the federal representatives?" And he answered:

> Not the rich, more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

What Madison did not say in 1788 was, "not the white, more than the black," a deliberate omission the Fourteenth Amendment attempted to repair about seventy-five years later. Section 1 of the Fourteenth Amendment reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Now, clearly, blacks were eligible to become part of the people of the United States—that is, citizens; and those born in the United States were declared to be citizens. As such, they were entitled to be represented in the lawmaking process where their rights would be protected. There they might be outvoted, but that was a prospect shared by everybody. At least now, having been officially incorporated into the body politic, they would be governed not, as in the past, as slaves or subjects, but with their consent.

That was the promise, and on the face of the amendment it appeared to be a serious promise: section 2 stipulated that any state denying the right to vote and be represented was to be deprived of its congressional representation just so much. The sanction was clear and, apparently, mandatory. Congress by law would simply reduce the number of members to which the offending state would otherwise be entitled; or perhaps the House of Representatives would simply refuse to seat a proportion of the state's representatives, equal to the proportion of persons disenfranchised. As it turned out, however, although many a state denied or abridged the right, no serious effort was ever made in Congress to impose the sanction.

Nor did Congress make a serious effort to exercise the other major power granted it by the Fourteenth Amendment (in section 5), that of enumerating the privileges or immunities belonging to national citizenship. Although it has been a subject of considerable dispute, the power to provide that enumeration or specification seems to be crystal-clear in the language of the amendment, especially when read in the light cast by one of its related provisions.

Article IV of the unamended Constitution speaks of the privileges and immunities of *state* citizenship, and the language carries the presumption that enumeration of these privileges and immunities would be provided by the respective states. Would it not follow, having now for the first time prescribed the conditions of *national* citizenship, and having elevated national citizenship over that of the states, and having then, in the next sentence, spoken of the privileges or immunities of this national citizenship, that the Constitution intended to give Congress the authority to provide their substance?

Specifically, if New York may, by law or constitutional provision, declare that one of the privileges of New York citizenship is to sue in its courts, would it not seem an appropriate exercise of the power granted in section 5 of the Fourteenth Amendment for Congress, by law and in the course of time, to declare that one of the privileges of national citizenship is to attend a nonsegregated public school? (A privilege that may not be abridged by "any law" of any state?) Yet Congress never made a serious effort to provide that enumeration, and this, combined with a ridiculous decision of the Supreme Court in 1873, had the effect of rendering the clause a practical nullity.

These failures on the part of Congress—indeed, on the part of the political branches of the government—had consequences that extended into our own time and will extend beyond it.

Although now formally a part of the people of the United States, black Americans remained politically isolated, unrepresented in the constitutional majorities that governed the country. This meant that their rights would not be secured by the institutions of representative government, and the problem this presented festered until, almost of necessity and certainly not unjustly, the Supreme Court intervened. Unfortunately, the instruments available to and employed by the Court were not well adapted to the use to which they were put, and using them caused them to be deformed. More than that, their use contributed to the deformation of the Constitution.

READ literally, the due-process clause of the Fourteenth Amendment imposes restrictions not on state legislatures or on the kind of laws they may enact but on state courts. It forbids those courts "to deprive any person of life, liberty, or property, without due process of law"; which is to say, when imposing punishments or penalties on *any* person, the state courts are now under a national constitutional obligation to follow the accepted processes of law.

The equal-protection clause of the Fourteenth Amendment, again when read literally, also says something of real importance to the state executives. Governors and sheriffs and the rest were now, for the first time, under a *national* constitutional obligation to provide the protection of the laws to any person within the jurisdiction of their states or counties, whether resident or visitor, citizen or alien, black or white, adult or child, male or female.

Only by distortion of their terms could either of these clauses be made a measure of the constitutionality of state *legislation*. But in the absence of congressional definitions of privileges or immunities, making them so is what the Supreme Court began to do toward the end of the 19th century.

One of the first so-called substantive due-process cases illustrates the point. Louisiana had enacted a statute forbidding the purchase of insurance from out-of-state companies and had sought to recover a sum of $3,000 from a New Orleans cotton merchant who had insured a shipment with a New York company. Whatever might be said against the substance of this statute, Louisiana had not violated legal *process* by adopting or enforcing it. The Supreme Court nevertheless declared it to be a violation of due process. It said the liberty protected by the clause included the liberty to enter into contracts and then proceeded to say, in effect, that the states were forbidden to deprive any person of this liberty no matter what process, due or undue, it followed.

