



BORK, DWORKIN, AND THE CONSTITUTION

Marvin A. Chirelstein

THE LATE Robert Bork and the late Ronald Dworkin – they died just months apart – were for some years colleagues on the faculty of the Yale Law School, where I, also on the law school faculty in those years, had an opportunity to observe them in action and in interaction. No two legal thinkers could have been farther apart in points of view and in personal tone. Both were then in their mid- or late-thirties. Dworkin was slim and elegant. Bork was heavy-set, could be truculent, an ex-Marine. Both departed Yale in the late 1960's, a time of violent campus protests, classroom chaos at the Law School, arson in the law library, and a Black Panther murder trial in New Haven.

Dworkin left to accept the Chair of Jurisprudence at Oxford as successor to H.L.A. Hart and then moved on to University College in London. He promised to return to Yale and New Haven after spending a few years in England, but, having settled into a charming home in Belgravia, and with a summer cottage on Martha's Vineyard, he never did. I asked him once whether I could sublet the Belgravia home for a family sabbatical. "You couldn't afford it," he replied.

Bork left to become Solicitor General in the Nixon administra-

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tion. At a farewell dinner, which I attended, he thanked his wife for her warm support and said he wished he could show his gratitude by giving her the severed head of a student activist. After struggling through Watergate, he became a judge on the powerful District of Columbia Court of Appeals, was nominated for a seat on the Supreme Court by President Reagan, was rejected by the Senate after long and painful hearings, and finally became a fellow at the American Enterprise Institute. He also taught law, part-time I believe, at Ave Maria School of Law, now in Naples, Florida.

Both men had careers of great distinction, wrote extensively on constitutional law and legal philosophy, and – each being the other’s *bete noire* – apparently agreed on nothing.

Apart from an insightful and persuasive work on the goals of antitrust enforcement written early in his time at Yale, Bork’s most interesting books (he wrote five more, including *The Tempting of America*) were the best-selling *Slouching Towards Gomorrah: Modern Liberalism and American Decline* and its long-delayed sequel, *Coercing Virtue: The Worldwide Rule of Judges*. Bork was no moderate; his views began and ended at the extremes of immorality as he saw it.

Slouching largely took place in the 1960’s and early ’70’s, a time when, in Bork’s view, a generation of pampered adolescents drugged themselves at Woodstock and planted within their cohort the poisoned seeds of self-indulgence and degeneration; *Coercing* takes place thirty years later when the former adolescents, now adults and in positions of power and authority in government and (especially) in the universities, flowered forth in the vilely colored blooms of that earlier planting. What we suffered from them when they were kids is nothing to what they have done to us to us and made us suffer now that they’ve grown up.

In *Slouching*, Bork accounted for the wild and rebellious youth of the 1960’s for the following (now familiar) reasons, apparently in descending order of importance: (a) tremendous growth in baby boomer population, meaning children born between 1946 and 1964; (b) swelling of college enrollment and exposure to professors still in thrall to FDR; (c) parental affluence, leading to lack of purpose as well as boredom and malaise; (d) marijuana and LSD; and

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finally (e) rock & roll, yet another dangerous narcotic, which Bork might have preferred to move up higher on the list. The generation immediately preceding (his and mine, as it happens), having been in one sense lucky enough to have gone through the rigors of the Great Depression, and having fought or endured the stresses of World War II and in Bork's case the Korean War, was by contrast mature, seasoned, even patriotic, and essentially immune to disorder and debilitation.

All this is standard fare, or has become so. *Coercion*, an extended version of an invited lecture given at the University of Toronto, brought Bork up to date (as of the year 2003) and happily combined sociology with jurisprudence in a manner closer to his special expertise. Although less widely read, *Coercing* is actually more interesting and important (in its own terms) than *Slouching* because it contains Bork's ultimate judgment on the likely fate of American society, especially as fashioned or refashioned by the Supreme Court of the United States.

