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ORIGINAL SIN

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Approximately one-third of Robert Bork's new book, *The Tempting of America*,[1] is devoted to attacking "the bloody crossroads" that were his confirmation hearings.[2] A careful reading of the book as a whole, however, serves to vindicate the Senate's action in rejecting Bork for the Supreme Court. As the fullest elaboration of Bork's judicial philosophy to date, *The Tempting of America* shows that Bork lacks most of the attributes essential to a Supreme Court Justice. His positions on most issues are as extremist as his critics have portrayed them. His intellectual abilities are weaker than his opponents suspected. He is an abysmal historian, which—although not ordinarily a cause for concern—is a fatal flaw in a self-professed originalist. Bork has, moreover, no understanding of what Anthony Kronman, following Alexander Bickel, has called the "prudence" required of judges.[3] I will deal with each of these problems in turn.

I.

Bork begins his attack on the confirmation process by quoting Senator Edward Kennedy's initial speech in opposition to his nomination:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim or [sic] government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.[4]

Bork then cries out that "[n]ot one line of that tirade was true."[5] This is a necessary denial; throughout both the confirmation hearings and the book itself, Bork, like his supporters, has tried to portray his positions as mainstream. In fact, every one of Kennedy's charges finds support in *The*

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1 R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

2 *Id.* at 269.

3 Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985).

4 R. BORK, *supra* note 1, at 268 (quoting 133 CONG. REC. S9188-89 (daily ed. July 1, 1987) (statement of Senator Kennedy)).

5 *Id.*

Tempting of America. Kennedy's speech is an accusation of extremism, and it is an accurate portrayal of Robert Bork.

I need not say much about Bork's position on abortion; his opposition to *Roe v. Wade*[6] is well known. Developments since *Webster v. Reproductive Health Services*,[7] moreover, have demonstrated that many state legislatures, given the opportunity, would likely restrict abortions. If Bork had his way and *Roe* were overruled, women in many states, as Senator Kennedy claimed, *would* be "forced into back-alley abortions." Nor is Bork's opposition to *Roe*, as he claims, merely based on constitutional theory: he reveals his underlying moral opposition to abortion by referring to the "unborn child"[8] and by repeatedly labelling the pro-choice position as "pro-abortion."[9] As either a judge or a legislator, Bork would deny women the right to safe, legal abortions. Kennedy's first charge stands.

Perhaps the most controversial accusation in Kennedy's speech was that a Justice Bork would return us to an era of racial segregation. In *The Tempting of America*, Bork virtually admits that his judicial philosophy would *allow* a return to that era by limiting the reach of constitutional prohibitions. Indeed, at least one implication of Bork's constitutional philosophy is that he would *foster* that return by denying Congress the power to prohibit segregation.

Bork's best refutation of this charge is that he supports *Brown v. Board of Education*[10] as a historically tenable interpretation of the fourteenth amendment.[11] He never says, however, that the rationale of *Brown* necessarily supports its extension to contexts outside of education. Bork, moreover, explicitly states that *Bolling v. Sharpe*[12] was incorrectly decided: he labels it "a substantive due process decision in the same vein as

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6 410 U.S. 113 (1973).

7 109 S. Ct. 3040 (1989).

8 R. BORK, *supra* note 1, at 116.

9 *See, e.g., id.* at 3, 115. There is a significant difference between "pro-abortion" and "pro-choice." Those who are "pro-abortion" advocate abortions, while those who are "pro-choice" advocate allowing women to make their own decisions about whether to terminate a pregnancy. The implication that those who support *Roe* view abortion as a positive good—rather than as a lamentable but sometimes necessary private choice—is a manipulative and derogatory tactic used by those who oppose abortion.

10 347 U.S. 483 (1954).

11 His basic argument is that the historical evidence shows that the framers of the amendment intended both to prohibit racial inequality and to allow segregated schools. Because we, unlike the framers, recognize that it is not possible to realize both goals simultaneously, we must choose between conflicting intentions. Bork suggests that the prohibition on racial inequality is the broader of the two intents, and therefore trumps the inconsistent intent. R. BORK, *supra* note 1, at 74-84; *see also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 12-15 (1971) (setting out this argument in greater detail).