In this and a host of similar cases, the judges were exercising a power that had been explicitly denied them in the Constitutional Convention of 1787: they were passing judgment on "the mere policy of public measures." Of necessity, and no doubt out of conviction as well, they cast these judgments in constitutional terms, but the time came when the people (led by the politicians) were not persuaded of the connection. By 1937, having long been "employed in the task of remonstrating agst. popular measures of the Legislature"—the words are those of Luther Martin in the 1787 convention—the Justices were on the verge of losing the confidence of the people, and it was on this confidence that their power ultimately depended. Hence, when President Franklin Roosevelt threatened to undermine their authority by "packing" the Court with new members of his choosing, the old members gracefully withdrew from the field. From that time forward, public economic policy would be made by officials constitutionally and nominally qualified to make it; at a minimum, it would henceforth be made with the consent of the governed.

What became true of economic policy, however, would prove not to be true of social policy; and with respect to racial policy especially, it would prove to be emphatically untrue.

THE "switch in time saved nine" in 1937 and also preserved the principle of judicial independence, but it could not by itself repair the damage done over the years to the Constitution. Thanks in large part to the Court's Fourteenth Amendment jurisprudence, the Constitution came to be seen not as the embodiment of fundamental and clearly articulated principles of government but as a collection of hopelessly vague and essentially meaningless words and phrases inviting judicial construction. In other words, it came to be understood as no more than an invitation to these insulated judges to make constitutional law and, when necessary, remake it.

For a time after 1937, the Court was disposed to decline that invitation and to defer to the judgments made in the political branches of government, both state and national. To a far greater extent than in the immediate past, statutes were to be presumed constitutional or, at least, not unconstitutional; this was stated as a principle in a famous footnote in an opinion handed down in a 1938 case. In the same footnote, however, the Court indicated that it would not necessarily be governed by that principle in all categories of cases. One of the exceptions, it said, might be cases involving statutes directed at "racial minorities."

What followed is too familiar to require elaboration: housing in formerly restricted neighborhoods was made available to black buyers; public schools and then public facilities generally were desegregated; and, to mention merely one more example, the various barriers to black voting were

removed. All this and more was accomplished by the courts directly or, in some cases, as the result of their initiative, and it was done because the states, governed by white majorities, had failed to act and because Congress had done nothing to cause them to act.

But, again, the instrument employed was ill-adapted to the task. The Court's treatment of racially restrictive real-estate covenants is one example. The covenants—private agreements entered into with a view to excluding (in this case) blacks from certain neighborhoods—were discriminatory but not, the Court acknowledged, illegal. Nevertheless, unlike other legal contracts, these were held to be unenforceable: "In granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws." But this was by no means evident, and nothing the Court said made it evident. The blacks were surely the victims of *private* discrimination, but if anyone was being denied the equal protection of the laws it was the white covenantors. They had entered into legal contracts, reprehensible but legal nevertheless, and they were denied access to the courts, where, alone, those contracts might be enforced. In short, they were denied the right to claim the protection of the laws, which Chief Justice Marshall said many years ago is "the very essence of civil liberty."

No more persuasive was the Court's rationale in *Brown* v. *Board of Education*, the public-school desegregation case. The black schoolchildren were surely being denied a privilege that ought to have been enjoyed by all citizens, but as even the most venerable opponents of racial discrimination have admitted, the Court did not make it evident that they were being denied the equal protection of the laws. The Court might have meant that for a state to separate by race is to treat races differently and therefore—although the conclusion is by no means obvious—unequally. Yet what it said was that "separate educational facilities are inherently unequal," a logical absurdity that evoked no comment from persons blandly contented with the result but hoots of derision from logicians and hostile white Southerners. Nothing in the Court's opinion could persuade them that the decision was rooted in, or issued from, the Constitution.

To prove its nonconstitutional origins, the state of Virginia sponsored a project culminating in the publication of a sizable volume of over 700 pages containing the legislative history and the debates in the post-Civil War Congress on the Thirteenth, Fourteenth, and Fifteenth Amendments. Careful study of these materials would enable "judges, lawyers, teachers, and students" to determine for themselves whether decisions such as that in *Brown* v. *Board of Education* "comport with the reconstruction amendments as originally understood and intended."

