Meeting the Enemy

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Meeting the Enemy

Robert F. Nagel†


I.

When roughly forty percent of American law professors proclaimed their opposition to the appointment of Robert Bork to the Supreme Court,¹ what were they announcing about their profession and themselves? In _The Tempting of America,_² Bork contends that the opposition revealed the legal academy’s subordination—even rejection—of legal norms, and he argues that this devaluation of law is a part of broader anti-intellectual movement based within the universities. He insists that this movement poses a grave threat to our constitutional system and, more generally, to the health of our political culture. Bork goes so far as to argue that those who are most responsible for intellectual values lie in order to achieve their immediate political objectives, and that they systematically engage in cynical fabrications in order to displace the right of the people to govern.³

† Rothgerber Professor of Constitutional Law, University of Colorado School of Law. I appreciate the helpful comments of Christopher Mueller, Gene Nichol, Pierre Schlag, and Steven Smith. My thinking was also influenced by Professor George L. Priest’s statement at the Bork hearings; his testimony is printed in Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on the Judiciary, 100th Cong, 1st Sess 2439 (1987). Neither my colleagues nor Professor Priest, however, should be blamed for what I have written.

¹ Kenneth B. Noble, _Bork Panel Ends Hearings,_ NY Times B9 (Oct 1, 1987).
³ Bork repeatedly asserts that jurists and scholars use constitutional doctrines as
These are extreme charges and Bork makes them bluntly. For a law professor, the temptation is great to belittle Bork's book as a rehash of an inadequate legal philosophy and a slightly paranoid counter-attack on his political tormentors; more charitably, one might be inclined to describe it as a forceful polemic understandably provoked by a galling and humiliating experience. Such descriptions are tempting in part because, while the book is more than these things, it is all of these things. But there is another reason for academics to be inclined to dismiss the book: we law professors are, after all, the targets of Bork's serious accusations. If Bork's book is suspicious because it is self-serving, quick rejection of his charges by legal scholars would also be suspicious for the same reason.

There is, moreover, much that is plausible about Bork's major claims. As the former Alexander Bickel Professor at Yale Law School, Solicitor General of the United States, and Judge of the Court of Appeals for the District of Columbia Circuit, Bork in many ways personifies the law as a discipline and a profession; in a loose metaphoric sense, his defeat did represent the rejection of Law. More importantly, support for the various elements of Bork's indictment of his former colleagues can be found throughout the academic literature itself. Bork is hardly the first to note the strong and convenient convergence of constitutional conclusions and political preferences. He is alone neither in his apprehension at the ferocity of the modern intellectual assault on the idea of law nor in his belief that the current practice of political judging...
is deeply illegitimate. Even some of Bork's small touches—for example, his belief that contemporary constitutional theory is not worth reading and his apparently heartfelt resolution to stop reading it (p 255)—are sentiments that many legal scholars will recognize, if not confess, as their own.

Even without the recent explosion of interest in liberal democratic institutions throughout Eastern Europe and in South Africa, I think we would have recognized that an important part of Bork's argument is both serious and accurate. But the perspective cast by those splendid events makes graphically clear the precious, self-absorbed, immoderate quality in much of the academic commentary on American constitutional law. Constitutional theorizing, protected and nourished by an enormously successful political system, has grown luxuriant—often both irrelevant and reckless. We academics ask for so much from constitutional interpretation, and in the pursuit of these ambitions we casually question whether our system ought to be democratic, whether it is possible for judges to follow legal rules, and whether even modest institutional stability is desirable. Yet we understand so little about the fundamental preconditions for what others, who can take less for granted, seek so urgently: publicly accountable government and the rule of law. Perhaps Bork exaggerates when he characterizes the legal academy as a unified, cynical, purposeful threat to our form of government; there is, however, enough to what he says to warrant some abashed introspection. We ought not to pretend otherwise simply because Bork is the messenger.