To begin with, Bork identified what he called a "New Class" (of which, I would guess, he might have named Dworkin Head Boy). The New Class consists of the "elites" – journalists, academics at all levels, Hollywood celebrities, mainline clergy, radical environmentalists, and single-issue activist groups of every kind. Born of the 1960's, the New Class opposes "tradition" – the Pledge of Allegiance, for example – and the teaching of family values – most especially parents in traditional combination, that is, man (male) and wife (female) – in public schools. In particular, the New Class maintains an active hostility to religion and religious institutions. It supports abortion, homosexual rights, funding for the arts, "social justice" and *equality*, a kind of soft socialism, however defined. The elites fight the culture wars through the public media, of which they command a substantial part. In the end, however, they are a political minority, and when serious social issues are at stake and sufficiently focused in the public mind – gun ownership would be an example – they lose elections and suffer defeat. The ballot box is not always or even often a friend of the Left except in a few isolated locations like the Upper West Side of Manhattan.

What the New Class has found to take the place of the popular will is the legal concept of “individual rights,” for which the Supreme Court of the United States has become the unelected spokesman. The source of those rights is to be found not in the statutes of the United States as enacted by the elected representatives of the people, but in the Constitution itself, a document underlying all other laws and obviously free of statutory limitations and elective correction. The Supreme Court long ago arrogated to itself (incorrectly and improperly, Bork thought) the power of “judicial review,” meaning that the Court has unlimited authority to determine whether the acts of Congress or of any of the state legislatures are or are not consistent with the Constitution’s requirements. Many have admired this function, presumably on the ground that it protects minority interests from the tyranny of the majority; but in Bork’s view the effect, ultimately, has been to give a small cadre of left-leaning lawyers, some or most of them most likely members of the New Class, the power to promote their own political agenda and to use that power to “coerce.” Sex and Religion were, for Bork, two major areas of public morality (there are others, Pornography and Gender) on which the Court has shown itself to be actively ideological and has made the most egregious use of its self-assumed authority.

The founding source of modern judicial activism, Bork declared, was the Supreme Court’s 1965 decision in *Griswold v. Connecticut*¹ – argued, as it happened, by yet another member of the Yale Law School faculty. In *Griswold*, the Court struck down a state law prohibiting the use of contraceptives on the ground that it violated the individual’s “right to privacy.” To be sure, no such “right” appears anywhere in the Constitution itself, at least not in explicit terms, but other constitutional provisions such as rights of association and freedom from unreasonable searches and seizures showed that actions taken in private, of which the use of contraceptives is certainly one, were intended by the Framers of the Constitution to be protected by the due process clause. Time passed and, as Bork anticipated, the *Griswold* decision, which he viewed as “utterly specious,”

¹ 381 U.S. 479 (1965).

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proved to be of great importance. The right to privacy, “invented” or “constructed” by the Court in order (in Bork’s opinion) to enforce sexual freedom, led to the famous decision in *Roe v. Wade*,² “a curious performance . . . [which] contains no shred of legal reasoning (or logic of any description), but simply announces that the right of privacy is sufficiently capacious to encompass a woman’s right to an abortion,” protected as such by the due process clause of the Constitution. Intensely critical, Bork quite correctly observed that the Constitution says nothing whatever, even by remote implication, about a “right” to abortion, and certainly nothing that denies a state the legal power to treat abortion as a crime. “Abortion,” Bork wrote, “has become a sacred cow for the Court, before which neither the Constitution nor the Court’s previous decisions can stand.”

The same “right,” as he grimly foresaw, finally led the Court to overrule its earlier 5-4 decision – *Bowers v. Hardwick*³ – upholding a state law making homosexual sodomy a criminal offense. Finding the *Bowers* decision to be “not correct when it was decided, and . . . not correct today,” the Court in *Lawrence v. Texas*⁴ (now 6-2 the other way) reversed the convictions of two individuals under the Texas “Homosexual Conduct” law, holding unconstitutional a statute that would, if enforced, make “private sexual conduct a crime.” In effect, the right to privacy, a judicially created fantasy having no other legal source, led to “the normalization of homosexuality” and the abandonment of moral and ethical standards rooted in the Judeo-Christian tradition.

