

JUDGE ROBERT H. BORK AND PROFESSOR BRUCE ACKERMAN: AN ESSAY ON *THE TEMPTING OF AMERICA*

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Twenty-five years ago this fall Judge Robert H. Bork finished writing his book on originalism and constitutional theory and sent it to the Free Press for publication in January 1990.¹ Professor Calabresi had the great privilege of serving as Judge Bork's principle sounding board and research assistant on this book. He read and commented on every section of Judge Bork's argument for originalism in constitutional interpretation.

Shortly after the publication of *The Tempting of America: The Political Seduction of the Law*,² Yale Law Professor Bruce Ackerman published a critical review of Judge Bork's book entitled *Robert Bork's Grand Inquisition*.³ Judge Bork was aware of Professor Ackerman's critical review, but by 1990 Judge Bork had vowed not to read any more essays on constitutional theory based on his belief that the whole field of constitutional theory was morally and intellectually bankrupt. Professor Calabresi did, however, read Professor Ackerman's book review and has long thought it merits a thought-provoking response. This essay is therefore a hitherto unpublished response to Professor Ackerman's 1990 book review of *The Tempting of America*. As the reader will see, the issues raised by Professor Ackerman's book review of Judge Bork's book remain timely and relevant to present day debates about constitutional interpretation.

Part I of this essay responds to Professor Ackerman's call for holism over a clause bound approach to constitutional interpretation. Part II

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1. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).
2. *Id.*
3. Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 *YALE L. J.* 1419 (1990) (book review).

responds to Professor Ackerman's claims with respect to the Fourteenth Amendment's Privileges or Immunities Clause and to the Bill of Rights' Ninth Amendment. And Part III concludes with a discussion of the relevance of the Enlightenment to U.S. constitutional law. The views expressed herein are the authors' own views, and we do not pretend that Judge Bork would necessarily have agreed with everything we say in this essay in defense of *The Tempting of America*. Indeed, we know he would not have been totally in agreement with us.

I. THE IMPOSSIBILITY OF A CLAUSE BOUND CONSTRUCTION

Professor Ackerman first begins his review of *The Tempting of America* by faulting Judge Bork for not citing enough work by professional historians of the Founding or of the Reconstruction; and secondly for considering the meaning of each clause of the Constitution he discusses without a holistic consideration of where those clauses fit into the whole structure of our Constitution as amended. We think both criticisms are unwarranted. *The Tempting of America* is not, and was not intended to be, a legal history of either the Founding of the Constitution or of the period of Reconstruction. Judge Bork's primary historical goal was to uncover the original meaning of the Due Process Clauses of the Fifth and Fourteenth Amendment, which had allowed the reemergence of substantive due process in *Griswold v. Connecticut*.⁴ Judge Bork's interest in legal history was thus much narrower than Professor Ackerman's; while Professor Ackerman seeks to discover and apply the zeitgeist of the 1780's and 1860's which only he can detect, Judge Bork was only interested in the much narrower and more lawyerly project of uncovering the original legal meaning of the two Due Process Clauses along with the Ninth Amendment and various other clauses in the Fourteenth Amendment. Professor Ackerman thus criticizes Judge Bork for failing to do something Judge Bork deliberately decided not to do. While Judge Bork believed emphatically that the laws made by people dead and gone bind us, he believed just as strongly that the un-enacted opinions of prior generations do not bind us today. For this reason, Judge Bork pursued the original meaning of the Due Process Clauses in 1791 and in 1868, but he did not inquire into the general legal zeitgeist of the Framing or of Reconstruction nor was it necessary or even appropriate for him to do so.

Professor Ackerman implicitly accuses Judge Bork of doing law office history, which is to say that he thinks Judge Bork delved only lightly and inadequately into the history of the 1780's and 1860's to reach a fore-

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

ordained conclusion. But Professor Ackerman does not seem to realize that in writing *The Tempting of America*, the only history that Judge Bork deemed to be relevant was the history of the original public meaning of a small handful of constitutional texts and clauses. Professor Ackerman is such a foe of original public meaning textualism and such a fan of American history that he thinks a detailed exposition of the whole history of the 1780's and 1860's is necessary for Judge Bork's legal process to be a success. This is simply not true. Original public meaning lawyers consult history for much narrower purposes than legal historians—hence Judge Bork's focus on the original public meaning of a handful of clauses. Professor Ackerman is guilty of criticizing Judge Bork for practicing law office history when Professor Ackerman's own approach to constitutional interpretation leads to the original public meaning of legal texts becoming submerged in some elaborate account of the history of the times that gave rise to a legal text. Judge Bork could easily have responded by accusing Professor Ackerman of practicing “history office” law. History office law is what happens when you read up on the leading public intellectuals and Supreme Court of the New Deal, and then conclude that all their un-enacted opinions have somehow become law even though no new constitutional text codifying any change has survived unscathed in the Article V constitutional amendment process. *The Tempting of America* and *Robert Bork's Grand Inquisition* thus pass like ships in the night in relation to this matter because each is concerned with a fundamentally different historical question. As a result, Professor Ackerman does not lay a glove on this aspect of Judge Bork's book in Ackerman's own book review.

Professor Ackerman also bitingly criticizes Judge Bork for offering what Ackerman calls a clause-bound construction of the Constitution focusing on a few constitutional or bill of rights clauses in isolation, such as the Due Process Clauses of the Fifth and Fourteenth Amendments, while rejecting the connect-the-dots holism of Justice William O. Douglas's opinion for the Court in *Griswold v. Connecticut*.⁵ Unlike the zeitgeist complaint above, this is a serious charge, which merits a serious response.