Even if Bork is right in important respects, he is, of course, not entirely right. Few in academia, however, can be trusted to be especially objective in separating truth from exaggeration in this book. I, for instance, am a member of the post-realist, Vietnam-era generation at which Bork points the finger of blame. And, as will

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* Although Herbert Wechsler's strictures on neutral principles, Toward Neutral Principles of Constitutional Law, 73 Harv L Rev 1 (1959), have taken a heavy beating in recent years, important scholars continue to denounce the Court for unprincipled imposition of values. See, for example, Ely, 92 Harv L Rev 5 (cited in note 4); and Michael J. Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 Stan L Rev 1113, 1127 (1980). Some of these denunciations are as fervent as Bork's and often involve the same cases. See, for example, John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L J 920 (1978).

7 Bork writes:

Only recently . . . have intellectual class policies been advanced with the ferocity and, it
become clear, I do not believe in the possibility of apolitical law in the way that Bork does. Most of the legal writers whose work I admire reject Bork’s approach to constitutional law, and they vociferously opposed his confirmation. For me the matter is complicated because I supported Bork’s confirmation, but wrote approvingly of aspects of the hearings that led to his rejection.8

Despite my peculiar mixture of identifications and beliefs, I was flatly dismayed at the role the legal academy played in Bork’s defeat. I would guess that many who read this book will recognize they too were disturbed by that role and will wonder why the issue dropped from sight so quickly. The disturbing aspect of the scholarly opposition lies not in the identity of the person placed on the Court, but in the questions raised about the character of the enterprise in which we are engaged. The Bork hearings momentarily illuminated doubts about legal scholarship that have been obscured for a long time. While Bork’s interpretation of the hearings is wrong on many incidentals, it is right on some fundamentals. He reminds us that our profession is too willing to trifle with serious ideas and important institutions. He reminds us that both knowledge and democracy depend on more than brilliant minds and good intentions. Although his book is itself intemperate, Bork is right to insist on the necessity for civility, self-restraint, and integrity.

The predictable reply to what I have suggested so far is this: There were good and sufficient reasons for opposing Bork, so neither the events surrounding his nomination nor his book analyzing those events raises significant doubts about the character and role of the legal academy. My response, which I develop in the course of this review, is that the most conscientious doubts about Bork’s fitness were directed, not at his political beliefs, but at his intellectual qualities. These qualities are widely shared among law professors (although they are not, of course, universal) and are especially visible in the writings of the elite theorists who tend to represent our professional aspirations. The best reason to oppose

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8 Although I criticized the extent to which jurisprudential and doctrinal vocabulary dominated the hearings, I praised the Senate’s effort to achieve some control over the Court and I urged that this effort might be more successful if confirmation hearings were more unapologetically political. See Robert F. Nagel, Advice, Consent, and Influence, 84 Nw U L Rev (forthcoming, 1990).
Bork, in short, was that he reminded us of ourselves; if we right­fully condemned him, we condemned our profession. Indeed, I sus­pect that mixed in with all the other fuel that fed the intense, almost exhilarated academic opposition to Bork was something close to self-hatred.

II.

The author of The Tempting of America certainly does not present himself as the mirror of the legal professoriat. He depicts the academy as a specialized and sophisticated “clerisy of power” (p 250) and describes its work product as “abstruse” and “convoluted.” (p 134) The “clerisy,” he charges, uses its intellectualism to mask and mystify its political objectives. (p 250) In contrast, Bork models himself after the more practical writers of earlier eras. Like the Constitution itself, which he says was “addressed to the common sense of the people” (pp 5, 134), Bork speaks with an uncomplicated vocabulary aimed at ordinary citizens. The relationship that he attempts to establish with the American people is the opposite of the relationship that he accuses the academy of establishing. Bork tries to defrock the judges and the professors, to report directly to the general public on the real agenda of the intellectual class. He describes that agenda as nothing less than the cultural and political dominance of left­liberal intellectuals— the equivalent of a “coup d’état,” the true nature of which has been concealed by elaborate rationalizations obligingly adopted by the federal judiciary. Bork writes with a kind of populist confidence, apparently secure in the belief that, if words are plainly used, the public will reject the crassly political lawlessness of the educated classes as constitutional “heresy.” (p 7)