12 347 U.S. 497 (1954) (District of Columbia's segregation laws prohibited on fifth amendment grounds; fourteenth amendment applicable only to states).

Dred Scott and *Lochner*."[13] Thus, at least in the District of Columbia, Jim Crow laws would be constitutional.

In a change of position from earlier writings, however, Bork maintains that federal legislation outlawing segregation is constitutional.[14] Thus, he can argue that the constitutionality of segregation is irrelevant, because it is illegal under federal statutes. A careful reading of the constitutional philosophy propounded throughout his book, however, shows that Bork's position on federal laws outlawing segregation is much more equivocal than this simple denial of Senator Kennedy's charge would suggest.

Bork condemns the Supreme Court's post-1937 "permissive attitude"[15] toward congressional power as judicial activism and an abandonment of the tenth amendment and the commerce clause. He argues that congressional power over commerce—on which most federal anti-discrimination statutes are based—is constitutionally limited to regulating "for commercial reasons and not as a means of effecting social or moral regulation."[16] Although Bork never mentions the cases upholding the 1964 Civil Rights Act,[17] he does view the decision in *Wickard v. Filburn*,[18] from which the Civil Rights Act cases naturally flow, as an unwarranted "manifestation of judicial activism."[19] Thus, Bork presumably would oppose the Court's failure to enforce the commerce clause in favor of the obvious "social or moral" regulation effected by the 1964 Civil Rights Act. Due to his philosophy, moreover, Bork would not countenance basing the Civil Rights Act on the fourteenth amendment either; section 5 of that amendment, according to Bork, gives Congress only the power to "provide remedies" for substantive violations, and *not* "the power to change the law's content."[20] Despite Bork's simple statement that the Civil Rights Act is constitutional—a statement directed only at rebutting his earlier position that the Act violates the first amendment—his constitutional jurisprudence leaves Congress with no power to enact such legislation. Kennedy's second charge stands.

Bork does not say much to rebut Kennedy's charges of "rogue police," of midnight raids, that schoolchildren could be forbidden from learning about evolution, and that writers and authors would be censored. He does, however, discuss the incorporation doctrine, by which

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13 R. BORK, *supra* note 1, at 83.

14 *Id.* at 80-81. Bork specifically recants the position he took in a *New Republic* article, in which he argued that the 1964 Civil Rights Act violated the constitutional right of freedom of non-association. *See* Bork, *Civil Rights—A Challenge*, THE NEW REPUBLIC, vol. 149, Aug. 31, 1963, at 21.

15 R. BORK, *supra*, note 1, at 56.

16 *Id.* at 56-57.

17 *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); *see also* Katzenbach v. McClung, 379 U.S. 294 (1964).

18 317 U.S. 111 (1942).

19 R. BORK, *supra* note 1, at 56-57.

20 *Id.* at 91-92.

the protections of the Bill of Rights (including those against unreasonable or warrantless searches, against the establishment of religion, and against infringements on freedom of speech) are made applicable to the states.[21] Without the incorporation doctrine, only federal schools, federal law enforcement officials, and federal censors would be restrained from engaging in the conduct Kennedy deplores.

Although Bork notes that "[t]here is no occasion here to attempt to resolve the controversy" over incorporation,[22] the tenor of his two-page discussion makes clear his opposition to the doctrine. He states, for example, that the doctrine has "enormously expanded the Court's power,"[23] has "created the occasions for some of [the Warren Court's] most controversial rulings,"[24] and "has done much to alter the moral tone of communities across the country."[25] Despite the apparently restrained tone of these individual statements, each carries a wealth of underlying meaning. Throughout the book, Bork lambastes the Warren Court, advocates a less powerful judiciary, and laments the effect that the "ultraliberals"[26] and the "knowledge class"[27] have had on the moral fiber of American communities. His seemingly ambivalent statements about the incorporation doctrine, packed with the force of everything he criticizes about the current judicial system, thus lose any hint of neutrality and become more extreme. Bork also states elsewhere in the book that the incorporation doctrine is a "form[] of substantive due process,"[28] which he spends much of the book criticizing.