First, Professor Ackerman concedes Judge Bork did rely on a holistic interpretation in cases involving the separation of powers. Judge Bork had a very robust view of the separation of powers, which he thought should be judicially enforced with vigor. A quick look at the Vesting Clauses of Articles I, II, and III reveals why holism is helpful in separation of powers cases, thus explaining Judge Bork's reliance on it for purposes of interpretation. The Vesting Clause of Article I reads that:

5. *Id.*

All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.⁶

The Vesting Clause of Article II reads that:

The executive Power shall be vested in a President of the United States of America.⁷

And the Vesting Clause of Article III and the “shall extend” clause read that:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . *The judicial Power shall extend to* [nine categories of specifically enumerated cases or controversies].⁸

It is readily apparent when reading these clauses together, holistically, as Professor Ackerman recommends, that Congress’s legislative power is limited to only those enumerated powers “herein granted” explicitly by the Constitution; while the judicial power of the federal courts extends only to the specified nine categories of cases or controversies. Strikingly, however, the President’s executive power is not limited by the Vesting Clause of Article II to apply only to those executive powers *herein granted*, and the Vesting Clause of Article II is thus a general grant of all powers thought to be executive in 1787, with the exception of a few specified powers; for example, the powers to make appointments and treaties which the constitutional text explicitly shares between the President and the Senate. Therefore, a holistic interpretation of Articles I, II, and III leads to a broad reading of executive power which Professor Ackerman has elsewhere bemoaned, especially in his book, *The Decline and Fall of the American Republic*.⁹ Professor Ackerman cannot have it both ways. Either Professor Ackerman endorses the holistic interpretation of the constitutional text, as in the *Grand Inquisition*, or he deplores the holistic interpretation of the three Vesting Clauses together as in his recent book criticizing presidential power. Professor Ackerman cannot criticize Judge Bork for failing to holistically interpret Articles I, II, and III, when Professor Ackerman himself does not interpret those articles

6. U.S. CONST. art. I, § 1.

7. U.S. CONST. art. II, § 1, cl. 1.

8. U.S. CONST. art. III, § 1, § 2. (alteration in original).

9. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

holistically. It is a plain stubborn fact of U.S. constitutional law that Article II's general grant of the executive power to the President gives him some inherent and implied powers; such as the removal power and what Henry Monaghan labels the protective power.¹⁰ The President does not, however, have the power to act *contra legem*, i.e. a power to act contrary to enacted statutes that are constitutional.

The courts have held a similar view that the structural division of the three branches' powers into three separate articles reflected a clear intent on the part of the Framers of the Constitution in favor of a holistic separation of powers principle. In a classic example of this separation of powers jurisprudence, the Justices of the Supreme Court wrote a famous letter to President Washington in 1793, called *The Correspondence of the Justices*,¹¹ in which they said that the judiciary, under its Article III powers, would exceed its duties by providing the Executive Branch with advice pertaining to several legal questions concerning the United States' relationship with France.¹² Even in a simple matter such as providing legal counsel, the Founding generation respected the responsibilities and autonomies of each branch and was thus careful not to encroach on domains outside the scope of each branch's separated and enumerated powers.

Keeping in line with the Madisonian standard of separation of powers, Circuit Justice Roger B. Taney cited the Vesting Clause of Article I in deciding *Ex parte Merryman*.¹³ In response to a national security crisis, President Lincoln had unilaterally suspended the writ of habeas corpus in the Spring of 1861 as the Civil War began.¹⁴ In 1861, a citizen of Maryland challenged Abraham Lincoln's authority as President to unilaterally suspend the writ of habeas corpus without congressional approval.¹⁵ In this matter, the Federal Court for the District of Maryland sided with the citizen, on the grounds that the power to suspend the writ of habeas corpus was an exclusive power of Congress.¹⁶ The provision supporting the Court's position was Article I § 9 cl. 2 which reads as follows:

10. Henry Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

11. Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), in THE PAPERS OF GEORGE WASHINGTON, June 1–Aug. 31 1793, 392–393 (Christine Sternberg Patrick ed., U. Va. Press 2007).

12. MICHAEL PAULSEN, ET AL., THE CONSTITUTION OF THE UNITED STATES 502 (Foundation Press, 2d ed. 2013), (analyzing “Secretary of State Jefferson, Letter to the Justices of the Supreme Court” (1793) & “The Justices of the Supreme Court, Letter to President Washington” (1793)).

13. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

14. *Id.* at 147.

15. *Id.* at 148.

16. *Id.*

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.¹⁷

The Court correctly asserted that the authority to suspend the privilege of the writ of habeas corpus was a power “herein granted” to the legislature under Article I’s Vesting Clause.¹⁸ President Lincoln refused to enforce Chief Justice’s district court ruling; however, and once it returned to session, Congress ended the Constitutional dispute by passing a resolution supporting the suspension of habeas corpus.¹⁹

In a more recent case, the U.S. Supreme Court struck down legislation allowing the President to use a line item veto in budgetary matters.²⁰ The Supreme Court ruled in *Clinton v. New York* that giving the President the authority to issue line item vetoes was essentially a grant of legislative powers to the Executive Branch to repeal portions of enacted statutes.²¹ Therefore, an Article V amendment would need to be ratified in order to grant the Executive Branch a power that is explicitly reserved for Congress.²² As in *Ex parte Merryman*, the Supreme Court correctly upheld the Madisonian standard of a strict separation of powers concluding that the statutorily provided line item veto for the President contradicted the explicit grant of legislative powers to Congress under Article I, Sections 1 and 8.²³