There is much to admire in Bork’s report to Americans. It can be useful, even crucial, to address the public generally and to couch constitutional debate in terms of larger cultural conflicts. Bork is right to insist, against the academic fashion, that erudite and creative thinking has no special claim to legitimacy in public law, and that even in scholarship the simple truths—for all their lack of surprise—may still be true. While he oversimplifies considerably when he lumps everyone from Ronald Dworkin to Duncan Kennedy into a monolithic “left-liberal elite” (pp 187­221), he is


10 Bork refers to “coups” (pp 215, 265), “judicial revisionism” (p 128), “lawlessness” (p 44), “infiltration” (p 246), and “judicial despotism” (p 41), as well as “heresy” (p 7).
still essentially correct to depict legal academics and their scholarship as largely a force for leftist politics. As he suggests, there is an incestuous relationship among judges, their law clerks, and the clerks' professors, through which the politics of the academy are funneled into the case law. (p 135-36) Although the same could be said about some right-wing politics, it is true that left-wing activism can be at once cloyingly tolerant and relentlessly self-righteous. (pp 243-45) Anyone who has served on an academic appointments committee, read law reviews, followed judicial decisions, or noted ABA resolutions knows that Bork is onto something when he says that political considerations now suffuse every issue taken up by the legal elite, from assessing intellectual capacity to defining the law. Of course, it is likely that under a veneer of high-mindedness and objectivity, politics in some version has always exercised a heavy influence on both scholarship and judging. Even so, Bork is right to focus on what seems to be a widespread modern trend: the loss of that veneer and the pervasiveness of the belief that even attempts at political neutrality are worthless or destructive.  

As a long-time participant in academic debates and in judging, Bork cannot completely distance himself from what he criticizes; he writes as a dissenter from within the legal establishment, almost as an apostate, disclosing to the wider public the significance of the intellectual practices that he now sees as dangerous. This prolific Chicago School economist and constitutional theorist reports on the obscuring effects of scholars' "vast outpouring of words" and "arcane inquiries." (p 134) Much of the book is an effort to decode

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11 For a recent, vivid illustration, see Michael H. v Gerald D., 109 S Ct 2333, 2349, 2351 (1988) (Brennan dissenting) (arguing that privacy rights should be extended to adulterous, putative fathers because our society is "a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practices" and also that the contrary view is "stagnant, archaic, hidebound . . . steeped in the prejudices and superstitions of a long past").

12 This trend was perhaps the most striking aspect of the Bork hearings. As recently as 1983, Mark Tushnet could write:

A ritual is enacted whenever a nominee for a federal judgeship appears . . . . One Senator will ask, "Do you intend to apply the law rather than make it?" Another will ask, "Will you apply the words of the Constitution in the way the framers intended?" Nominees . . . play their part in the ritual by answering "Yes" to both questions.

Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv L Rev 781, 781 (1983). A few years later, Bork was skewered when he tried to answer "yes" to those questions. A forthright call from the mainstream to drop the veneer can be found in Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 Harv L Rev 43 (1989).
current legal writing so that its substance can be seen for what it is—flimsy, sometimes bizarre, and subversive. (p 135)

Bork's commentary on the content of constitutional theorizing is often telling. Since his standard is common sense and his audience the general public, he sometimes just shoots the fish in the barrel. He notes Laurence Tribe's never-ending quest to justify *Roe v Wade* and quotes Tribe's fatuous effort to invoke "Abraham Lincoln's warning, voiced on a previous occasion when the nation was deeply divided over a different issue of fundamental liberty, that the Union could not long endure 'half slave and half free.'" (p 203) There is much material of this kind: Tribe's views on "chemical predilections" and obscenity (pp 204-05); David A. J. Richards's announcement of "the principle of love as a civil liberty" (p 211); Mark Tushnet's declaration that he would decide cases according to what is "likely to advance the cause of socialism" (p 214); Paul Brest's suggestion that the criterion for constitutional interpretation should be the advancement of "the well-being of our society" (p 208); and so on.