Bork, moreover, implicitly rejects incorporation by limiting the due process clause to restricting governmental procedures[29] and by limiting the privileges and immunities clause to the nullity to which *Slaughter-House*[30] reduced it.[31] There is thus no constitutional hook on which to hang incorporation. Bork's meager discussion of religion also buttresses the conclusion that he would apply the establishment clause very narrowly, perhaps so narrowly as to permit states to ban the teaching of evolution. He criticizes the Court's holding in *County of Allegheny v. ACLU*,[32] invalidating the public display of a creche.[33] For him, the

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21 *Id.* at 93-95.

22 *Id.* at 93.

23 *Id.* at 94.

24 *Id.*

25 *Id.* at 95.

26 *See, e.g., id.* at 223 (characterizing previously described theorists of liberal constitutional revisionism as "ultraliberals").

27 *See, e.g., id.* at 8 (describing an "intellectual or knowledge class" whose members "see the Constitution as a weapon in a class struggle about social and political values").

28 *Id.* at 60.

29 *Id.* at 32.

30 Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1872).

31 *See* R. BORK, *supra* note 1, at 37-39.

32 109 S. Ct. 3086 (1989).

33 R. BORK, *supra* note 1, at 128, 247.

Court's attempt to foster religious neutrality is instead the "banish[ment] [of] religious symbolism from our public life,"[34] and part and parcel of "the Court's establishment of secularism as our official creed."[35] In suggesting that he would allow "official expressions of religious morality,"[36] Bork seems to implies that a government decision to prefer a religious explanation of our origins to a secular one—in otherwords, to privilege creationism over evolution—might be legitimate and constitutional.

Finally, Bork's only discussion of freedom of speech indicates that he has changed his position very little since 1971, when he suggested that the first amendment protects only core political speech.[37] He criticizes the Court's invalidation of flag-burning statutes in *Texas v. Johnson*[38] as "left-liberal,"[39] "judicial revisionism,"[40] and the consequence of "decades of left-liberal dominance on the Supreme Court," which has resulted in "moral relativism and untrammeled individualism."[41] (Justices Scalia and Kennedy would doubtless be somewhat surprised at this assessment of their votes in *Johnson*). Bork apparently has little taste for the last three decades of free speech jurisprudence, which have witnessed the expansion of the rights of writers and artists. Senator Kennedy's charges—of censorship and other governmental intrusions on privacy and ideas—stand.

Kennedy's last charge is that Bork would close the courthouse doors to those most in need of judicial protection. The most likely means of doing so is by the use (or abuse) of such doctrines as standing, abstention, or sovereign immunity.[42] A technical discussion of these doctrines is obviously beyond the ken of Bork's projected audience, and it is therefore unsurprising that he does not deal with them. He does, however, discuss footnote four of *Carolene Products*,[43] which serves as a major basis for extending substantive constitutional protections to those most in need of the judiciary's assistance. He labels the *Carolene Products* doctrine "pernicious,"[44] the worst type of substantive due process,[45] and a means of enabling "the Justices [to] read into the Constitution their own subjective sympathies and social preferences."[46] According to Bork, the doctrine

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34 *Id.* at 247.

35 *Id.*

36 *Id.* at 248.

37 Bork, *supra*, note 8, at 20-35.

38 109 S. Ct. 2533 (1989).

39 R. BORK, *supra* note 1, at 127.

40 *Id.* at 128.

41 *Id.* at 247.

42 *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984) (denying standing); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (dismissing claim on grounds of sovereign immunity); Younger v. Harris, 401 U.S. 37 (1971) (requiring lower court to abstain).

43 United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

44 R. BORK, *supra* note 1, at 58.

45 *Id.* at 60-61.

46 *Id.* at 61.

ushered in "a constitutional revolution" that "adumbrated the rise not of the (as-yet-unspecified) minorities, but of elites advocating the causes of minorities."[47] Bork's palpable disdain for the doctrine of discrete and insular minorities goes a long way toward substantiating Kennedy's final charge.

