

BOOK REVIEW

THE CLERISY OF POWER

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW. By *Robert H. Bork*. New York, New York: The Free Press, 1990. pp. 432.

*Reviewed by David B. Sentelle**

Ever since the serpent persuaded Adam and Eve to eat the forbidden fruit in the Garden of Eden, unscrupulous marketers have tempted and seduced an unsuspecting and trusting public into purchasing their shoddy merchandise. In music, in movies, and in advertising, the sirens of contemporary culture shamelessly tempt and seduce us with images of explicit sex and graphic violence—euphemistically called “action.” They have been so successful in their manipulation that we have come to ignore all warnings against them, warnings emanating from the very theological heart of our Western culture. Even when temptation and seduction are exposed to those who should know better, their dangers are all too often dismissed with a wave of the tenured hand. The notion of temptation, we are told, is derived from a naive tradition, long obliterated by events ranging from the French Revolution to the advent of relativity theory to the rise of literary deconstruction. Likewise, the term seduction has lost much of its meaning in today’s sexually permissive society.

Robert H. Bork—a former professor at Yale Law School, a former federal appellate court judge, and currently the John M. Olin Scholar in Legal Studies at the American Enterprise Institute—understands temptation and seduction in their original and theological senses. In his book, *The Tempting of America: The Political Seduction of the Law*, he explores how constitutional interpretation has been tempted, seduced, and ultimately corrupted.

The “tempting” referred to in the title is the enticement to believe “that nothing matters beyond politically desirable re-

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sults, however achieved."¹ The objects of this temptation are the Adams and Eves of the "[p]rofessions and academic disciplines that once possessed a life and structure of their own"² In the introduction, Bork argues that the pursuit of the "apple" of politically desirable results inevitably causes the tempted discipline—law, religion, literature, economics, science, or journalism—to betray its integrity and independence. In the context of constitutional law, judicial advocates attempt to justify their pursuit of politically desired results by appeals to natural law or moral philosophy. Bork points out, however, that the use of such amorphous concepts as natural law or moral philosophy in constitutional interpretation is highly problematic, because our written Constitution provides for an unelected, and thus politically unaccountable, federal judiciary. Because of this unaccountability, when judges are lured into interpreting the Constitution in a politically driven manner, the notion of self-government, the foundation of our governmental structure, is severely threatened.

The judicial "seduction" that Bork cautions against is the propensity of judges, when interpreting the Constitution according to natural law, to "confuse their strongly held beliefs with the order of nature."³ Decisions based on this confusion dangerously infect constitutional law with politically charged doctrines. As Bork warns, "what begins as an attitude of 'Let's do it just this one time' grows into a deformation of constitutional government."⁴ To avoid this deformation, Bork argues, the judge must be "bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment."⁵

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

2. *Id.*

3. *Id.* at 66.

4. *Id.* at 67. Judge Bork offers Justice Douglas's opinion for the Court in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), as an example of the use of the Equal Protection Clause as a funnel through which the jurist pours his notions of natural law or abstract morality:

[T]o justify *Skinner's* approach the Court must decide that there are fundamental rights that the Court will enforce and that it knows how to identify them without guidance from any written law. This is indistinguishable from a power to say what the natural law is and, in addition, to assume the power to enforce the judge's version of that natural law against the people's elected representatives.

R. BORK, *supra* note 1, at 66.

5. R. BORK, *supra* note 1, at 5.

The book consists of 432 pages of text, notes and appendices. Contrary to the assertions of some journalists and reviewers, *The Tempting of America* is not a podium from which Judge Bork whines to the world that he was mistreated during his confirmation hearings.⁶ The hearings and the surrounding events take up only eighty-three pages in Part III, and their description is designed not to evoke sympathy for Bork personally but rather, as Bork writes, to document “the wars that rage for control of our legal culture and our general culture, [to] suggest what is at stake as those wars continue, and [to] try to estimate what effects my experience may have on the future.”⁷ In Part I of the book, Bork describes the Supreme Court from its beginnings to the present. Part II considers leading liberal and conservative academic theoreticians of the Constitution and offers an exposition of Bork’s argument that a sophisticated form of originalism (or intentionalism) is the only legitimate method of constitutional adjudication under our written Constitution. This second part also considers and rebuts the major objections to an originalist methodology, examines the roles of morals and moral relativism in constitutional decisionmaking, and argues that emphasizing desired results at the cost of sound constitutional reasoning imperils the separation of powers and, ultimately, the very structure of constitutional government.