Ridicule is not the stuff of serious intellectual exchange, but Bork's purpose is not so much to debate as to expose, and (as opponents of Bork's confirmation certainly know) there is value in laying before the American public the occasional silliness of intellectuals who try to influence public affairs. At any rate, Bork's report often goes beyond ridicule to analysis and rebuttal. He observes, for example, that the current "torrent" of interest in theory is a sign of institutional weakness and self-doubt. (pp 133, 138) The energetic, sometimes outlandish efforts to legitimate reformist judging communicate more anxiety than justification. More spe-

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16 Laurence H. Tribe, *American Constitutional Law* § 15-10 at 1351 (Foundation, 2d ed 1988). Bork comments, "Lincoln certainly never suggested that the cure for a nation half slave and half free was for the Supreme Court to end slavery by inventing the thirteenth amendment." (p 203)
specifically, Bork notes that the important intellectual achievements of modern theorists—for instance, the deepening (and consequent complication) of our ideas about drafters’ intent and textual meaning (pp 213-14)—are fundamentally inconsistent with judicial review, so that the sophisticated theorizing is at odds with the theorists’ preferred institutional recommendations. In order to salvage these recommendations, scholars are forced to make unrealistic assumptions about the resources and abilities of judges. Bork is properly skeptical, for instance, about the political usefulness of the discipline of moral philosophy, and he makes the refreshingly simple observation that judges have neither the training nor the time for moral philosophy anyway. (p 191)

According to Bork’s analysis, the key tactic of modern constitutional interpretation is epitomized by the reliance on “penumbras” in Griswold v Connecticut: the expansion of a limited or partial right that is protected by the text of the Constitution into a general value that is not. He sees this technique not only in the privacy cases, but also in Ely’s “representation-reinforcement” model (p 196), in Tribe’s “antisubjugation principle” (pp 201-02), in Dworkin’s distinction between concepts and conceptions (pp 213-14), in Justice Brennan’s ideal of “human dignity” (p 219), and in Siegan’s economic liberties. (p 224) While Bork does not attempt a systematic criticism of the strategy of generalization, he repeatedly makes two powerful points: (1) the framers’ decision about where to stop is as important and as worthy of respect as their decision where to go (pp 196, 198); and (2) every expansion of rights diminishes “the liberty of the individuals who make up a community to regulate their affairs . . . .” (p 229)

More than any of his other positions, Bork’s commitment to democratic decisionmaking places him in sharp contrast to modern academic fashion. That fashion, as expressed in our leading law journals, permits the performance of the United States Congress to be mocked with an incredulous exclamation point;¹⁹ it permits belief in the principle of electoral accountability to be dismissed with the word “curious.”²⁰ Against a confident, inventive assault on the

¹⁹ Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv L Rev 1281, 1311 (1976): “And to retreat to the notion that the legislature itself—Congress!—is in some mystical way adequately representative of all the interests at stake . . . is to impose democratic theory by brute force on observed institutional behavior.”

²⁰ T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich L Rev 20, 59 (1988): “Legitimacy is maintained, the argument might go, not by allowing willful judges to update the law, but by respecting legislative supremacy (and therefore democratic government). This argument . . . strikes me as curious.”
moral legitimacy of legislative decisionmaking, Bork raises this unfashionable, unoriginal—but important—idea:

The often untidy responses of the elected branches possess virtues and benefits that the "principled" reactions of courts do not. Our popular institutions . . . were structured to provide safety, to achieve compromise . . ., to slow change, to dilute absolutisms. They both embody and produce wholesome inconsistencies. They are designed, in short, to do the very things that abstract generalizations . . . tend to bring into contempt. (pp 352-53)

Together with his emphasis on framers' intent and his thorough-going commitment to neutrality in law, Bork's defense of democratic values makes him the unapologetic embodiment of most of the significant ideas that have been under attack by constitutional theorists for over thirty years. The sweep of his criticisms reaches from Bruce Ackerman to Richard Epstein to Ronald Dworkin to Alexander Bickel to Duncan Kennedy to Michael Perry to John Ely to James Thayer. It only makes matters worse that he expresses these positions in an unmodulated writing style aimed at a general audience. In short, the author of The Tempting of America presents himself as the Anti-Scholar.