The Tempting of America also offers one further piece of evidence that Bork is a political extremist. Apparently, no United States Supreme Court Justice in history has satisfied his stringent standards for appropriate judicial behavior. It is not surprising that Bork attacks liberal Justices like William O. Douglas and Hugo Black[48] (or, for that matter, Samuel Chase, for his position in *Calder v. Bull*[49]). It is both surprising and indicative of the extremism of Bork's position, however, that he also attacks (as overly activist and liberal) Justices usually thought of as moderate or conservative, including Oliver Wendell Holmes,[50] John Marshall Harlan,[51] Sandra Day O'Connor,[52] and Anthony Kennedy.[53] He "deplore[s]" John Marshall's activism, but excuses it on the ground that Marshall adopted it to strengthen and to preserve the Union.[54] Bork, moreover, accuses both the Burger and Rehnquist Courts of liberal activism, noting that "[t]he moral imperialism of the Supreme Court"[55] did not end with the Warren era:

> The Courts headed by Chief Justice Warren Burger and now by Chief Justice William Rehnquist, while perhaps less relentlessly adventurous than the Warren Court, displayed a strong affinity for legislating policy in the name of the Constitution. As before, departures from the Constitution invariably incorporated part of the modern liberal agenda.[56]

A nominee to the Supreme Court who finds no one before him worthy of emulation is a dangerous extremist.

II.

Although Bork's critics accused him of extremism, they generally conceded that he possessed considerable intellectual ability. The evidence provided by *The Tempting of America* calls that judgment into question. Judging by the arguments he makes in the book, Bork has a knack for political rhetoric, but not much inclination for serious thought. Indeed, I

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47 *Id.*

48 *See, e.g., id.* at 70 (describing the "Black-Douglas wing" of the Court as applying "social preconceptions to the interpretation of statutes as well as to the constitution").

49 3 U.S. (3 Dall.) 386 (1798); *see* R. BORK, *supra* note 1, at 19-20 (criticizing Chase for his willingness "to strike down laws that violated no provision of any constitution").

50 Bork, *supra* note 1, at 45.

51 *Id.* at 231-35.

52 *Id.* at 237.

53 *Id.*

54 *Id.* at 21-28.

55 *Id.* at 101.

56 *Id.*

would have doubts about granting tenure to the author of *The Tempting of America* were it the only evidence of his intellectual and scholarly abilities.

There is much room for debate about theories of judicial review and constitutional interpretation (and indeed there has been perhaps a surfeit of such debate). No single position in this debate can claim intellectual superiority, although some positions are more persuasive than others. Bork's treatment of the thorny intellectual problems presented by judicial review and constitutional interpretation—problems that have plagued judges and scholars since the beginning of the republic—is superficial and simplistic.

He states, for example, that there are only two sides to the interpretation question: "[e]ither the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win."[57] Apparently, Bork has either missed or misunderstood the last decade or so of constitutional scholarship; all sides in this debate now concede that neither half of Bork's dichotomy is a complete picture of judicial interpretation.[58] Bork states that it is his "firm intention to give up reading [the interpretation-debate] literature."[59] He obviously did so years ago.

Bork's simplistic and distorted view of the Constitution is apparently that its words mean what they mean, and no honest interpreter could mistake them. Throughout the book he unquestioningly asserts that the act of interpretation is essentially a mechanical one: "[t]he intended function of the federal courts is to apply the law as it comes to them from the hands of others";[60] "[t]he principles of the actual Constitution make the judge's major moral choices for him";[61] and "[the originalist judge's] first principles are given to him by the document, and he need only reason from these to see that those principles are vindicated in the cases brought before him."[62] No reputable constitutional scholar today—including those who argue strenuously in favor of originalism—would so cavalierly ignore the ambiguities and uncertainty inherent in constitutional language.

Bork's belief that words (and history) can be interpreted in only one way permeates his defense of originalism. He notes that "any theory [of

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57 *Id.* at 2.

58 For summaries of this scholarship indicating that scholars of constitutional law recognize the fallacies in Bork's statements, see, *e.g.*, M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

59 R. BORK, *supra* note 1, at 255.

60 *Id.* at 4.

61 *Id.* at 252.