As Bork points out, the bitter and shameless fight over his nomination to the Supreme Court “was simply one battle in [the] long-running war for control of our legal culture” in which “there are only two sides. Either 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.”⁸ If

6. Academic reviews of Bork’s *The Tempting of America* range from the thoughtfully critical, see Nichol, *Bork’s Dilemma*, 76 VA. L. REV. 337 (1990); to the puerile and virtually ad hominem, see Book Note, *The Priest Who Kept His Faith But Lost His Job*, 103 HARV. L. REV. 2074 (1990); to the picayune and indignant, see Ackerman, *Robert Bork’s Grand Inquisition*, 99 YALE L.J. 1419 (1990). Given Bork’s withering assessment of the current state of the American legal academy, the unfavorable reaction of elite academics is hardly surprising.

7. R. BORK, *supra* note 1, at 13. One unfortunate effect of the disinformation campaign mounted against Judge Bork and his subsequent senatorial lynching is that a premium quality in judicial nominees today, especially those for the Supreme Court, is that they have no “paper trail,” that is, no body of scholarly writings that opponents can distort and then cite as evidence of “insensitivity.”

8. *Id.* at 2.

the latter formulation or some close variation of it is perceived as the correct description, then "a major heresy has entered the American constitutional system," specifically, "the denial that judges are bound by law."⁹ This heresy is especially dangerous because federal judges are appointed for life and are thus largely unaccountable to the people. The heretics, Bork argues, are those theorists who find the written Constitution inadequate for their political purposes. Leftist heretics perceive our system of separated and federated powers as a stumbling block to their goal of remaking the Republic into a collectivist, egalitarian, materialist, race-conscious, hyper-secular, and socially permissive state that would never be approved by a democratically elected legislature. Conservative heretics, meanwhile, would look outside the Constitution in order to write into that document a wish-list of social or economic conservatism, and Bork spares them no criticism. By necessity, however, he trains most of his fire on left-wing constitutional theories inasmuch as their exponents control the academy and have a considerable number of sympathizers in the elite media and in Congress.¹⁰

The serpent of political temptation most clearly rears its ugly head when judges feel the impulse to "do justice," without regard to legal principle or precedent. To this temptation Bork invokes Justice Oliver Wendell Holmes's famous exhortation to Judge Learned Hand: It is the judge's job to apply the law, not to do justice.¹¹ Bork describes Holmes's approach as the "American orthodoxy," in contrast to the constitutional theorists' heresy "that the ratifiers' original understanding of what the Constitution means is no longer of controlling, or perhaps of any, importance."¹²

To a layperson, the essence of the act of judging is the judge's application of a set of legitimate, preestablished legal

9. *Id.* at 4.

10. During the 1988-89 academic year, for example, members of the Senate Judiciary Committee staff used a network of sympathetic liberal and left-wing faculty members at elite law schools, including Harvard and Chicago, to identify outstanding liberal students willing to do research. The students were each assigned a person, usually a judge, that the Democrat-controlled committee thought would be a likely Republican nominee for the Supreme Court. Each student then read all of the potential candidate's judicial opinions, law review articles, and public statements, and finished his assignment by writing a summary of his conclusions in memorandum form. The memos were turned in to the professors, who forwarded them to the Senate Judiciary Committee.

11. See R. BORK, *supra* note 1, at 6 (citing Sergeant, *Justice Touched With Fire*, in MR. JUSTICE HOLMES 183, 206-07 (F. Frankfurter ed. 1931)).

12. *Id.*

rules to the dispute before him. Otherwise, the judge ceases to be an umpire and instead becomes a player in the dispute. The bulk of contemporary commentators, however, scorn this common-sense approach to judicial decisionmaking, especially when one also argues that judges should apply legal rules in the fashion intended by the people who drafted them. A methodology of originalism or intentionalism is impossible, these critics argue, because no judge has ever done what Bork prescribes: Judges have always looked to a variety of components—perceptions of history, personal predilection and bias, moral philosophy, economic theory, partisan politics, and religious, racial, or ethnic considerations—in order to arrive at a result they consider to be “correct” in any number of senses. Far from being heretical, the critics assert, this approach is entirely normal and eminently justifiable.¹³ Held by the intellectual elites—in Bork’s terms, the “knowledge class”—this view is certainly more radical than, and highly condescending toward, the common-sense understanding of the citizen who believes that a written document such as the Constitution contains specific, intended meanings apart from the interpretations that an appointed judge chooses to read into the text.