Given the position that he assumes, the academy undoubtedly will give lovingly detailed attention to the various deficiencies in Bork's jurisprudence and sociology. And deficiencies there are. But we should hesitate before undertaking the predictable demolition because what is wrong with Bork's ideas is not much different from what is wrong with the ideas of mainstream constitutional scholars. Indeed, the closer Bork's book is examined, the harder it is to distinguish the author from the rest of us.

III.

Bork describes the idea of political judging as a "heresy" (pp 6-7), and refers to judicial "civil disobedience" and "limited coups d'état" perpetrated by the Supreme Court. (p 265) Scholars who are squeamish about overstatement might be inclined to criticize this language as the sort of rhetoric appropriate only in political campaigns, union organizing, faculty meetings, and other unpleasantly sweaty events.

Professors will be even further perturbed by Bork's assurances that, in contrast, there is "nothing extreme" about his own views. (p 280) Bork describes the doctrine of substantive due process as "utter[ly] illegitima[te]" (p 32); he labels the process of deriving
rights from sources such as "the essential nature of all free governments" as "preposterous" and "judicial despotism." (pp 41, 119) He criticizes the application of the desegregation principle to the federal government as "social engineering from the bench," and the reapportionment decisions as examples of "disregard for the Constitution." (p 84) He condemns not only the work of Justice William Brennan, but also that of Justices Samuel Miller (for adopting a position that would lead to "despotism"), Oliver Wendell Holmes (for the deferential standard of review proposed in his *Lochner* dissent), John Marshall Harlan (for his "entirely legislative" arguments based on tradition), and—in one swoop—William Rehnquist and Antonin Scalia (for assuming an "illegitimate power" when deriving rights from the "most specific tradition available").

For Bork, it seems, the heretics are everywhere and he stands alone representing orthodoxy.

Although it is offensive for Bork to claim the mantle of reasonableness for himself while condemning the work and ideas of so many responsible and intelligent jurists, his sweeping condemnations might be forgiven as the kind of excess common (as Bork himself knows well) in politics; this is, after all, not primarily an academic book. But Bork's posture is not merely a matter of combativeness; he means what he says. He has insisted for many years—including in testimony before Congress—that the courts are engaged in a pattern of illegal conduct. The fact is that Bork believes that his approach to constitutional law is right and that just about every other current jurist and scholar is wrong. Thus the problem with Bork's book is not the extreme phrasing it contains but the towering intellectual self-assurance it displays.

We have, however, seen that kind of self-assurance before. It was evident, for example, in Laurence Tribe's assertion that Bork's views set him apart "from the entire 200-year-old tradition of

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21 *Loan Assn. v Topeka*, 87 US (20 Wall) 655, 663 (1874).
22 See pp 41 (Miller), 45 (Holmes), 234 (Harlan), and 240 (Rehnquist and Scalia).
23 In 1981, Bork testified that *Roe v. Wade*, 410 US 113 (1973), was "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority. . . ." He added, "I also think that *Roe v. Wade* is by no means the only example of such unconstitutional behavior by the Supreme Court." He suggested that the Human Life Bill (which would have deemed human life to exist from conception for purposes of the Due Process Clause) would alter "the constitutional function of the courts as we have known it since *Marbury v. Madison*," but described this change as "no more drastic than that which the judiciary has accomplished over the past 25 years." The Human Life Bill, Hearings on S 168 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong, 1st Sess 310-11 (1981)("Human Life Hearings").
thought about rights that underlies the American Constitution."24 Since Tribe presumed to speak on behalf of an entire 200-year tradition, it is not especially surprising that in the same statement he testified for all of those who established the Constitution (saying that "no understanding of the Constitution could be further [than the theory of original intent] from the clear purpose of those who wrote and ratified the Constitution ... ").25 Or that he spoke for all of the "105 past and present Justices of the Supreme Court" (none of whose views were as "radical" as Bork's).26 Or that on occasion he has purported to know the thinking of all respectable legal scholars on controversial issues;27 or that, like Bork, he is very often certain about the true meaning of complicated constitutional provisions.28