Did God exist, at least in Bork’s mind? I do not know the answer, but one thing is entirely clear: Bork believed that religious practice, meaning prayer and church-going, was vital to the moral character of the nation, that the Framers believed the same and that they intended the Constitution to reflect that belief without reservation (Jefferson, who wrote that there must be a “wall” between church and state, being a possible exception). The New Class, in

² 410 U.S.113 (1973).

³ 478 U.S. 16 (1986).

⁴ 539 U.S. 558 (2003).

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Bork's view, believes in only one religion, a non-religion, namely secular humanism born of the Enlightenment, and has succeeded in persuading the Supreme Court to accept that radical reading of the Constitution, contrary to original intent.

“Now we are treated to the preposterous spectacle of lawsuits by persons whose only complaint is that they are ‘offended’ by seeing a religious symbol, such as a creche or a menorah, on public property during a holiday season or even by the sight of the Ten Commandments on a plaque on a high school wall. Apparently those who do not like religion are exquisitely sensitive to the pain of being reminded of it, but the religious are assumed to have no right to such feelings about the banishment of religion from the public arena. . . . It is surely significant that, as religious belief has declined, moral behavior has worsened as well. When law becomes antagonistic to religion, it undermines its own main support.”

Bork and I were classmates and good friends at the University of Chicago Law School many years ago. One of the great unpublished photographs of Bork – funny beyond anything if, but only if, you actually knew the two people in the picture – shows Bork (wearing a yarmulke) leading my widowed mother, her arm in his, down the aisle at my wedding – also many years ago. In any case, Chicago fairly speedily fostered in Bork an impassioned and unqualified libertarianism. Beyond a belief in the efficiency of markets, which needs no detailed exposition, Bork developed and held to a “moral” view of government and the Constitution which, as it turned out, pretty well excluded everything the New Class would have viewed as social progress. His guiding principle was “personal liberty,” of which the best known expression, widely quoted at the time of his Supreme Court nomination (though partly retracted), was his opposition to the Civil Rights Act of 1964, which required businesses – “public accommodations” – to serve customers without regard to race. “The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, I am justified in having the state coerce you into the more righteous paths. That is itself a principle of unsurpassed ugliness.”

As I remember it, he also objected to the State of Connecticut's

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action in requiring fluoride to be added to our drinking water; also, to the work of the Food & Drug Administration in protecting consumers from buying uninspected meat and vegetables. Each was an attack on “personal liberty”; viz., we can and should be allowed to protect ourselves – brush our own teeth, so to speak – without the imposition of government mandates.

Bork had a widely shared and relatively uncomplicated theory of constitutional interpretation, if “theory” is the word for it. The moral standards of American society as originally understood and intended by the Framers of the Constitution in 1787 and under Amendments subsequently adopted are binding on the Supreme Court, he insisted, until altered by Congress or, depending on jurisdiction, by state legislatures. The Court itself, whether in terms or by necessary inference, is bound to apply those standards when faced with claims by individuals that were not foreseen or foreseeable by the Framers themselves. It cannot create a new set of standards of its own devising. If it does, it commits the sin of “judicial activism” by propounding a radical view of individual rights that is not expressed or implied by the language of the Constitution itself. Thereby, it subverts democracy and assumes a role in government that it was never intended to occupy. *Grissold*, *Roe v. Wade*, *Lawrence v. Texas*, together with decisions prohibiting the public exercise of religion, are examples of illicit judicial activism that Bork thought thoroughly discreditable. There are others. “The New Class,” Bork wrote in *Coercing*, “heartily dislikes bourgeois culture. Hence, courts everywhere displace traditional moralities with cultural socialism.”

