

JUDGE ROBERT BORK'S EIGHTIETH BIRTHDAY CELEBRATION[†]

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Justice Clifford W. Taylor[‡]

It is a privilege just to be on the same program with Robert Bork, much less to have the happy task of introducing him. I think history will continue to bear out what we already know: that both in the United States and abroad, Robert Bork is the leading figure in ending the intellectual monopoly that activist judges and scholars have held over constitutional jurisprudence.

In his 1978 book *The Antitrust Paradox*, Judge Bork wrote that “[o]ne of the uses of history is to free us of a falsely imagined past. The less we know of how ideas actually took root and grew, the more apt we are to accept them unquestioningly, as inevitable features of the world in which we move.”¹ I think Robert Bork’s legacy is precisely that he did free the rest of us, or at least those who would listen, from a falsely imagined view of the law, from unquestioning acceptance of an imperial judiciary and constantly morphing Constitution. Not only that, he propelled the debate over judicial activism versus judicial restraint headlong into the popular press and the public consciousness, where it remains to this day.

Think back to twenty-seven years ago. While I was fortunate to have had an “originalist” constitutional law professor, Max Eisenberg, for constitutional law in law school, and found the approach intellectually coherent and thus compelling, the rest of the faculty either was outrightly hostile or indifferent to this approach. They, at best, treated the originalist approach as a vestige of a now long-gone era that had yielded to a newer,

[†] Ave Maria School of Law and the Michigan Lawyer’s Chapter of the Federalist Society co-hosted this birthday celebration for Judge Bork while he was a member of the Ave Maria School of Law faculty.

[‡] Clifford W. Taylor, a retired Chief Justice of the Michigan Supreme Court, is the Justice in Residence and Visiting Professor of Law at Ave Maria School of Law and is of counsel with the Michigan law firm of Miller, Canfield, Paddock and Stone, P.L.C. Justice Taylor also serves as the Chairman of the Board of Directors of the Michigan based free market think tank, the Mackinac Center for Public Policy.

1. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 15 (2nd ed. 1993).

better world where effectively law, although it was never admitted so plainly as this, was merely a means to an end.

The idea was: a judge, properly schooled and acculturated, decided what result was wanted and then engineered the law to get it. There were no guiding neutral principles, save those facilitating opportunistic doctrines that would be utilized by judges and lawyers to camouflage the whole process as law rather than mere fiat.

It was all unsatisfying to me at least but it was the way, as they say, it was, and it surely was not seen widely for what it was—a means of effecting political ends by empowering the “better” people among us, the judges, to protect the people from the excesses of popular government—as Lino Graglia at the University of Texas Law School has so pithily characterized it: protecting the country from the clods.²

Indeed, so great was the power of this notion of how courts should approach decision-making that in this state, in fact, particularly in this state, and just about everywhere else in the country, it was the unquestioned orthodoxy. Simply stated, it went largely unchallenged in all but arcane reviled academic circles such as those populated by such as Judge Bork and our own heroic and much-missed Joe Grano at Wayne State.

Unchallenged, that is, until the Reagan Administration. As Professor Matthew Franck pointed out in a 2004 *National Review* article,

“From abortion to school prayer to busing and affirmative action, from soft-on-crime readings of the Bill of Rights to pornography, from separation of powers to federalism and limited government, Reagan hammered on the theme of returning to the Constitution the Framers had bequeathed us Over and over again he made the simple, compelling argument that the job of judges is to interpret the law of the Constitution, not make it, and that interpretation properly understood means coming to terms with the understanding of the Constitution held by those who had made and ratified it.”³

While I believed this long prior to the Reagan Administration, I really didn’t think anyone with any power would say it out loud and in front of everybody, and then they started to.

2. See Lino Graglia, *How the Constitution Disappeared*, COMMENTARY (Feb. 1, 1986), available at <http://www.commentarymagazine.com/article/how-the-constitution-disappeared/>.

3. Matthew J. Franck, *Originalist Thinking: Reagan Revived the Founding*, NATIONAL REVIEW ONLINE (Jun. 9, 2004, 8:43 AM), <http://www.nationalreview.com/articles/211018/originalist-thinking/matthew-j-franck>.

Attorney General Edwin Meese, assisted by our own now Justice Stephen Markman, gave a series of speeches in 1985, in which he called for originalist jurisprudence and condemned activist precedents.⁴

The popular press, not normally interested in questions of legal scholarship, lambasted Meese in editorials and called for his resignation and the academy was, needless to say, outraged. Even the United States Supreme Court's activists got into it with Associate Justice William Brennan ridiculing the Meese Proposals and even suggesting that, if it became impossible to use the Federal Constitution for the creation of new rights, resort for progressives should be to State Constitutions where the march of, as Thomas Sowell might describe it, the anointed vs. the benighted could continue.⁵ The battle over the Constitution had been joined.

The debate reached fever pitch in 1987 during the battle over Judge Bork's nomination to the United States Supreme Court. Suddenly the Academy was forced, by a most capable, learned, and articulate opponent, to defend the proposition that it was wrong, and should be ended, for the judiciary, at any time, to deform the Constitution to make it correspond to contemporary political norms.