The separation of powers cases are a notorious instance then in which Judge Bork construes the Constitution holistically, while Professor Ackerman does not, but there is an even more famous and momentous example of this, which Professor Ackerman does not allude to in his review of *The Tempting of America*. Professor Ackerman is an ardent nationalist who praises the broad reading of federal power to enforce the Fourteenth Amendment in *Katzenbach v. Morgan*.²⁴ Professor Ackerman is also famous for arguing that during what he calls the Constitutional Moment of 1937, the Constitution was *sub silentio* amended outside of Article V to grant the federal government unlimited national power. Professor Ackerman is thus a

17. U.S. CONST. art. I, § 9, cl. 2.

18. *Id.*

19. Jeffrey Rosen, *Lincoln v. Lincoln*, THE NEW REPUBLIC (May 10, 2014), <http://www.newrepublic.com/article/books-and-arts/lincoln-v-lincoln>.

20. *Clinton v. New York*, 524 U.S. 417 (1998).

21. *Id.* at 448.

22. *Id.* at 449.

23. *Id.*

24. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

big fan of New Deal atrocities such as *Wickard v. Filburn*²⁵ and their ill-begotten modern progeny like *Gonzales v. Raich*.²⁶

A holistic interpretation of the Constitution as called for by Professor Ackerman in *Robert Bork's Grand Inquisition* reveals the blatant unconstitutionality of Professor Ackerman's breathtakingly broad construction of federal power. Article I, Section 1 makes it clear as day that Congress does not possess all legislative powers, but instead possesses only those legislative powers herein granted.²⁷ Article I, Section 8 then spells out eighteen limited and enumerated powers of Congress.²⁸ To drive the point home even further, the Tenth Amendment then adds all powers not delegated by the Constitution to the federal government are reserved to the States or the people.²⁹ Holism in constitutional interpretation of the kind Professor Ackerman calls for in *Robert Bork's Grand Inquisition* thus plainly leads to the conclusions that Professor Ackerman's paeans to unlimited national power in his three books—collectively titled *We the People*³⁰—are just plain wrong under Professor Ackerman's very own professed interpretive method. In summary, Professor Ackerman talks a good game in *Robert Bork's Grand Inquisition* when he praises holism in constitutional interpretation, but he fails to practice what he preaches in his other scholarly work.

Professor Ackerman's praise of holism in *Robert Bork's Grand Inquisition*³¹ is made in defense of Justice William O. Douglas's majority opinion in *Griswold v. Connecticut*.³² In that case, Justice Douglas connected the dots of the First, Third, Fourth, and Fifth Amendments to deduce from them an underlying right to privacy, which he then used to strike down a Connecticut law that banned the sale of contraceptives to married couples.³³ In *Eisenstadt v. Baird*,³⁴ the right to privacy was further extended to constitutionally require the selling of contraceptives to unmarried couples, and in *Roe v. Wade*,³⁵ the right to privacy was further extended to

25. *Wickard v. Filburn*, 317 U.S. 111 (1942).

26. *Gonzales v. Raich*, 541 U.S. 1 (2005).

27. U.S. CONST. art. 1, § 1.

28. U.S. CONST. art. 1, § 8.

29. U.S. CONST. amend. X.

30. ACKERMAN, *WE THE PEOPLE, VOLUME 1: FOUNDATIONS* (1993); ACKERMAN, *WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS* (2000); ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2014).

31. *Id.*

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

33. *Id.*

34. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

35. *Roe v. Wade*, 410 U.S. 113 (1973).

create a right on behalf of women to abort their pregnancies in public places such as clinics and hospitals with the help of a doctor.

Justice Douglas's majority opinion in *Griswold v. Connecticut* has long been the subject of derisive laughter among those who read it. His talk of the emanations and penumbras of the First, Third, Fourth, and Fifth Amendment is nonsense, and all of those amendments other than the Fourth Amendment are plainly motivated by values other than privacy. The First Amendment was designed to protect freedom of speech, of the press, and of the free exercise of religion *in public places*. The Third Amendment was designed to prevent home-owners from being compelled to quarter troops. The Fifth Amendment was designed to create a privilege against self-incrimination so that suspects could not be tortured into confessing *in public* to crimes they had not committed.

The Fourth Amendment does protect some aspects of privacy, and it deserves to be quoted in whole here:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³⁶

This Amendment does in our opinion, protect married and unmarried couples from having their homes, papers, and effects searched in a hunt for contraceptive devices. A search for such devices, given the minimal harm that they cause if any, and given their personal value to those who use them is an unreasonable search and seizure. It does not follow, however, that a law prohibiting the sale *in public* of contraceptives to married or unmarried couples is also a violation of the Fourth Amendment. A law limiting such sales is stupid and highly offensive, but public purchases and sales are simply not *private* by definition. The same thing is true with respect to public access to abortions in clinics and hospitals, which *Roe v. Wade* held to be protected pursuant to the right to privacy.³⁷

Professor Calabresi thinks that *Griswold v. Connecticut* is right because in 1868 when the Fourteenth Amendment was adopted, twenty-four out of thirty-seven States had Lockean Natural Rights Guarantees in their State Bills of Rights. Such guarantees are thus deeply rooted in American history and tradition as is required of substantive due process