The former Alexander Bickel Professor from Yale, then, is excessively definite, harshly critical, and heroically confident, and in these characteristics he resembles the Tyler Professor of Constitutional Law from Harvard—who resembles the distinguished Professor of Jurisprudence from Oxford. Recall that after Bork's nomination, Ronald Dworkin, like Tribe, presumed to speak for everyone and invoked the idea of heresy: "Bork is a constitutional

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24 Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on the Judiciary, 100th Cong, 1st Sess 1278 (1987) ("Bork Hearings").
25 Id at 1279.
26 Id at 1281.
27 For example, in voicing his opposition to the Human Life Bill, Tribe referred to a letter of opposition signed by eighteen distinguished scholars and public servants and asked why the bill "should have called forth such an unprecedented unison of voices... ." He then suggested that the "most likely reason... is that virtually all careful students of the Constitution—those who write and teach about it, as well as those sworn to enforce it"—agreed with his position. Human Life Hearings at 255-56 (cited in note 23).
28 The Human Life Bill, for instance, involved difficult interpretative issues arising out of both Roe v Wade and the various cases defining Congress's power to enforce Section 5 of the Fourteenth Amendment. Nevertheless, Tribe claimed that no "truly reasonable basis" existed to support the constitutionality of the Bill—that "invalidity... is the only plausible verdict to which a considered analysis can lead... ." Human Life Hearings at 256 (cited in note 23) (emphasis in original). Well, perhaps Tribe was being uncharacteristically fervent on this issue? Here is Professor Tribe on the Religious Speech Protection Act: "H.R. 4996 is a clearly, and I underline the word 'clearly,' constitutional exercise of Congress'[s] power." Religious Speech Protection Act, Hearing on HR 4996 before the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 98th Cong, 2nd Sess 46-47 (1984). Similarly, Tribe co-authored a letter to Senator Edward Kennedy on the constitutionality of the "line-item veto." The letter concludes that "any attempt to exercise such a 'line-item veto' would clearly be unconstitutional." 135 Cong Rec S14387 (Oct 31, 1989). A thoughtful explanation of the actual complexities of this issue can be found in J. Gregory Sidak and Thomas A. Smith, Four Faces of the Item Veto: A Reply To Tribe and Kurland, 84 Nw U L Rev (forthcoming, 1990).
radical who rejects a requirement of the rule of law that all sides . . . had previously accepted.” Harsh criticism? Dworkin wrote that Bork’s philosophy is “not just impoverished and unattractive but no philosophy at all.” In language eerily similar to Bork’s own, Dworkin dismissed Bork’s conclusion that homosexuality is not constitutionally protected as “the jurisprudence of fiat.” Certainly not all of the professors who opposed Bork’s nomination recognized something familiar in his arrogant intellectualism. But it is safe to say that a very large number of law professors (including me) try to stake out positions that are different from everyone else’s, criticize uninhibitedly, and generally write with a degree of authority to which we are not entitled.

Bork may seem unique, nonetheless, in that his condemnation of judges and the authority of their decisions is so complete; it is one thing to be intellectually confident but another to recklessly call into doubt so much of what so many courts have done for so long. Accordingly, although many may be self-assured, it is Bork who is said to be “outside the mainstream.” This response underestimates the force and ambition of academic commentary. Bork is indeed at odds with much legal authority, and his criticism of anchoring substantive due process rights in tradition seems especially extreme, separating him from positions taken even by Justices Harlan and Scalia. These criticisms, however, are no more far-reaching than John Hart Ely’s devastating work on the same subject. Michael Perry’s early writing depicts virtually all of modern constitutional law as illegitimate, except insofar as it is justified by some functional theory that has never been imagined, let alone adopted, in any decision that I have read. While Bork rejects much authority, both scholarly and legal, he could not reject more than Mark Tushnet does in his recent, respected book. In criticizing the privacy cases, does Bork repudiate more precedent than the academic critics who took on the Court’s hundred-year-long refusal to enforce the Free Speech Clause? More than the progressive realists when they condemned pre-1937 activism on

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30 Id at 10.
33 Michael J. Perry, The Constitution, the Courts, and Human Rights 11, 24, 91 (Yale, 1982).
economic issues? More than the process theorists who described the main work of the Warren Court as usurpation?