The project was, of course, naive in its conception and barren in its consequences. By this time the prevailing view was that Supreme Court Justices could not be bound by the original understanding of a constitutional provision or by the intent of its Framers, even if that understanding or intent could be unearthed from the rubble of those old words.

The good judge, according to this new view, does not engage in the hopeless and, more to the point, irrelevant task of trying to ascertain the "true" meaning of the equal-protection clause, for example. He does what Justice William O. Douglas was praised for doing: he raises the question of what is good for the country and seeks "to translate his answers . . . into constitutional law." The instruments he employs—the equal-protection clause or whatever—cannot be said to be ill-adapted, not to *this* task; on the contrary, the (presumed) vagueness of those clauses affords him the freedom he requires to do his job, which is to make public policy. "Interpreting those five little words ["equal protection of the laws"] is hardly a question of law in the ordinary sense," said Joseph Rauh, a one-time Supreme Court clerk and long-time Court watcher. "It is a matter of highest public policy based on history, custom, and current public morality."

As those "five little words" had come to be understood, Rauh was surely correct; interpreting them is not a matter of constitutional exposition. Read literally, the clause means that every "person" within the jurisdiction of a state—regardless of race, gender, age, nationality, social status, or whatever—is entitled to the protection of the laws, whatever they are. There is nothing in its language (or, for that matter, in its legislative history) that can serve as a measure of the constitutionality of the laws themselves. To make a decision on this basis is policy-making, and Rauh admits as much when he goes on to say that the "Supreme Court is part of our nation's political process, and the sooner this is accepted as inevitable the better." It has become, against the expressed will of the Framers, a council of revision and, because the Court casts them in constitutional terms, its revisions or policy decisions cannot be overridden or reversed.

In his Pulitzer Prize-winning book on the *Dred Scott* case, Professor Don E. Fehrenbacher writes that, while the decision in that case represented an effort on the part of the Supreme Court to turn back the clock of civilization, "in at least one respect it had a distinctly modern ring." Like its successor today, the *Dred Scott* Court was not content to play the role of constitutional censor of "public policies fashioned by other hands"; it attempted to do what the contemporary Court has succeeded in doing—namely, to become the initiator of social change. "Government by

judiciary," Fehrenbacher writes, "is now, in a sense, democracy's non-democratic alternative to representative government when the latter bogs down in failure or inaction." Not surprisingly, its most avid friends are of the opinion that government by judiciary is not a "non-democratic alternative"—that, in fact, the judiciary is more truly representative than even the Congress and, therefore, that the judges are under no obligation to wait for the other branches of government to "bog down."

Why wait when, according to Harvard law professor Abram Chayes, the judicial process is superior in all respects to the way things are done (or not done) in the legislative and executive branches? Chief among its presumed advantages is that it is governed by lawyers, and lawyers are governed by a "professional ideal of reflective and dispassionate analysis of the problem before [them] and [are] likely to have some experience in putting this ideal into practice."

Not only that, but it is a judge who presides over the process, a judge whose "professional tradition insulates him from narrow political pressures." Which is to say, the judge, unlike members of Congress, is insulated from the voters and, for that reason, is better able to govern. As Chayes would have it, the Framers provided a system of representative government because they failed to see the advantages of government by judiciary—either that, or they thought the lawyers of their day were unprepared to assume the responsibilities of statesmanship. Perhaps they thought them incapable of disinterested actions.

Nothing, of course, could be further from the truth. In theory, the country was indeed founded by self-interested men who acted in order to secure their private rights; in practice, however, these same men pledged "to each other [their] Lives, [their] Fortunes and [their] sacred Honor." In theory, the country was founded by men claiming rights against one another; in fact, they were men closely associated in families, churches, and a host of other private institutions. According to their books, government is created by men who had been living in a state of nature and are seeking to escape its miseries; in fact, the American government was created by men whose characters had been formed under the laws of an older and civilized politics.