36. U.S. CONST. amend. IV.

37. See generally *Roe*, 410 U.S. 113.

rights by *Washington v. Glucksberg*.³⁸ The typical language of the Lockean Natural Rights Guarantees is that they say that “All men are born free and equal and have certain natural and inalienable rights among which are the right to enjoy life and liberty and to acquire, possess, and defend property and to pursue happiness.” Professor Calabresi thinks that the Lockean Natural Rights Guarantees create a presumption of liberty in Fourteenth Amendment cases, which presumption ought to be applied as trumping Connecticut’s sale of birth control laws in *Griswold*. He develops this argument in detail in a forthcoming Texas Law Review article entitled *On Liberty and the Fourteenth Amendment: The Original Meaning of the Lockean Natural Rights Guarantees*.³⁹

We are all in favor of holistic interpretations of constitutional texts where holism makes sense as Judge Bork realized that it did in separation of powers or federalism cases. In light of the Constitution’s establishment of a constitutional democracy, we also find that construing the Freedom of Speech and of the Press to be especially compelling in political speech cases. But, we think the connect-the-dots holism of Justice Douglas’s opinion in *Griswold* is singularly unpersuasive. Maybe a better case can be made for the outcomes in *Griswold*, *Eisenstadt*, and *Roe* relying on the Privileges or Immunities Clause, which should be disinterred, but such a defense simply does not appear in Professor Bruce Ackerman’s book review entitled *Robert Bork’s Grand Inquisition*.

II. CORFIELD V. CORYELL

A major theme of Professor Ackerman’s *Robert Bork’s Grand Inquisition* is that Judge Bork fails to seriously engage with the legislative history that gave rise to the Fourteenth Amendment.⁴⁰ Professor Ackerman’s main complaint surrounds the fact here that Judge Bork failed to quote and engage with Justice Bushrod Washington’s lone opinion written when he was riding circuit in *Corfield v. Coryell*.⁴¹ In this famous opinion, Justice Washington construed the meaning of the Privileges and Immunities Clause of Article IV.⁴² The Framers of the Fourteenth Amendment famously said that this opinion controlled the meaning of the similarly worded Privileges or Immunities Clause of the Fourteenth Amendment. Professor Ackerman

38. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

39. Steven G. Calabresi & Sofia Vickery, *On Liberty and the Fourteenth Amendment*, 93 TEX. L. REV. (forthcoming 2015).

40. Ackerman, *supra* note 3.

41. *Corfield v. Coryell*, 6 F. Cas. 546, No. 3,230 (C.C.E.D. Pa. 1823).

42. *Id.*

beats Judge Bork over the head rhetorically for not excerpting the *Corfield* opinion, which Professor Ackerman claims proves the existence of unenumerated constitutional rights.

Unfortunately, Professor Ackerman quotes from Justice Washington's opinion in a highly selective and misleading way. He omits language from the critical passage in *Corfield* that would have supported Judge Bork's views, thus offering a highly misleading account of what Justice Washington said in his opinion. We have quoted the full passage below with the material that Professor Ackerman deleted in *Robert Bork's Grand Inquisition* italicized so that the reader can easily see how the deleted material critically alters the *Corfield* quote:

The next question is, whether this act infringes that section of the constitution which declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?' The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; *which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.* They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.* The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of

confederation) ‘the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.’⁴³

In the first omission made by Professor Ackerman when quoting the famous *Corfield v. Coryell* passage, he quotes only the first clause of a three clause sentence, which describes the very content of the phrase “privileges and immunities.” Here is the full sentence with Ackerman’s omitted phrases italicized:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; *which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.*⁴⁴

In this critical sentence, the phrase privileges or immunities is confined to: (1) privileges which belong of right to the citizens of all free governments; and (2) to privileges “which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”⁴⁵ The full un-bowdlerized passage Professor Ackerman quoted clearly limits unenumerated rights to only those rights which the Supreme Court has described as being “deeply rooted in this Nation’s history and tradition.”⁴⁶ It goes without saying that the so-called rights to privacy and to obtain abortions are quite modern ideas that are simply not deeply rooted in American history and tradition. Moreover, the three ideas in this sentence of the *Corfield* opinion are linked together by the word “and” and not by the word “or.”⁴⁷ It follows that privileges and immunities need not only be fundamental, but that they must also “be” deeply rooted in history and tradition. Since the passage says “and” not “or,”⁴⁸ Professor Ackerman, in deleting that phrase fundamentally changed the very meaning of that passage that he berated Judge Bork for not quoting. There may well be a way to get to *Griswold v. Connecticut* and to a constitutional right to abortion before fetal brain waves appear using modern equal protection doctrines with respect to gender discrimination. Suffice it to

43. *Id.* at 551–552 (emphasis added).

44. *Id.* at 551 (emphasis added).

45. *Id.*

46. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

47. *Corfield*, 6 F. Cas. at 551.

48. *Id.*

say that Professor Ackerman does not pursue this route in his book review of *The Tempting of America*.

Professor Ackerman's second omission from the *Corfield* opinion is as damning as the first. Here is the full sentence with Professor Ackerman's omission italicized yet again:

[Privileges and Immunities] may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.*⁴⁹

This is a key limitation on the content of privileges and immunities, which allows the legislature to use its police power to trump any fundamental, unenumerated right with "just" laws prescribed "for the general good of the whole" people.⁵⁰ It is from this clause that the modern day rational basis test descends, and it is this clause that led four out of nine justices in *Lochner v. New York*⁵¹ to conclude that New York State's exercise of the police power in that case trumped any fundamental, unenumerated right to liberty of contract. This is an astonishing omission by Professor Ackerman given that Judge Bork's whole point in *The Tempting of America* was to defend a broad view of the police power! Professor Ackerman bowdlerizes *Corfield v. Coryell* in using it to hit Judge Bork over the head in a way that is completely illegitimate. Any fair assessment of the consistency of *The Tempting of America* with fundamental rights as trumped by the police power requires consideration of the language of *Corfield* which Professor Ackerman omits from his book review.