62 *Id.* at 257.

judicial review] worthy of consideration must both state an acceptable range of judicial results and, in doing that, confine the judge's power over us."[63] In a brief and superficial review of a few of the currently popular theories of judicial review, he concludes that none of those theories satisfies that constraint, because they can all "be made to reach any result."[64] He fails to note, however, what virtually every other scholar in the field recognizes: originalism leaves as much room for interpretive discretion and manipulation as any other theory of judicial review, and thus cannot itself satisfy Bork's requirements for a valid theory of judicial review.

It is, of course, possible to argue that originalism is the best theory of judicial review, despite its inherent flexibility.[65] Bork instead flatly denies that originalism allows for any interpretive flexibility or variation at all. He states baldly but repeatedly that interpreting the Constitution by recourse to the original intent of its framers is value-neutral, eliminates discretion and controversy, and requires a judge only to "find" the meaning of the Constitution's words.[66] Any purported constitutional scholar who maintains that such phrases as "the equal protection of the laws" have a single meaning that can be readily "found" without any value-weighing by the interpreter[67] is disingenuous, naive, or both.

Finally, Bork is oblivious to the nuances of the term "democracy," especially as the term applies in the context of the democratic government established by our Constitution. He assumes without discussion

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63 *Id.* at 141.

64 *Id.* at 214; *see also id.* at 141 ("One of the more entertaining features of the literature is that the revisionists regularly destroy one another's arguments . . . .").

65 *See, e.g.*, Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and a Response*, 82 NW. U.L. REV. 226 (1988); McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.[-]KENT L. REV. 89 (1988) (denying that belief in objective moral reality necessitates open-ended interpretation of the Constitution and advocating a constrained approach to constitutional interpretation under which legislative bodies resolve questions not resolved by the Constitution itself).

66 *See, e.g.*, R. BORK, *supra* note 1, at 10 (the "philosophy of original understanding" is associated with the "idea of political neutrality in judging"); *id.* at 145-46 (asserting that concepts of neutral principles are "a safeguard against political judging"); *id.* at 149-50 (finding the meaning of the Constitution's text is difficult "when dealing with the broadly stated provisions of the Bill of Rights," but is ultimately discernible from "the level of generality [of language] chosen by the ratifiers"); *id.* at 162-63 (discussing Ely's view of interpretivism and asserting that "the text, structure, and history of the Constitution" provide a judge with a "major premise," that the answer to the question of whether a "principle or stated value" enshrined by the ratifiers is threatened by a challenged statute or action constitutes a "minor premise," and that "the conclusion follows"); *id.* at 176 (the "intended meaning" of the Constitution "has an existence independent of anything judges may say"—a meaning that judges "*ought* to utter" and have "a moral duty to pronounce") (emphasis in original); *id.* at 257 (the originalist judge need not face the quandary of deciding when courts are justified "in overriding democratic choices where the Constitution does not speak"—"[h]is first principles are given to him by the document, and he need only reason from these to see that those principles are vindicated in the cases brought before him").

67 *See id.* at 149-50 (the scope of the equal protection clause can be determined from "the level of generality" of the language chosen by the ratifiers).

that "democracy" means pure majoritarianism, limited only by a few specific provisions in the Constitution that should be narrowly interpreted.[68] In fact, as a matter of political theory, "democracy" has a wealth of meanings, not all of which demand such absolute fidelity to majority rule.[69] As a matter of history, moreover, it is far from clear that majoritarianism was the guiding principle animating those who wrote and ratified the Constitution.[70] Thus, Bork's theory of judicial review—which is largely devoted to justifying particular politically biased results—is based on an extremely weak and simplistic understanding of the more basic concepts of interpretation, democracy, and historical scholarship.

III.

Bork's historical scholarship shows perhaps his weakest and most manipulative side. Of course, most lawyers and legal scholars need not be historians. Those who advocate interpreting the Constitution by reference solely to the intent of the founders, however, must be able to do a credible job of discovering that intent.[71] Bork's attempt to do so, most of which is contained in the first chapter of his book, "Creation and Fall," demonstrates either his weakness as a scholar of history or his lack of intellectual integrity in the face of distasteful evidence.