Moreover—and it is precisely here that the modern Supreme Court has shown its incapacities for governing—although the Framers (including all the lawyers among them) knew that their principles forbade the use of the laws directly to generate virtuous habits, they did not regard it as improper for the laws—and in practice this meant the laws of the states—to support the private institutions in which those habits had been generated and were to be generated. They apparently took it for granted that states would use the law to support the institution of the family, for example; on at least one occasion even the Supreme Court acknowledged its *political* importance. Here is John Marshall writing for the Court in an 1823 case:

> All know and feel . . . the sacredness of the connection between husband and wife. All know that the sweetness of social intercourse, the harmony of society, the happiness of families, depend on that mutual partiality which they feel, or that delicate forbearance which they manifest towards each other.

No such sentiment, no such appreciation, ever surfaces in a modern family case—not, that is, at the Supreme Court level. With a view to supporting the institution of the family, and in a variety of ways, the states punish and seek to inhibit illegitimacy; but the Court, starting "from the premise that illegitimate children are not 'nonpersons,' " that they are in fact "clearly 'persons' within the meaning of the equal-protection clause of the Fourteenth Amendment," strikes such statutes down one and (almost) all. Only once did the Court, by the narrowest of margins, uphold such a statute—this one prohibiting an illegitimate child from sharing equally with legitimate children in the estate of a father—and here Justice Brennan, speaking for the four dissenters, complained that the majority had acted "to uphold the untenable and discredited moral prejudice of bygone centuries."

Tocqueville, the greatest of democratic educators, could write powerfully of the importance of the woman who, in the family, shapes the morals and manners by which democracy lives, who is allowed to choose her husband and is taught that "the springs of happiness are inside the home," and whose chastity as a young girl is protected not only by religion but by an education that limits her "imagination"; but not a trace of these lessons appears in today's Supreme Court decisions.

The old-fashioned state laws proscribing obscene—to say nothing of pornographic—publications are regarded by the modern Supreme Court as narrow-minded comstockery that, by inhibiting the liberty to "express oneself," are in flat violation of the Fourteenth Amendment. Indeed, Justice Douglas was of the opinion that obscenity was good for us, and quoted a Universalist minister in support of that judgment. One could never suspect from a reading of the Court's opinions in these censorship cases that, as Allan Bloom has written, "during the greater part of recorded history disinterested, that is to say, philosophic, men were of the opinion that republics required the greatest self-imposed restraints whereas tyrannies and other decadent regimes could afford the greatest individual liberties."

Tocqueville again, even more powerfully than

Washington in his farewell address, could argue the importance of religion in a democratic regime. "When any religion has taken deep root in a democracy," he wrote, "be very careful not to shake it, but rather guard it as the most precious heritage from aristocratic times." But such a concern is foreign to the modern Supreme Court. Nominally, at least, it allows statutes supporting religious institutions if their purpose is "secular," but in case after case the Court has managed to find that, whatever the purpose of the statute, its "primary effect" is to aid religion, and that cannot be permitted. Although the Court proceeds in blissful ignorance of the fact, what the First Amendment meant to the men who added it to the Constitution was not at all that government must be neutral between religion and irreligion.

It is not possible to point to a single statement proving that the Framers expected the states to provide the sort of civic or moral education required of citizens in a republican regime, but there is ample evidence that they were aware of the requirement. And it is incontestable that, from the very beginning, the states were aware of it and attempted to meet it, if only by supporting the private institutions whose business it was to provide such an education. The laws providing that support are certain to inhibit somebody's freedom, or somebody's idea of freedom, if only by depriving that somebody of his "right" to attend a public school where teachers are not required to "announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation." And sadly, when these laws are tested under the rubric of the Fourteenth Amendment, the Court tends to expand the rights of republican citizenship but ignore altogether its conditions or preconditions.

Nowhere is this more evident than with the so-called right of self-expression. This new right has nothing to do with representative government in general or with the gaining of consent in particular. By this right one may "express" himself (or his *self*) by wearing obscene jackets in courthouse corridors, uttering the foulest of language in schoolboard meetings or publishing it in student newspapers, hanging the American flag upside down or wearing it on the seat of one's trousers or, under some circumstances, burning it. All forms of political expression, no doubt, but not the sort of *speech* that is calculated to elicit consent; nor, for that matter, is it uttered with that intention. On the contrary, it is a way of expressing contempt: for fellow citizens, for the country ("Amerika"), and for the very idea of representative government. "Those who are 'into' self-expression," as one authority put it recently, "do not care whether they gain a point by persuading a majority."