Everyone knows that in constitutional law, not only scholars but also judges defy whole lines of authority. In the face of specific constitutional text and many decisions directly to the contrary, Justices Brennan and Marshall continue to insist that the death penalty is inherently unconstitutional. And well they might, for many firmly established doctrines have been discarded, including "separate but equal," the non-application of the Bill of Rights to the states, economic due process, the "bad tendency" rule in free speech cases, the political question doctrine in reapportionment and prison cases, and so on. Moreover, many of the Court's most important decisions—New York Times v Sullivan, Miranda v Arizona, Griswold v Connecticut, and Roe v Wade come to mind—were departures, reversing long-held understandings on the basis of sometimes casual and occasionally incomprehensible references to prior cases. In a country that saw very little judicial review in the first half of its history and saw such review frequently exercised in lurching defiance of precedent during the second half, Bork's willingness to rethink case law puts him in the company of many eminent jurists.

One might try to differentiate Bork from this critical tradition on the ground that the destruction of theory and doctrine is usually accompanied by some positive suggestion, giving the resulting innovations in the case law a creative kind of integrity. Bork does, however, offer a positive theory—original intent—that even has an established lineage. Moreover, Bork's argument is precisely that original intent would align the cases better with the Constitution as it is properly understood. Like most theorists and judges, he justifies apparently radical recommendations by claiming that they represent an underlying continuity, a realization of the true Constitution.

Probably the least attractive aspect of Bork's iconoclasm is that, while intended to be intensely serious, it sometimes pushes fundamentally accurate observations so far as to verge on the frivolous or even nutty. He asserts, for example, that for the past fifty years the Court has never departed from the framers' intent in order to establish "an item on the conservative agenda." (p 130) (Never? Is it so clear that the framers of the Equal Protection Clause intended to restrict the authority of local governments to assist disadvantaged racial minorities? Did the authors of the Free Speech Clause think they were protecting commercial advertising and campaign expenditures by corporations?) Bork writes as if ir-
responsible political tactics are practiced only by the left and as if there are no exceptions or qualifications to the rule that "activists of the 1960s" have "only contempt" for responsible politics. (p 11) He depicts the *Griswold* litigation as a cabal of Yale professors battling for the cultural validation of their sexually libertine values. (pp 96-97)

Bork's problem runs deeper than conspiratorial themes, however, for those themes betray a general willingness to believe too quickly in the novel or daring idea. Indeed, some of the book's fundamental claims are doubtful because they rest so heavily on the challenging abstraction and ignore the ordinary and concrete. As correct as Bork's criticism of *Griswold* may be in principle, it just seems fanciful to regard judicial creation of the right to privacy as a threat to our form of government. Such an allegation places too little value on what Bork purports to respect: a sense of history and the public's common sense. The public, after all, has had experience with the right to contraceptives for considerable time now and senses in that experience no real danger. More generally, what most undermines the sense of outraged urgency in Bork's argument that the rule of law is in jeopardy is his own survey of political judging in American history; according to that history, the rule of law has been in some jeopardy since *Calder v Bull* in 1789.

Bork ascribes to his former colleagues the vice of being over-attracted to generalizations and principles. He is right—law professors tolerate and reward abstract writing that is every bit as quirky, conspiratorial, and doomsdayish as Bork's. Space limitations preclude anything like a full set of illustrations, but a few notable examples come to mind. Certainly much of the free speech literature is characterized by exaggerated fears and extreme claims.35 Scholarly evaluations of the Burger Court were often notable for their conspiratorial cast.36 The commentary on abortion,
exemplified by Tribe’s reference to abortion laws as “the power to sentence women to childbearing” (p 202), is sometimes strained and apocalyptic. The brilliant, the imaginative, and the unlikely abound in our images of judges—as moral prophets, as intellectual demi-gods, as protectors of democracy, as Christlike parable-tellers, as saviors of “the very regime itself at some awful moment of supreme peril.”