When judges *do justice*, rather than apply the law as written,¹⁴

13. Examples of constitutional theories relying on anything *but* an original understanding of the Constitution are as legion as they are unconvincing. As Bork notes, “[o]ne of the more entertaining features of the literature is that the revisionists regularly destroy one another’s arguments and seem to agree only on the impossibility or undesirability of adherence to the Constitution’s original meaning.” *Id.* at 141. The stout of heart and eye may wish to consider the following, somewhat arbitrarily selected list: Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Moore, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 364 (1988); Parker, *The Past of Constitution Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979). The work of Professor Laurence Tribe of Harvard Law School has had a profound influence on constitutional theory. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988); *Laurence Tribe and the Politics of Constitutional Law*, 4 BENCHMARK 99 (1990). It is noteworthy that the revisionists generally seek to implement a social and political program more radical than any adopted to date in the American political system.

14. I do not intimate, nor does Bork, that an appeal for judges to “apply the law” implies that judges are to choose mechanically the correct clause, amendment, or subsection; quote it; and then send the opinion to the printer. Such a process is not possible; any moderately sophisticated intentionalist would admit that words are susceptible of some indeterminacy. Such an approach would also make for very peculiar

the judge must take two steps of questionable legitimacy. First, he must claim for himself the power to determine in each case what justice *is*. Second, he must somehow make the determination of just what *doing justice* entails. This determination will invariably reflect the judge's personal beliefs on the nature of a good society. To make this claim of authority, and then to "do" his version of "justice," the judge must abandon the strictures that are both explicit and (to some degree) implicit in the Constitution (or statute). So liberated, the judge's conscience will burst forth, guided only by deeply held notions of the good, the just, the desirable, or the divinely mandated. This flowering of the unconstitutional conscience has taken many forms that range from Chief Justice Taney's discovery in the Fifth Amendment of a right to own another person as property,¹⁵ to Justice Peckham's substantive use of the Due Process Clause to protect the prerogatives of business,¹⁶ to the penumbræ that Justice Douglas found in the Bill of Rights, creating a previously unknown constitutional right to use contraceptives.¹⁷

Bork concedes that the presence of raw political, economic, and social considerations in the process of constitutional adjudication has ebbed and flowed almost from the founding of the Republic,¹⁸ but he rejects the notion that a heretical doctrine's waxing and waning over a long period of history somehow diminishes its heretical quality.¹⁹ As Bork points out, the struggle

selection of judges; the most essential characteristic in a judge would be his power of literal recall. Therefore, a medium ground must be reached. As a judge of the Fourth Circuit has noted:

To be a judge is to exercise judgment, and some measure of what Justice Frankfurter called "creative power" is a legitimate and necessary part of the job. That word "creative," however, must be closely watched. It implies the fashioning of new rules rather than the interpretation of existing ones. It conjures images of judges whose ideals and imaginings may get the better of them.

Wilkinson, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 780 (1989) (footnote omitted). This "interstitial" creation of meaning, however, is a far cry from the revisionists' conception of the relation between textual meaning and judging.

15. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

16. *See Lochner v. New York*, 198 U.S. 45 (1905). *See also Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Adair v. United States*, 208 U.S. 161 (1908).

17. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

18. *See R. BORK, supra* note 1, at 19 ("The Constitution was barely in place when one Justice of the Supreme Court cast covetous glances at the apple that would eventually cause the fall.").

19. *Cf. Ackerman, supra* note 6, at 1421:

If the judicial expression of heresy extends backward before *Marbury v. Madison*, and unites such disparate sorts as [Laurence] Tribe and [Richard] Epstein, perhaps it is a mistake to think of it as a "heresy." Why isn't it better

between the judge's obligation to follow the Constitution and the temptation to follow his political instincts is an old one, going back to *Calder v. Bull*.²⁰ The undeniable fact that we shall always have judicial over-reaching, however, is hardly a normative argument for encouraging this type of jurisprudence.