"Creation and Fall"—which is, incidentally, charmingly written—begins, appropriately enough, with a biblical description of *Calder v. Bull*:[72] "[t]he Constitution was barely in place when one Justice of the

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[68] *See, e.g., id.* at 49 ("Being 'at the mercy of legislative majorities' is merely another way of describing the basic American plan: representative democracy."); *id.* at 143 ("only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy" and "is consonant with the design of the American Republic"); *id.* at 154-55 (asserting that the Constitution erected a highly majoritarian form of democracy and that "[t]he philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution"); *id,* at 159-60 (unless judges interpret the Constitution according to the original understanding, the American people face "an authoritarian judicial oligarchy" instead of a "representative democracy"); *id.* at 191 (legislative decisions involve "a tradeoff between [] principle and expediency," but "[c]ourts have no apparent mandate to impose a different tradeoff merely because they would arrive at a mix that weighed principle more heavily"); *id.* at 264-65 (in order "to restrict judges to their proper role in a constitutional democracy," and thereby preserve the separation of powers, legal reasoning must be governed by "the original understanding of the Constitution").

[69] *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); M. EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION (1987); D. HELD, MODELS OF DEMOCRACY (1987); Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74-76 (1989).

[70] *See generally* D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (1990); *see also infra* Part III.

[71] Bork himself says that "[o]ne purpose of this book is to persuade Americans that no person should be nominated or confirmed who does not display both a grasp of and devotion to the philosophy of original understanding." R. BORK, *supra* note 1, at 9.

[72] 3 U.S. (3 Dall.) 386 (1798).

Supreme Court cast covetous glances at the apple that would eventually cause the fall."[73] In his usual narrow-minded way, Bork apparently fails to recognize that the apple—whether the one in Eden or the one in *Calder v. Bull*—might be the apple of knowledge as well as the apple of sin.

"Creation and Fall" then lives up to its allegorical allusions by presenting conclusions based on faith instead of reason. It is an uninspiring and one-sided trek through the history of the Constitution, full of sound (mostly whining) and fury (at "ultraliberals") and signifying nothing. In his attempt to demonstrate the historical illegitimacy of judicial reliance on anything other than the text of the Constitution and the direct intent of the founders, Bork omits or distorts enough history to make the description "law office history"[74] seem a compliment. He invites even greater condemnation, moreover, because his tactics are unsuccessful: even overlooking the evidence that Bork ignores, "Creation and Fall," shorn of its polemical preaching of the faith, is a powerful argument in favor of the notion that our constitutional tradition has always included an unwritten component.

The history that Bork omits includes: evidence that state courts invalidated statutes that conflicted with unwritten natural law from the early 1780s until at least well into the middle of the nineteenth century; the inherited traditions of Coke, Bolingbroke, and others admired by eighteenth century Americans; statements in support of natural law constraints on legislatures by some of Bork's own heroes, including James Iredell and the John Marshall of *Marbury*; and strong suggestions at the Constitutional Convention of 1787, at some of the state ratifying conventions, and in the congressional debates over the Bill of Rights that unwritten natural law constituted a limit on legislative powers.[75]

Bork's distortions include castigating Chief Justice Roger Taney's opinion in *Dred Scott*[76] as the grandfather of illegitimate non-originalism.[77] In fact, even a cursory examination of his opinion shows that Taney based it mainly on his careful (and arguably correct[78]) examination

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[73] R. BORK, *supra* note 1, at 19.

[74] Alfred Kelly has described "law-office history" as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data offered." Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 & n.13.

[75] *See generally* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (R. Barnett ed.1989); D. FARBER & S. SHERRY, *supra* note 56, at 51-76, 175-245; *Interpreting the Ninth Amendment*, 64 CHI.[-]KENT L. REV. 37 (1988); Grey, *The Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.[-]KENT L. REV. 1001 (1988).

[76] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[77] R. BORK, *supra* note 1, at 26-34.

[78] *See, e.g.*, W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 62-83 (1977) (suggesting that framers meant to protect slavery).

of the original intent of the framers.