But to persuade a majority, or demonstrate a willingness to join one, is the constitutionally prescribed way of exercising the most basic of human rights, the right to consent to government, or the right to govern oneself. It is the most basic right because, as we know from the Declaration of Independence, without a government to which we give our consent no rights are secure. By "creating" this new right of self-expression, then, and thereby encouraging persons intent on exercising it to the limit described in these decisions, the Supreme Court has—unwittingly no doubt—contributed to the weakening of that basic right, thus putting at risk the sort of representative and constitutional government that depends on it.

Success in the legislature is measured by the extent to which one's interest is accommodated in the law adopted by the majority, and to achieve that success it is necessary to display a willingness to be accommodating oneself. Immoderate and outrageous demands especially are not likely to be successful, which explains why immoderate politicians are disdainful of legislative assemblies. "Take away that fool's bauble," Oliver Cromwell shouted, the bauble being the mace symbolizing the authority of the House of Commons.

Success in the Courts, however, is measured by having one's interest declared a right, and with the right comes the freedom to be immoderate because—to repeat—the right defines an area where the public may not enter. And the modern Supreme Court has done little to discourage interests that are immoderate to begin with. When the Court looks into those "penumbras, formed by emanations" from a potpourri of constitutional provisions and manages to find a "right" to terminate a pregnancy, it is almost inevitable that it will be asked to look again and see if it cannot come up with a right to engage in consensual sodomy. And had the Court succeeded in finding it—and it recently came within one vote of doing so—it would have inevitably been asked to look one more time and see if it could not find hidden somewhere in those shadows the "fundamental right" to be incestuous. After all, as one law professor said back in 1973, the Constitution protects all fundamental rights, sexual expression is a fundamental right, and sexual intercourse between "blood relatives" is one form of that expression.

But what foundation is there for any of these new "rights"? This nation began by declaring that certain rights—among them the rights to life, liberty, and the pursuit of happiness—are unalienable or natural, and natural because they are grounded in the nature of man. Many an American at the time was familiar with the philosophical works purporting to prove this. Then, because there was a general agreement that these rights were indeed fundamental, we the people were able to institute a government designed to secure

them. In the literal sense of the word, we were able to *found* a government on what was understood to be fundamental. It is not possible to believe that we could have founded a government on the right to terminate a pregnancy or the so-called right to engage in consensual sodomy, even if some judge or some law professor were solemnly to assure us that they were fundamental. Besides, what could possibly be the basis for such an assurance or such a declaration?

Justice Harry A. Blackmun, whose most enduring legacy to the American people will be his opinion in *Roe* v. *Wade*, the leading abortion case, wrote the principal dissent in the sodomy case, *Bowers* v. *Hardwick*. He began by protesting that, contrary to what was said in the majority opinion, the case did not concern a fundamental right to engage in homosexual sodomy but, rather, the fundamental right "to be let alone." But that argument carries no weight whatever. There is, and can be, no general constitutional right to be let alone. Let alone to do what? To worship? Absolutely. To read? Yes. To waste time? Even that. But to rob a bank? To counterfeit money? To make noise? To refuse to be vaccinated? To shoot heroin? To manufacture it? To make child pornography films?

In countless ways the law invades privacy, even (with a warrant) the privacy of the home. So it is not enough to speak abstractly of a right to be let alone, and, implicitly at least, Blackmun acknowledges this in the very next sentence when he says that the Georgia statute at issue "denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity." So the question is, what is the foundation for *this* so-called right? And the answer is, no more than the interest that some persons have in being let alone to engage in that form of sexual activity.

The Court is undoubtedly under pressure from the jurisprudence currently in fashion in the prestigious law schools to take rights seriously. Fair enough. But contrary to the purveyors of this fashion—in the press as well as in the schools—this does not require the Court to grant interests the status of rights, as if by natural right a person consents to government on condition that his interests be satisfied. This is absurd because it is impossible, and it is impossible because not all interests can be satisfied.