In a constitutional democracy characterized by a judiciary that is empowered to invalidate legislative acts, the temptation judges face to follow their own political intuitions instead of applying the law as set down by someone else is inescapable. That temptation is a byproduct of the struggle between the values of majority rule and minority rights, the struggle between the dangers of tyranny of the majority and tyranny of the minority. Indeed, we even have a name for this struggle: the Madisonian dilemma. Bork describes the dilemma succinctly:

The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty.²¹

Bork's book represents an honest and largely successful effort to come to grips with that fundamental dilemma, to steer an

to view such an historically entrenched and politically diverse theme as part of the *main line* of American constitutional development?

Id. (emphasis in original). The fact that a notion is "historically entrenched," of course, in no way saves it from being fundamentally wrong: The Ptolemaic solar system, the divine right of kings, and slavery were all at one time quite entrenched. In addition, the fact that persons with dissimilar goals could invoke the same nonconstitutional premises is hardly surprising: When the attainment of the end is more important than the legitimacy of the process by which one arrives at that end, one will obviously be free to use whatever tools are at hand.

20. 3 U.S. (3 Dall.) 386 (1798). See R. BORK, *supra* note 1, at 19-20. Bork recalls the famous dispute between Justice Chase of Maryland and Justice Iredell of North Carolina concerning the scope and sources of judicial power. Justice Chase took an expansive, natural-law approach to the exercise of judicial power. As Justice Iredell noted, however, "[t]he ideas of natural justice are regulated by no fixed standard: the ablest and purest of men have differed upon the subject. . . ." *Calder v. Bull*, 3 U.S. (3 Dall.) at 399 (Iredell, J., concurring). The argument between Justices Chase and Iredell is a remarkable reflection of much of the current debate over judicial power and legitimacy. As Bork notes, "[i]t is somewhat disheartening, indeed, that, while the debate has grown increasingly complex, in almost two centuries the fundamental ideas have not been improved upon." R. BORK, *supra* note 1, at 20.

21. R. BORK, *supra* note 1, at 139.

even course between the dangers of tyranny of the majority and tyranny of the minority. Bork offers a principled and coherent effort to set the boundary between those areas where majorities should be entitled to rule and those areas where minority rights should be protected.

Bork's criticism of elite revisionist academics is also particularly useful. Through their writing and speaking, these academics influence not only judges but also legions of students, many who become clerks, government or public interest attorneys, journalists, and judges. This influence on students is no less profound for being indirect. Law professors devoted to infusing the Constitution with radical contemporary constructs each year may produce only a handful of committed revolutionaries; yet, as years pass, they anoint a growing number of law students with a fundamental disaffection for the American constitutional system. It has often been stated that the most powerful ideas are those that are half-baked. It is Bork's great gift to offer us a conception that is not half-baked, but rather intellectually clean and honest, unlike the offerings of most of his critics.

For example, one critic, Yale Professor Bruce Ackerman, attacks Bork for considering himself to be working within a Madisonian tradition. Ackerman asserts that Bork's conception "does not resemble anything Madison would find familiar."²² Not surprisingly, Ackerman offers his own work as an example of a view with which Madison would be more comfortable.²³ Under this self-defined Madisonian vantage point, Professor Ackerman explains historical spates of judicial over-reaching as hyper-constitutional pow-wows that occur every so often in American history. During these periods, according to Professor Ackerman, an undescribed abstraction called "We The People" functions politically but on a constitutional dimension, producing amendments to the Constitution without resorting to the amendment procedure prescribed by Article V.²⁴ Not surprisingly, the results reached by the vote of "We The People" paralleled the results desired by what might be termed "We The Faculty of Yale Law School." Though he may have appreciated Professor Ackerman's erudition, Madison would not have con-

22. Ackerman, *supra* note 6, at 1439.

23. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1019-31 (1984).

24. U.S. CONST. art. V. See Ackerman, *supra* note 23, at 1019-31.

sidered the professor's theory to describe any sort of law, much less constitutional law.