Bork also uses legerdemain to induce the disappearance of the "anti-originalist clauses," such as the ninth amendment, the privileges and immunities clause, and the preamble, which clearly seem to give judges latitude to incorporate natural rights into the Constitution. He suggests, for example, without any further reasoning, that the preamble is "entirely hortatory and not judicially enforceable,"[79] ignoring the fact that several early Supreme Court Justices actually cited it.[80] He disposes of the privileges and immunities Clause by merely noting that its meaning is obscure and that it has been dormant since *Slaughter-House*.[81] The rationale underlying Bork's treatment of these two clauses is that it would be incorrect to interpret any clause of the Constitution to give judges discretion, regardless of what the constitution's text and history would suggest. As he states explicitly in another context:

> Even if evidence of what the framers thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the Constitution's words. If that method of interpretation were not common in the law, if James Madison and Justice Joseph Story had never endorsed it, if Chief Justice John Marshall had rejected it, we would have to invent the approach of original understanding in order to save the constitutional design.[82]

He gives no theoretical justification for his insistence that the "constitutional design" requires limiting judicial discretion, but instead relies on his own peculiar interpretation of the language and the history.

Bork never even mentions the ninth amendment in his historical survey, and devotes a mere two pages to it in the course of refuting John Ely much later in the book.[83] His summary conclusion is that "[t]here is almost no history that would indicate what the ninth amendment was intended to accomplish. . . . [N]othing about it suggests that it is a warrant for judges to create constitutional rights not mentioned in the Constitution."[84] In fact, there is a great deal of historical evidence to suggest just that.[85] Bork's discussion of the ninth amendment cites only John Ely (who never claimed to be making a thorough historical argument), and Russell Caplan (whose research is by now almost outdated and whose

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79 R. BORK, *supra* note 1, at 35.

80 *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

81 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872);R. BORK, *supra* note 1, at 37-38; *see also id.* at 180-82 (rejecting, with little discussion, evidence that at least some of those responsible for the fourteenth amendment intended to direct judges outside the Constitution. For further evidence that some of the nineteenth-century founders intended for judges to rely on extra-constitutional principles, ignored by Bork, see D. FARBER & S. SHERRY, *supra* note 70, at 247-334).

82 R. BORK, *supra* note 1, at 154-55.

83 *See id.* at 178-85.

84 *Id.* at 183.

85 *See* the sources cited *supra* in note 61.

conclusions are almost universally rejected).[86] In a somewhat different context, Bork also discusses Thomas Grey's similarly open-ended approach to constitutional interpretation. He says that Grey "once urged courts to depart from the written Constitution on the theory that there is an unwritten law." Such a theory, Bork admonishes, "departs from the historical meaning of the Constitution."[87] Bork seems to have missed the point of the articles by Grey (which he cites),[88] which suggest that attributing to the framers an intent to resort to unwritten natural law is supported by historical evidence. Nor has Bork apparently read the wealth of recent scholarship on the ninth amendment, much of it suggesting that the founders did indeed intend to direct judges beyond the written Constitution.[89]

Indeed, most of Bork's historical citations are stock excerpts from *The Federalist Papers* and Supreme Court cases that appear in every constitutional law casebook.[90] He appears to have read very little else—neither the historical sources themselves nor the legal historians who have studied them.[91] One criticism of originalism that Bork ignores is that active judges have neither the time nor the training to read sufficient history, and thus would instead interpret the few historical sources of which they have knowledge according to their own predilections; Bork is an apt illustration of that very tendency.

IV.

Finally, in addition to his intellectual lapses, Bork exhibits in *The Tempting of America* an utter lack of judicial temperament. Alexander Bickel was among the first to note that judges need a special sort of wisdom, which Anthony Kronman has nicely labelled "prudence."[92] Bickel believed that judges should have "the leisure, the training, and the insulation to follow the ways of the scholar."[93] Kronman writes of "practical

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86 *See* R. BORK, *supra* note 1, at 183-85

87 *Id.* at 209.

88 *See id.* at 209 n.83 (citing Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975)).

89 *See* the sources cited *supra* in note 61.