For example, it is a fact that the interests of the pro- and anti-abortion groups cannot both be satisfied. Indeed, by making abortion a right, the Court brought into being an organized and frequently violent anti-abortion interest. And that is likely to happen whenever the Court declares an activity to be a fundamental right when it is demonstrably—because it has no basis in nature, in convention, or in contemporary opinion—not a fundamental right. A professor (Ronald Dworkin) who set out to take rights seriously proceeded to find, in a model of government of his own devising, a fundamental right to disobey the law, which, if exercised by a significant number of persons, would return us to the state of nature where we could enjoy that "right" to our hearts' content—to our hearts' content but within the limits of a life that, if Hobbes was correct, will be "solitary, poor, nasty, brutish, and short." And that is the direction in which the Court's decisions have been taking us.

No government, not even the most liberal or generous, can promise to satisfy all wants or interests. What it can fairly promise, if it is properly organized, is security for those rights that are understood to be unalienable or fundamental, which in practice will mean the right to be governed only with one's consent. Under the Constitution's system of representative government, this becomes the right to be part of a governing majority. Such majorities cannot be constructed out of the variety of hostile single-interest groups that have been generated by the Supreme Court's recent holdings under the Fourteenth Amendment, an amendment adopted in order to make one people where there had previously been two.

Quis custodiet ipsos custodes? Who indeed will guard the guardians themselves? The extravagance of the power now claimed by some members of the Court is nowhere better seen than in Justice Brennan's actions in a women's-rights case decided during the period when the so-called Equal Rights Amendment, having been proposed by the required two-thirds vote in each House of Congress, was awaiting ratification by the required three-fourths of the states (a ratification it never received). The issue in the case, *Frontiero* v. *Richardson*, or more precisely, the issue on which the Justices were divided, was whether sex, like race, should be treated as a suspect classification. If so, states would be required to bear a heavier burden when attempting to justify the distinctions drawn in the statute.

> Brennan circulated a draft opinion on the limited grounds, and then he sent around an alternative section that proposed a broad constitutional ban, declaring classification by sex virtually impermissible. He knew that his alternative would have the effect of enacting the Equal Rights Amendment, which had already passed Congress and was pending before the state legislatures. But Brennan was accustomed to having the Court out in front, leading any civil-rights movement.

The authors of this account conclude by quoting Brennan as being of the opinion that there "was no reason to wait several years for the states to ratify the amendment"—no reason other than the fact, which Brennan knew to be a fact, that the Constitution *as then written* would not sup-

port the decision he wanted the Court to render. Unable to persuade Justice Potter Stewart to join the coalition he had put together, Brennan lamented to his law clerks that he had come "within an inch of authoring a landmark ruling that would have made the Equal Rights Amendment unnecessary."

No statement is more revealing of the contemporary liberal's view of the Constitution and the powers of the Court respecting it. It says, in effect, that Brennan and any four of his colleagues are entitled to do in private—in the privacy of the Court's conference room—what may be done in public only by extraordinary majorities of the states and of the House and Senate. It says, in effect, that the Constitution may be amended in two ways, one difficult and the other easy; one public and the other private; one by following the procedures delineated in Article V of the Constitution and the other by vote of William J. Brennan, Jr., joined by four other Supreme Court Justices. Assigned the task of being the "faithful guardians" of the Constitution, these Justices fancy themselves its surrogate parents.

The recently decided Santa Clara County affirmative-action case provides further evidence of Justice Brennan's disdain for constitutional law and, indeed, for the very idea of constitutionalism. In his majority opinion, Brennan converts a federal statute forbidding racial and gender discrimination (the Civil Rights Act of 1964) into one effectively requiring, indeed compelling, such discrimination, and by doing so reminds us of that legendary National League umpire, Bill Klem, who, in response to a batter's protest that the pitch was a ball, outside the strike zone, said, "It ain't nothin' till I call it."

The Santa Clara case establishes these three propositions: (1) some people do not have to obey the law; (2) they do not have to obey it when a Supreme Court majority does not like the law as written; (3) there is nothing in the Constitution preventing Justice Brennan, speaking for that majority, from simply rewriting the law to suit his fancy.

Meanwhile, the rest of us—members of Congress, the President, Admiral John Poindexter, Colonel Oliver North, and plain private citizens —are expected to obey the law as well as the Constitution. Following Brennan's example, however, we can also be expected to want to change this requirement to obey the law when it suits *our* fancy. That we are entitled to do this is the lesson in constitutionalism taught by Justice Brennan.