Dworkin too read the Constitution as a source of moral principle. His conclusions were reasonably clear when it came to particular cases and particular Court decisions on which he often wrote articles for the *New York Review of Books* – and I invariably agreed with him. But the links in his analysis – usually more than a few from start to finish – were, I admit, sometimes difficult for me to keep clearly and steadily in mind. His major books (he wrote eleven in total) were *Taking Rights Seriously* and, much later and at length, *Law’s Empire*, both being the product of his training and experience as a lawyer and philosopher. Bork’s books were much easier to fol-

low because written in anger and replete with heroes and villains. Dworkin wrote in measured tones and as a scholar, but he was as eager as Bork to promote a point of view and just as quick to attack his critics.

Like Bork, Dworkin had the courage and ambition to confront what I take to be the largest and hardest question to be asked about the Constitution, namely: how, if at all, shall we make applicable to modern social and political problems a document written in 1787 and 1866 in language of Biblical generality? As suggested, Bork's answer to that question, briefly, was by resorting to the original intent of the Framers or by reasonable inference therefrom. Dworkin's answer was quite different.

In his first and, I think, ultimately his most influential book – *Taking Rights Seriously* – Dworkin more or less began by adopting the philosophically “rationalist” view of morality, meaning in brief that moral principles exist and can be determined by rational means quite apart from our desires, motivations, and self-interest. Moral claims, Dworkin argued, are necessary, independent and objectively determinable. I do not know nearly enough about moral philosophy to be able to judge what status this position holds among moral philosophers, but I have the impression – subject to correction by anyone who knows more – that, though it does have support, it is far from gaining universal acceptance. Whether that conjecture is right or wrong, my particular aim is to try to say what effect Dworkin's philosophical position had on the narrower question of how he would relate the Constitution, which does not at any point contain the word “moral,” to contemporary social issues.

Under the chapter heading “What Rights Do We Have?” Dworkin saw “the great social issues of domestic politics . . . as presenting a conflict between the demands of liberty and equality. It may be . . . that the poor and the black and the uneducated and the unskilled have an abstract right to equality, but the prosperous and the white and the educated and the able have a right to liberty as well and any efforts at social reorganization in aid of the first set of rights must reckon with and respect the second. . . . Every piece of important social legislation, from tax policy to integration plans, is

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shaped by the supposed tension between these two goals.”

It is of course likely that the “two goals” will forever exist in tension but it was Dworkin’s bold conviction that one only – the right to be treated as an equal – constitutes a basic or a natural moral right. This is not (he was careful to say) a right to the same distribution of goods or opportunities that anyone else may have. Rather, it is the right to “equal concern and respect in the political decision about how those goods and opportunities are to be distributed.” It follows, then, everything else being equal, that the best skater in a figure-skating contest is entitled to receive first prize. Not so, of course, if the prize is awarded on the basis of race, gender, religious belief, sexual preference, party membership or, I suppose, filial relationship to the judges. The right to be treated as an equal is a moral concept, primary and enduring, from which particular applications or “conceptions” – whether or not first prize was fairly awarded – can be evaluated and judged.

Having established the moral primacy of equality, the question that remains is where “liberty” stands in Dworkin’s moral universe. The answer, of course, is that liberty is to be recognized and honored. It is, however, a secondary function of equality, and indeed is so recognized by the Constitution itself. We may do as we like – say what we like, worship whatever god we deem worth worshipping – provided that the State does nothing that leads to bias or preference “on the ground that some citizens are entitled to more because they are worthy of more concern” or “on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s.” Liberty is necessarily constrained by law, and properly so – you must stop when the traffic light turns red – as long as the constraint is not one that derives from a claim that “certain forms of life are more valuable than others.”