90 *Compare* R. BORK, *supra* note 1, at 27 (citing *Gibbons v. Ogden* and *Willson v. Black Bird Creek Marsh Co.*) *with* G. GUNTHER, CONSTITUTIONAL LAW 232-36 (11th ed. 1985) (same); *compare* R. BORK, *supra* note 1, at 154 (excerpts from *Federalist No. 78*) *with* G. GUNTHER, *supra* at 15-16 (same).

91 Bork's failure to discuss, or even to refer to, the seminal article on the founders' own understanding of how the Constitution was to be interpreted is inexcusable. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

92 Kronman, *supra* note 3, at 1584-90 (relying primarily on A. BICKEL, THE LEAST DANGEROUS BRANCH (1962)); *see also* Noonan, *Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119 (1987) (noting that judges need, among other things, the virtues of justice and prudence).

93 R. BICKEL, THE LEAST DANGEROUS BRANCH 25 (1962).

wisdom [and] the modalities of prudence."[94] Others have echoed and expanded upon these descriptions of judicial temperament. Lawrence Solum notes that a judge might have both "the ability to engage in sophisticated legal reasoning and insight into subtle connections in legal doctrine," but that this judge would still be a poor judge if she lacked practical wisdom.[95] Linda Hirshman writes about the need for judges to be educated for moral leadership.[96]

Bork rejects out of hand these descriptions of appropriate judicial attributes. He criticizes Bickel as "anti-democratic,"[97] and notes that "[f]ew [judges] have the training to do what Bickel asked, and none have the leisure for philosophic reflection or for immersion in tradition, history, and the thought and vision of philosophers and poets."[98] He views the judge's task as sterile and abstractly intellectual, without even room for growth: "[a] judge works with whatever intellectual capital he accumulated before coming to the bench; he is most unlikely to add appreciably to his store while there."[99]

Given Bork's description of the role and characteristics of judges, it is unclear why anyone with a questing intelligence would want to be a judge. One suspects that Bork sought the appointment to the bench only for the power that it might bring, rather than for its intellectual or moral satisfaction. This suspicion is confirmed by Bork's admission that he found judging to be an ultimately tedious and thoughtless task: he notes that by 1987 he had "serious doubts about remaining on the court of appeals for the remainder of [his] career," for the cases brought insufficient "engagement with larger ideas."[100] Bork's view of judging as boring and sterile apparently extends to serving on the Supreme Court. He states that he has "no sadness at not being on the Supreme Court," because he now has "the opportunity . . . to study and to write and to speak."[101] He thus draws a strong contrast between the Supreme Court and the American Enterprise Institute (where he was during the writing of this book), happily noting that the latter "is like being on a first-rate university faculty . . . without the necessity of grading examinations."[102] Although we might all empathize with Bork's delight at experiencing the joys of being on a university faculty without having one of the more onerous duties that being a faculty member entails, the implication that there

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94 Kronman, *supra* note 3, at 1584.

95 Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1753 (1988).

96 Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 196-201 (1988).

97 R. BORK, *supra* note 1, at 190.

98 *Id.* at 191.

99 *Id.* at 72.

100 *Id.* at 274.

101 *Id.* at 316.

102 *Id.* at 321.

is no intellectual challenge, no opportunity for growth, and no collegial interchange on the United States Supreme Court is frightening. The Senate acted perhaps more wisely than it knew when it refused to confirm the nomination of a man whose vision of that Court is so limited and whose desire to be on the Court seemed to stem so wholly from a yearning for power.

The Tempting of America presents one final conundrum. The first two-thirds of the book comprise an agonized plea in the name of popular sovereignty for judicial deference to the legislative process and legislative choices. The final one-third of the book, however, vituperatively condemns both the Senate and its constituents as evil, misguided, or easily duped. (Bork actually blames his rejection largely on the press and the intellectual elites,[103] including law professors, whom he naively thinks are tremendously influential.[104]) Bork cannot have it both ways. Either the people's representatives are not to be trusted, in which case the majoritarian justification for originalism—and for rejecting judicial activism in general—collapses, or he should accept the Senate's rejection of his nomination as simply a legitimate and unassailable exercise of its constitutional powers. Apparently, Bork has faith in representative government only when it does what he likes.

[103] *Id.* at 267-343.
[104] *Id.* at 134-37.