Bork's book is not flawless, of course. Bork's reading of the Ninth Amendment²⁵ as saying nothing that the Tenth Amendment²⁶ does not say better is debatable.²⁷ There is also the originalist's problem of what to do with what I call "venerable mistakes": those precedents that were erroneously decided but have become so thoroughly integrated into the fabric of American life that their reversal would engender real chaos. Bork's response is that at times we must simply tell the Supreme Court to "go and sin no more."²⁸ Though this may be the best practical approach, it is obviously less than satisfying from a theoretical point of view. Bork's critics see this reluctance to overrule past mistakes as inconsistent with his theory of originalism. They are largely attacking a straw man, however; Bork is simply not the hyper-pure intentionalist they hypothesize. Indeed, on the one hand, Bork's critics attack him as an inflexible purist placing intentionalism before the good of the Republic; on the other, they fault his inconsistency when he retroactively accepts the "venerable mistakes" that have woven themselves into the American political fabric.²⁹

Another difficulty with Bork's book lies in his conspicuously

25. U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."); see R. BORK, *supra* note 1, at 183-85.

26. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

27. See Ackerman, *supra* note 6, at 1430-34.

28. R. BORK, *supra* note 1, at 158-59.

29. See, e.g., Nichol, *supra* note 6, at 346-48; Book Note, *supra* note 6, at 2078-79.

Professor Ackerman also charges that "Bork's ignorance of the secondary literature is ecumenical—he fails to cite historians who might support him just as he fails to confront those who make his confident judgments seem problematic." Ackerman, *supra* note 6, at 1422 (footnote omitted). First, Ackerman fallaciously attacks the author for the book he did not write. *The Tempting of America* is not designed to be a tenure-piece on, say, popular views in Ohio concerning the Black Codes, or on the rhetorical distinctions between the North Carolina and Virginia ratifying conventions. This book is designed to reach the educated general reader without a law degree. Because Bork knew that he was unlikely to sway Ackerman and his allies, Bork attempted to reach the lay citizen. For that purpose he needed to write a book that reads as an indictment, not a cross-examination or a war of footnotes.

Second, the research and citation in *Tempting* is substantial: In 28 pages of endnotes, Judge Bork cites 150 books and articles and 135 cases. Among many others, Bork cites or discusses Ackerman, Akil Amar, Raoul Berger, Alexander Bickel, Allan Bloom, William Brennan, Paul Brest, John Ely, Richard Epstein, Charles Fairman, Mary Ann Glendon, Louis Henkin, Sanford Levinson, Leonard Levy, Michael McConnell, Frank Michelman, Michael Perry, John Rawls, Laurence Tribe, and Mark Tushnet.

belabored treatment of *Brown v. Board of Education*.³⁰ While he succeeds in demonstrating that the result in that landmark opinion can be reconciled with an originalist understanding, Bork does not explain why that decision requires such a protracted defense in the first place. That Chief Justice Warren and his colleagues were able in 1954 to produce a unanimous opinion supporting a result so necessary to the attainment of the ideal of equal justice, the goals of the framers of the Fourteenth Amendment, and the preservation of the nation, while preserving respect for the Supreme Court and the rule of law, requires no justification three-and-a-half decades later. The *Brown* decision certainly does not need a belabored attempt to square it perfectly with a hyper-pure originalism that makes Bork appear to be a straw man he is not.

Shortly before I read *The Tempting of America*, a young college student of my acquaintance who was struggling with some version of the revisionists' constitutional gnosticism asked me for a list of works on originalism. Before I was able to compile a list for him, I read this book. I called him and said that there need be no list. *The Tempting of America* is in one volume a succinct and thorough examination not only of originalism but of the broader context of the American constitutional struggle.

In Laurence Sterne's *Tristram Shandy*,³¹ one of the characters insists that it is impossible to curse another person without intentionally or unintentionally quoting—or borrowing from—the medieval excommunication writ of the church. In my personal experience, I have become convinced that it is similarly difficult to make a wise observation on human affairs without at least paraphrasing the Book of Ecclesiastes. I am now convinced that, in the future, it will be difficult to make a wise observation concerning the proper interpretation of the Constitution (or the confirmation process for federal judges) without citing or paraphrasing *The Tempting of America*. I am accordingly compelled to offer the following observations on the Senate's rejection of Judge Bork:

I returned, and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the

30. 347 U.S. 483 (1954). See R. BORK, *supra* note 1, at 74-78; Nichol, *supra* note 6, at 343-44.

31. L. STERNE, *THE LIFE AND OPINIONS OF TRISTRAM SHANDY, GENTLEMAN* (I. ROSS ed. 1983).

wise, nor yet riches to men of understanding, nor yet favor
to men of skill³²

Finally, in *The Tempting of America*, “that which was written was upright, even words of truth.”³³

32. *Ecclesiastes* 9:11.

33. *Ecclesiastes* 12:10.