The moral primacy of “equal concern” had great benefit for Dworkin because it effectively freed him from the confining limitations of historicism and original intent. The original intent argument, roughly and briefly speaking, is that the mental states of those who wrote the Constitution and the Amendments of 1866 had in view a concrete and identifiable set of outcomes which must and

should be determinative until changed by the electorate or by its legislative representatives. No simpler example exists, I suppose, than that of school segregation. The floor manager of the legislation that preceded adoption of the Fourteenth Amendment told the House that, “civil rights do not mean that all children shall attend the same school”; it was entirely clear that “equal protection of the law” was not intended or interpreted to require black and white children to go to school together in 1866. But “[i]t would be silly,” Dworkin wrote in *Law’s Empire*, “to take the opinions of those who first voted on the Fourteenth Amendment as reporting the public morality of the United States a century later.” What needs to be understood is that there is an abstract morality that underlies the Fourteenth Amendment – namely, a moral right to “equal concern” – that not merely allows but requires the Supreme Court to consider school segregation in contemporary terms. The same is true, Dworkin argued, of any limitation or constraint that is sensitive to time. What endures is morality as a concept. What changes and must change is “conception” – what the moral “fact” is which the Fourteenth Amendment and our interpretation of the Constitution generally obligates the Court to do, or at least justifies the Court in doing, in the face of changing circumstances and the community’s developing sense of public purpose. The Court may or may not wisely draw out the moral implications of the Constitution, but morality not original intention is the touchstone.

In any event, I am confident that Dworkin would approve or think justified the Court’s decisions in the very cases – among others, *Roe v. Wade* and *Lawrence v. Texas* – that Bork condemned. The principle of “equal concern” did not stand in Dworkin’s way in dealing with the vexed question of affirmative action as a means of favoring black Americans seeking preferential admission to college and professional schools. He rejected the *Bakke*⁵ decision in *Law’s Empire* with the observation that “a distinction obviously designed to aid historical victims of prejudice” would not have violated Bakke’s constitutional right.

⁵ 438 U.S. 265 (1978).

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Bork and Dworkin held sharply different theories of constitutional interpretation leading to very different results as cases arose. Both are interesting and to some extent persuasive, though, I suspect, less and less a matter of current influence as their major works recede in time. Neither, as far as I can tell, has ever been cited by the Supreme Court for his theory of constitutional interpretation or his appraisal of decided cases. In that sense, like other academic workers in this field, their particular views are transitory and harmless. But perhaps that gives them less credit than they are entitled to. Both have been widely read and have influenced scholarly and to some extent public opinion and each has a devoted political following.

There is of course another school of constitutional interpretation, but it is not based on a close reading of the cases or of the Constitution itself and certainly not on scholarly research. On the other hand, though not well informed, it is undoubtedly much more widely held than any other such theory. And that is the theory of “personal values.” Under that theory, the outcomes in cases involving sensitive social issues depends on just who is in the 5 that makes up the Court majority and who is in the 4 that excoriates those outcomes and inevitably raises the cry of “judicial activism.” This varies from time to time or from generation to generation and is fairly predictable. It is a theory held by all congressmen, by all presidents, by many judges, and by the man-on-the-street to the extent that the latter pays the matter any attention. The “personal values” theory is a bit hard to articulate, but perhaps one way, admittedly rather clumsy, is to say that when faced with a Constitution that is more or less wide open and unconfined, judges are likely to resort to their own heartfelt sentiments and what they regard as the choices best suited to righteousness, public duty, and conscience. For that reason the Court’s decisions appear to be political or aesthetic rather than strictly legal, with the obvious consequence that they are more likely to unsettle than to quiet the public mind.

I more than suspect, though I cannot prove, that Bork and Dworkin were influenced, indeed driven, by personal values in propounding their respective views of what the Constitution requires. Anyone who knew them, I believe, would be almost certain to share

that suspicion. To be sure, each would have insisted that the contrary was true and that his approach to constitutional interpretation was consistent, objective, even scientific. There is a certain irony in that, I suppose, since personal values *obviously* inspired their most interesting and incisive work. I do not mean to suggest that a theory of “personal values” is discreditable in any way. It would, however, if regarded as the theory that rules all other theories, have the effect of eliminating a large literature – theirs and others’ – otherwise directed to the great question of constitutional interpretation.

The Roberts Court has visibly swung in Bork’s direction, which must have given him satisfaction in his last days, but I am sure that Bork was wise enough even then, as Dworkin must have been, to know that every swing goes up and down.