Now that we have quoted and exposed Professor Ackerman's misquoting of the *Corfield v. Coryell* language that he so berates Judge Bork for not quoting, we can easily see why Judge Bork's criticism of Justice Harry Blackmun's opinion in *Roe v. Wade* is right on the mark and why Professor Ackerman's defense of that case falls woefully short. The right to have an abortion is quite simply not deeply rooted in American history such that it goes back to 1776. Moreover, even if women have a liberty/property interest in controlling the use of their bodies to grow their fetuses, which we think they do, that interest is "subject nevertheless to such restraints as the

49. *Id.* at 551–552 (emphasis added).

50. *Id.*

51. *Lochner v. New York*, 198 U.S. 45 (1905).

government may justly prescribe for the general good of the whole” people.⁵² It is not hard to see how the government could claim such an interest in laws curtailing access to at least some abortions. Professor Calabresi does believe that laws curtailing abortion can be challenged as violating the presumption of liberty, which he thinks underlies the Fourteenth Amendment, but he thinks such laws are justified once fetal brain waves appear fairly early in pregnancy. We use the disappearance of brain waves to determine when death has occurred such that food and water can be denied to a patient with a beating heart so a brain waves test for when life begins is eminently reasonable. In sum, Professor Ackerman is defeated in a devastating way by the un-bowdlerized text of the very *Corfield v. Coryell* opinion that he so berates Judge Bork for not quoting.

III. THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

Professor Ackerman berates Judge Bork for not having a theory as to the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, but he lacks such a theory as well. Professor Ackerman seems to think the Clause gives the courts *carte blanche* to invent new unenumerated constitutional rights unmoored in the text of the Constitution, or in its history or in Lockean Natural Law. Nothing could be further from the truth.

The original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, as well as of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, is well described in John Harrison’s article, *Reconstructing the Privileges or Immunities Clause*.⁵³ Professor Harrison points out that the language of the second sentence in Section 1 of the Fourteenth Amendment indicates it is only the Privileges or Immunities Clause, which directly addresses the question of what laws a legislature can *make or enforce*. Thus, the sentence in question provides that:

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.

Professor Harrison argues that the States “abridge” the privileges or immunities of citizens of the United States when they make or enforce laws

52. *Corfield*, 6 F. Cas. at 551–552.

53. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

that accord one class of citizens, e.g., freed African Americans, a lesser or abridged set of rights, as compared to another class of citizens, e.g., white citizens. The Privileges or Immunities Clause thus bans all systems of social caste or of class legislation whereby one class of citizens discriminates against another by giving them abridged or shortened lists of rights. Professor Harrison drew these conclusions based on his analysis of the debates in Congress leading up to the adoption of the Fourteenth Amendment. In a more recent article, Andrea Matthews and Professor Calabresi found that the idea that the Civil Rights Act of 1866 and the Fourteenth Amendment banned all systems of caste and of class legislation was widely held and publicized by the Northern press in the 1860's.⁵⁴ Among the systems of caste which we think the Fourteenth Amendment was thought to bar as an original matter were the introduction into the U.S. of the Hindu caste system or of European feudalism. No one in the United States would ever again be born a slave or a slave owner, a serf or a Lord, an untouchable or a Brahmin. The Privileges or Immunities Clause swept such distinctions of caste and class away and relegated them to the ash-heap of history. No State could "make" discriminatory laws.

The Harrison/Calabresi construction of the Privileges or Immunities Clause raises the question of what function the Equal Protection and Due Process Clauses of the Fourteenth Amendment were originally meant to play if the Privileges or Immunities Clause was simply a ban on the making by legislatures and the executive of invidious racial discriminations. The answer is that the Equal Protection Clause is on its face a guarantee of the protection of the laws and only secondarily of equality. The noun in the Clause is "protection" while the word "equal" is an adjective. The Equal Protection Clause as an original matter was thus primarily addressed to state executive branch law enforcement officials, and it directed them to enforce state criminal law so as to "protect" free blacks as well as southern white people from private violence such as assaults and batteries, robberies, and lynchings. Southern African Americans in the 1860s were the frequent targets of private violence by the Ku Klux Klan, among other organizations. The Equal Protection Clause was thus not originally meant to be a classic American negative liberty to be free of government action. It was instead a positive right entitlement that guaranteed to blacks and northerners in the South the same protection of the law, which the police and prosecutors were giving to white southerners. The Equal Protection Clause thus dovetailed nicely with the Privileges or Immunities Clause as an original matter. One

54. Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393 (2012).