As you may recall, National Public Radio broadcast the Senate judiciary committee hearings⁶ gavel-to-gavel and I, fortunately on the road for depositions, listened to them as I could. The hearings were a revelation, and not just because we got an insight into the brilliance of such as Senator Biden and his understanding of the works of Richard Epstein; more importantly, here was this prophetic figure, Robert Bork, a Daniel come to judgment, talking about first principles and shattering the prevailing dogmas about constitutional interpretation. It was an arresting and empowering moment for me, as I'm sure it was for many, many others in this room. The hearings went on for a while, as you will recall, and Judge Bork certainly cannot forget. While it went on, I began to read Judge Bork's writings, especially his seminal 1971 article, "Neutral Principles and Some First Amendment Problems," in the *Indiana Law Journal*.⁷ It was thoughtful and reinforcing—

4. See Edwin Meese III, Honorable Attorney Gen., Address before the D.C. Chapter of the Federalist Soc'y Lawyers Div. (Nov. 15, 1985).

5. See William J. Brennan, Jr., Assoc. Justice U.S., "The Constitution of the United States: Contemporary Ratification" Presentation at the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985); see also THOMAS SOWELL, *THE VISION OF THE ANOINTED* 105–142 (1995).

6. See *Hearings Before the Committee on the Judiciary United States Senate One Hundredth Congress: First Session on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong. (1987), available at <http://www.loc.gov/law/find/court-withdrawn.php#bork>.

7. See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

I learned later he didn't write any other way. Here we had a serious and important judge saying the things that needed to be said—and quite fearlessly at that. Maybe others could also.

I never thought that I would have any role in the controversy, but quite surprisingly, I, a near anonymous tort defense lawyer in “fly over country,” did. As the judiciary committee neared a vote, I was invited to defend Judge Bork on a Lansing area TV station's public affairs show. The taping was, as I now recall, on a Thursday in the late afternoon for showing on Saturday morning. I literally had twenty minutes' notice of the taping. I think they wanted a refusal, but I intrepidly jumped in. My opponent was a self-important professor at a local law school who evidently had had more notice, as he arrived bearing numerous books bristling with tagged pages and notes, accompanied by law student gun-bearers also lugging numerous weighty volumes studded with dog ears and such.

I had seen this guy in action at some local Bar things and, even though less well armed with research, I wasn't too worried. As we got into it, the professor read a hair-curling quote from a commencement address he said Judge Bork had given at an upstate New York college. While memory fades as to the particulars of the quote, it was all that his opponents would want him to say, yet I'd never heard it in all the extensive coverage of him and the hearings. In any event, after dramatically reading it, the professor demanded, “How can you support a man who would say such a thing?” I responded, “I couldn't, nor do I believe Bork himself could, but I don't think he did say it, and if he did, I doubt we'd be hearing about it for the first time on a program scheduled to appear opposite the Saturday morning cartoons in Lansing, Michigan.” It was glorious fun—even the studio staff, to say nothing of the professor's acolytes, fell apart. So Judge, don't blame us in Lansing for how it all turned out—catastrophe in Lansing anyway was averted. Sadly, not so in the Senate, and we are all the lesser for it.

Where are we twenty years later? Sadly, academic thinking of the Constitution is still dominated by the adversaries of authentic constitutionalism, like the shrill professor on that Saturday morning show who most recently buffed his reputation by appearing before our court to state quite emphatically that this is no such thing as deliberative privilege for a court conference—but I digress—patience is the important thing in effecting massive intellectual change. This is especially true in the legal academy.

The dogmas of decades, especially dogmas that facilitate the professoriate's preferred political outcomes, cannot be undone in the space of twenty years.

Given that glacial pace, what Robert Bork accomplished is all the more remarkable.

We now have a president who nominates potential Supreme Court justices who believe in interpreting rather than making the law. The debate over activism vs. textualism is going on in Federal courts and in State appellate courts all over the country as well, including the Michigan Supreme Court.

I can say, and I suspect the same is true of my colleagues Justices Corrigan, Young, and Markman, that Judge Bork and his thinking and writings, especially *The Tempting of America*⁸ which is the constitutional law course you always wanted and never got, have had a profound impact on my own thinking as well as on my decision to become a judge. (In case you don't know Bob, that is a good bit to answer for and if you don't believe me, check with Judge Cohen in Detroit).

We now have originalist scholars beyond counting, and a wealth of sound new scholarship on the Framers, the Supreme Court, and the philosophical underpinnings of the American Constitution, and we now have a public debate over the proper role of judges, much of it taking place in the popular press.

Before the Reagan Administration, particularly the Judge Bork hearings, what news program ever focused on judicial philosophy? When did people outside the Academy or the Bar discuss it? But now, in forums ranging from online blogs to classrooms, there are discussions about what it means to be an activist judge or a textualist. It's fodder for judicial campaign ads. The debate is now out in the public square, and much of the credit for that belongs to Judge Bork.

We owe Judge Bork a great deal for that, and for his robust, unblinking clarity of thought, the breadth of his vision, which takes in all the ways in which judicial imperialism has changed our culture, and not for the better. Consider, for example, his book *Coercing Virtue*, in which he argued that judicial activism alters western societies—not just American society—in ways that deliberately undermine the democratic process so as to enforce a minority agenda. He writes, “Increasingly, the power of people of Western nations to govern themselves is diluted, and their ability to choose the moral environment in which they live is steadily diminished,”⁹ and in a recent review of a book by the former president of the Supreme Court of Israel, Judge Bork warns against “[a] claim of judicial power to create a constitution

8. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

9. ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 1 (2003).

the people did not choose, and then to protect the judge-made charter against the legitimate claims of democracy.”¹⁰

He continues to be the prophetic voice, which warns us that our democracies, our social norms, and our freedoms are in danger from government by judicial fiat. He is the primary resurrector of American constitutional law. And I’m sure you will join me in wishing him a happy birthday and many more years of being that prophetic voice.

Ladies and Gentlemen, Judge Robert Bork.

10. Robert H. Bork, *Barak’s Rule*, AZURE, Winter 2007, at 127.