Clause forbade racial discrimination in the making and enforcing of laws while the other obligated state law enforcement officers to be as vigilant in enforcing the law for the benefit of blacks as they were in enforcing it for the benefit of white southerners. The Due Process Clause of the Fourteenth Amendment completed the trifecta by forbidding state judicial and executive officials from acting arbitrarily. This original meaning of the second sentence in Section 1 of the Fourteenth Amendment was quickly buried by the *Slaughter-House Cases*.⁵⁵ The Privileges or Immunities Clause's role in protecting blacks from discrimination in the making of laws came to be associated with the Equal Protection Clause, while its role in protecting individual human rights came to be associated with the oxymoronic doctrine of substantive due process. Nonetheless, as an original matter—and *The Tempting of America* is an originalist book—there is nothing problematic at all about such landmark cases as *Brown v. Board of Education*⁵⁶ and *Loving v. Virginia*.⁵⁷ For an originalist defense of both decisions, see Professor Calabresi's co-authored articles on *Originalism and Brown v. Board of Education*,⁵⁸ and *Originalism and Loving v. Virginia*.⁵⁹

Nor, as an originalist matter, is there anything problematic with the Supreme Court protecting unenumerated rights, so long as they are deeply rooted in American history and tradition and subject nevertheless to being overridden by just laws enacted for the general good of the whole people. The Privileges or Immunities Clause protects not only against class-based abridgement of rights but also against individualized abridgements of rights. Professor Calabresi develops this argument at length in *Substantive Due Process After Gonzales v. Carhart*⁶⁰ and in an article with Sofia Vickery, *On Liberty and the Fourteenth Amendment: The Original Meaning of the Lockean Natural Rights Guarantees*, forthcoming *Texas Law Review* (2015).

The bottom line then is that both Judge Bork and Professor Ackerman misunderstand the Privileges or Immunities Clause. Judge Bork is wrong insofar as he says that the Privileges or Immunities Clause is a meaningless inkblot.⁶¹ It is not. It is instead the very cornerstone of Section 1 of the Fourteenth Amendment. But, Professor Ackerman is equally wrong in

55. *Slaughter-House Cases*, 83 U.S. 36 (1873).

56. *Brown v. Board of Education*, 347 U.S. 483 (1954).

57. *Loving v. Virginia*, 388 U.S. 1 (1967).

58. Steven G. Calabresi & Michael Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. (forthcoming 2014).

59. Calabresi & Matthews, *supra* note 54.

60. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517 (2008).

61. BORK, *supra*, note 1, at 36–37.

saying that the Privileges or Immunities Clause is a font of new and post-modern natural law rights enforceable by the federal courts against the States.⁶² Instead the Clause protects only those unenumerated constitutional rights that are deeply rooted in American history and tradition and that are subject nevertheless to being overridden by just laws prescribed for the general good of the whole people. As to those rights, there is a presumption of liberty and Lockean Natural Rights thinking applies. The correct approach to the Privileges or Immunities Clause is that taken by former Chief Justice William Rehnquist in *Washington v. Glucksberg*,⁶³ a modern substantive due process case that espouses the deeply rooted in history and tradition test. The very word “privilege” in the Privileges or Immunities Clause comes from the two Latin words “privy” and “leges” which refer to private, or special interest, laws. The word immunity carries the same Latin meaning. The Privileges or Immunities Clause thus speaks the language of positive law and not of natural law, as Professor Ackerman seems to believe.

IV. THE NINTH AMENDMENT AND THE NECESSARY AND PROPER CLAUSE

The Ninth Amendment to the U.S. Constitution provides that: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁶⁴ We read it as being an interpretive canon that sheds light on the scope of the grant of powers to Congress in Article I, Section 8, clause 18, which says:

The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.⁶⁵

Ninety-percent or more of all the federal laws, which are enacted are meant to carry into execution the enumerated powers of the federal government under the Necessary and Proper Clause. All those laws must be not only necessary but also *proper* and a federal law that violates the unenumerated rights of the American people is by definition not *proper*.

Professor Ackerman reads the Ninth Amendment as being a font of judicially discovered postmodern, non-Lockean Natural Law rights like the right to privacy or to obtain an abortion. We disagree because we think the

62. Ackerman, *supra*, note 3, at 1430.

63. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

64. U.S. CONST. amend. IX.

65. U.S. CONST. art. 1, § 8, cl. 18.

Ninth Amendment should be construed holistically along with the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment. Both those Clauses have long been understood to protect only fundamental rights that are deeply rooted in American history and tradition or in Lockean Natural Law and not new so-called new post-modern natural rights like the right to an abortion in the twentieth week of pregnancy. Professor Ackerman berates Judge Bork at the start of *Robert Bork's Grand Inquisition* for offering an overly clause-bound and insufficiently holistic interpretation of the Constitution, and we want to take pains to say that we agree with Professor Ackerman's call for a holistic interpretation of the Constitution, rather than the clause-by-clause approach. However, holism with respect to the Ninth Amendment leads us to construe it as protecting only rights that are deeply rooted in history and tradition or in Lockean Natural Rights Theory and that the federal government could not *properly* invade when legislating under the Necessary and Proper Clause. A classic example of such right is the right not to be compelled to enter into interstate commerce to purchase a health insurance policy, which you do not need and which you do not want to buy.⁶⁶ Professor Calabresi does, however, believe that the Ninth Amendment creates a presumption of liberty at the federal level akin to the presumption of liberty created by the Fourteenth Amendment. Professor Calabresi thus endorses much but not all of the discussion of the presumption of liberty in Randy Barnett's *Restoring the Lost Constitution: The Presumption of Liberty*.⁶⁷

Judge Bork does argue in *The Tempting of America* that the Ninth Amendment's sole purpose was to protect existing state constitutional law, statutory, and common law rights from being infringed upon by a centralized federal government. We find this to be an unpersuasively narrow understanding of the Amendment. The Ninth Amendment does say on its face that there exist other unenumerated federal constitutional rights that are on par with the rights protected in the first eight amendments of the Bill of Rights. We think the Ninth Amendment protects unenumerated rights that are deeply rooted in history and tradition or in Lockean Natural Rights theory such as: (1) the right to marry; (2) the right to have as many or as few children as you want to have; and (3) the right not to be compelled to buy something like health insurance that you do not want to buy. We thus part

66. See *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

67. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2013).

company with both Professor Ackerman and Judge Bork when it comes to construing the Ninth Amendment.

However, as Judge Bork points out, the Framers did not write the Constitution in an intellectual vacuum. By this, he means that the Framers did not write the Constitution with hypothetical “despotic insanities” in mind that the legislatures or the people could then in theory have enacted following ratification.⁶⁸ During Judge Bork’s Supreme Court nomination hearing before the Senate Judiciary Committee, similar hypothetical “despotic insanities” were used by liberal senators in an attempt to disqualify his opposition to the application of non-existent federal privacy rights by Justice Douglas in the *Griswold* case. For example, Senator Edward Kennedy (D-MA) asked whether Judge Bork’s view on the Ninth Amendment would allow the government to use its police powers to pass compulsory abortion laws.⁶⁹ Senator Kennedy’s inane question presupposes that the American people are Neanderthals who are incapable of electing representatives who would avoid passing preposterous legislation. This is quite simply not true, and everyone knows it is not true.

V. THE ENLIGHTENMENT AND THE CONSTITUTION

Judge Bork’s book and Professor Ackerman’s review of it both end in heartfelt disagreement regarding the relevance and normative appeal of the Enlightenment to U.S. constitutional interpretation. Both authors cite Alasdair MacIntyre’s work⁷⁰ and try to bend it in support of their interpretive conclusions. We feel we should explain our thoughts on this subject in concluding this brief essay.

First, Professor Ackerman makes an unassailable point when he argues that Benjamin Franklin, Thomas Jefferson, James Madison, Alexander Hamilton, George Washington, and John Adams were all to various degrees steeped in Enlightenment thought and that Enlightenment ideas therefore pervade the Federalists’ Constitution. This observation is one-hundred percent correct insofar as it goes. The U.S. Constitution of 1787 was an Enlightenment document.

Second, Judge Bork is absolutely right that European Enlightenment figures took several drastically wrong turns in the Nineteenth and Twentieth Centuries, and the U.S. Constitution ought not to be construed to conform

68. BORK, *supra* note 1, at 234.

69. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary*, 100th Cong. 149 (1989) (statement of Sen. Edward Kennedy), available at <http://www.loc.gov/law/find/nominations/bork/hearing-pt1.pdf>.

70. ALISDAIR MACINTYRE, *AFTER VIRTUE* 253 (2d ed. 1984).

to those post-enactment wrong turns by the European heirs to the Enlightenment.⁷¹ The Framers of the U.S. Constitution were Deist Lockeans who believed to their core in the following passage from the Declaration of Independence:

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.⁷²

Two core Eighteenth Century Enlightenment ideas appear in these passages. First, the Framers of the Declaration of Independence and of the Constitution declare their belief in “the Laws of Nature and of Nature's God”⁷³ and their belief that all men are “endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”⁷⁴ and “that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁷⁵ The Framers of the U.S. Constitution were ardent believers in Lockean Natural Law as Sofia Vickery and I show in the forthcoming law review article, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Clauses*.⁷⁶

71. Steven G. Calabresi, *On Liberty, Equality, and the Constitution*, NYU J.L. & LIBERTY (forthcoming 2014).

72. THE DECLARATION OF INDEPENDENCE para. 1, 2 (U.S. 1776).

73. *Id.* at para. 1.

74. *Id.* at para. 2.

75. *Id.*

76. Steven G. Calabresi & Sofia Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Clauses*, 93 TEX. L. REV. (forthcoming 2014).

Second, the Framers of the Declaration of Independence and of the Constitution were also passionate believers in the equality of all men with one another. As the Declaration of Independence so powerfully says: “[w]e hold these truths to be self-evident, that all men are created equal”⁷⁷ The Founding Fathers were thus part of an early, Protestant form of the Enlightenment tradition, which combined a belief in Natural Law with classical liberalism and with egalitarianism. John Locke, not Diderot or Rousseau, was the Founders’ philosophical guide.

It is important that this be made clear because early in the Nineteenth Century, the Enlightenment tradition in Europe began to go off the rails in a quite spectacularly awful way. The first idea to be trashed was the Eighteenth Century belief in Lockean Natural Rights and libertarianism, which no less a scholar than Jeremy Bentham pronounced to be “nonsense on stilts.”⁷⁸ Bentham, in reaching this conclusion, built on the corrosive skepticism of David Hume and on the anti-Enlightenment writings of Edmund Burke who opposed the French Revolution and the American-inspired French Revolutionary Declaration of the Rights of Man and of the Citizen. Jeremy Bentham had a major impact on John Austin, a leading advocate of legal positivism over natural rights, and on John Stuart Mill, the leading classical liberal of the Nineteenth Century. Jeremy Bentham’s demolition of natural law as “nonsense on stilts” caused the authors of the Canadian Constitution in 1867 and the Australian Constitution in 1901 to omit entirely from those judicially enforceable documents an American-style Bill of Rights. Enlightenment thought in the Eighteenth Century embraced Lockean Natural Rights, but Enlightenment thought from 1800 to 1945 emphatically did not. Positivism reigned triumphant until the Nazis gave it a bad name, and it was repudiated by the community of nations in the Nuremberg Trials and by the Universal Declaration of Human Rights.

The second Eighteenth Century Enlightenment idea to come under vicious attack between 1800 and 1945 was the belief of America’s Founding Fathers that “all men are created equal.”⁷⁹ This idea was attacked by Thomas Malthus, Herbert Spencer, and Charles Darwin. The egalitarianism of the Declaration of Independence reflected the document’s Protestant and Enlightenment origins. Protestants believed in the equality of every member of a church’s congregation reading the Bible in the vernacular and rejecting a social hierarchy of Bishops, Popes, and Kings who claimed to rule by Divine

77. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

78. See Ross Harrison, *Jeremy Bentham*, in TED HONDERICH, THE OXFORD COMPANION TO PHILOSOPHY 85–88 (1995).

79. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Right. Charles Dickens' *A Christmas Carol* which was first published in 1843, has Scrooge arguing that the poor might as well die off to reduce the surplus population if there are no prisons or workhouses in which to employ them.⁸⁰ By then, Charles Darwin was well along the way in devising his book on the survival of the fittest, which he published in 1859.⁸¹ Herbert Spencer coined the phrase "survival of the fittest" in his *Principles of Biology* published in 1864.⁸² Sir Francis Galton, Darwin's cousin, created the "science" of eugenics based on Darwin's work, which called for compulsory sterilization of the feeble minded and of lesser races so as to "breed" only the best breed of men. Thomas Malthus, Herbert Spencer, Charles Darwin, and Francis Galton killed off the noble and true idea in the Declaration of Independence that "[a]ll men are created equal" and replaced it with a race for the survival of the fittest. Thus was born the movement for Social Darwinism and Eugenics, and ultimately the Holocaust.

Europeans had little trouble persuading themselves that they were more fit to govern Asians and Africans than those people were fit to govern themselves, and so in the late Nineteenth Century Europe's colonial empires grew exponentially as Europeans and Americans took up "the white man's burden" to civilize the world. In the United States, social Darwinism led to a vicious and racist national eugenics movement as a result of which 60,000 so-called feebly minded Americans were compulsorily sterilized. Adolf Hitler wrote admiringly of the American eugenics movement in *Mein Kampf*, and one of his first acts after coming to power in Germany in 1933 was to enact German eugenics laws, in imitation of the U.S. model. Before long, Hitler was not only compulsorily sterilizing those who did not belong to his master race but was also executing them as well in his concentration camps.

After the global cataclysm of World War II, Eighteenth Century Enlightenment ideas, such as Lockean natural rights and human equality came back into fashion, and nineteenth and twentieth century perversions of the Enlightenment fell into disrepute.⁸³ Post-war constitutions in Germany, Japan, and Italy enshrined Eighteenth Century Enlightenment rights and at home the U.S. Supreme Court incorporated the federal Bill of Rights so that it now applies almost entirely against the States as well as against the federal government.⁸⁴ All over the world, the nations of Asia and Africa overthrew

80. CHARLES DICKENS, *A CHRISTMAS CAROL* (1843).

81. CHARLES DARWIN, *ON THE ORIGIN OF THE SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF THE FAVORED RACES IN THE STRUGGLE FOR LIFE* (1859).

82. HERBERT SPENCER, *PRINCIPLES OF BIOLOGY* (1862).

83. *See supra* note 71.

84. *Id.*

the racist European colonial empires, and government by the consent of the governed became the new global norm except in China, Russia, and the Islamic World.⁸⁵ The world after 1945 returned to the eternal truths Americans had discovered between 1776 and 1791 about individual rights and equality.⁸⁶ For most of us living today Bentham, Spencer, Malthus, and Social Darwinism are just a very bad dream.

Neither Judge Bork in *The Tempting of America* nor Professor Ackerman in *Robert Bork's Grand Inquisition* seem to be aware of both the original Constitution's roots in Eighteenth Century Enlightenment thought as well as how very badly Enlightenment thought went off the rails especially in Europe thanks to Bentham, Malthus, Spencer, and Darwin. The Eighteenth Century Enlightenment was a very good thing, which we should do everything in our power to preserve, but we must ferociously guard against the ideas of Bentham, Malthus, Spencer, and Darwin who collectively gave us colonialism, American racism, the eugenics movement, and the Holocaust. Professor Ackerman is right in his passionate defense of the Eighteenth Century Enlightenment, but he errs egregiously in not appreciating just how far off the rails the intellectual European descendants of the Enlightenment went in the nineteenth and twentieth centuries. Judge Bork's paean to originalism in *The Tempting of America* is thus a welcome call for us to return to the better world that once existed.

CONCLUSION

Judge Robert H. Bork and Professor Bruce Ackerman were both my teachers at Yale Law School, and I have learned an invaluable amount from them both. I admire them and on many points I agree with them. As Judge Bork's principal research assistant when he was writing *The Tempting of America* and as his law clerk from 1984 to 1985, I learned a tremendous amount from him. As Professor Ackerman's student in law school and as a reader of much of his scholarship, I admire him greatly as well. This essay strives to draw lessons about U.S. constitutional theory and methods of interpretation from reading both *The Tempting of America* and *Robert Bork's Grand Inquisition* a quarter-century after the fact and after Judge Bork has passed away. It has now been more than twenty-seven years since Judge Bork's nomination to the Supreme Court was voted down and since he wrote *The Tempting of America*. It is high time that we revisit Judge Bork's and Professor Ackerman's exchange to see what it teaches us

85. *Id.*

86. *Id.*

today. We have written this short essay to keep alive the memory of Judge Robert H. Bork who died on December 19, 2012. He was a great constitutional scholar, a wonderful and wise mentor, and he was in every respect “A Man for All Seasons.”⁸⁷

87. ROBERT BOLT, *A MAN FOR ALL SEASONS* (1960).