My own favorite academic argument is Richard Wasserstrom’s extended analysis of the question whether a good society “would be one in which an individual’s sex was of no more significance... than is eye color today.” Realizing that such a society would be incompatible with almost all sexual differentiation—“[b]isexuality... would be the typical intimate, sexual relationship”—Wasserstrom hesitates in his endorsement. He has to admit, after all, that “substantial sexual differentiation is a virtually universal phenomenon in human culture.” This fact, he says, might support an “argument” that “where there is a widespread, virtually universal social practice... there is probably some good or important purpose served...” Wasserstrom, however, concludes that though this is an argument, “it is hard to see what is attractive about it.”

The virtue of Wasserstrom’s analysis, like Bork’s, is its bold, imaginative quality. The disadvantage is that it elevates the conceptual over the experiential and historical, and thereby achieves goofiness. Bork’s constitutional jurisprudence may be thought demonstrably wrong-headed by more scholars than share my opinion of Wasserstrom’s thinking on sexual differentiation, but widespread rejection of his theory does not set Bork apart—not from Herbert Wechsler or John Ely or Laurence Tribe or Ronald Dworkin or Roberto Unger. Bork is different, if at all, only in that his demonstrably weak theory also strains against much of our shared

ish.” Chemerinsky, 103 Harv L Rev 43 (cited in note 12).
37 Tribe, American Constitutional Law § 15-10 at 1354 (cited in note 14).
40 Id at 361.
41 Id at 365.
42 Id.
experience with the Court’s current practices. To insist on an interpretative approach that would require dismantling so much of what has come to seem normal and acceptable has, like Wasserstrom’s musings, an unmoored quality. The facts are that political judging is pervasive, it has accomplished some good, and it is counted on by many people. Although they are less solidly established than the fact of heterosexual attraction, these facts, too, ought to count for something. Bork’s book does not make much provision for such considerations, and when it does, he becomes (perversely) even less distinguishable from other legal scholars.

IV.

Constitutional scholarship is sometimes fanciful and adventurous, but in the end it usually comes home to the Court. So does Bork. It turns out that Bork finds the result in Brown v Board of Education to be quite consistent with the framers’ intent. (p 82) He also concludes that unreasonable sexual distinctions can be objectively determined and are unconstitutional, and that the reapportionment decisions, while not supported by the Equal Protection Clause, are nonetheless dictated by “what the Founders meant by a republican form of government.” (p 86) Many distortions of real constitutional meaning, like the post-1937 Commerce Clause cases, have to be lived with, according to Bork, because of stare decisis. (p 306)

Indeed, what at first appears to be a forbidding jurisprudence of original intent can—if you blink—transform itself into a conventional methodology not much different from Tribe’s or Dworkin’s. The giveaway comes early in the book, when Bork praises Marbury v Madison and McCulloch v Maryland and describes Chief Justice John Marshall as a faithful expositor of constitutional meaning. This is less of a jolt after Bork fully explains his theory of interpretation—judges ought not make policy “not fairly to be found in the Constitution . . . .” (p 5)—but judges must engage in policymaking when they apply constitutional values to specific cases (pp 167, 189), and moral philosophy sometimes does assist judges in “deciding whether a new case is inside or outside an

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43 “Sexual differences obviously make some distinctions reasonable while others have no apparent basis.” (p 150)

44 Bork’s praise of these rulings emphasizes, as does most scholarly commentary, the brilliance of Marshall’s arguments from text and structure. (pp 20-28) Bork does not comment, however, on Marshall’s failure to review evidence about the framers’ intentions regarding either the power of judicial review or congressional power to incorporate banks.
old principle.” (p 254) Although principles must be applied rather than invented, they must be applied so as to keep them relevant in a changing world. (pp 168-69) Judges should apply “[t]he principles of the text.” (p 5) These are to be understood as the framers intended, but if intention is unclear or unknowable, principles should be inferred from “the general language of the clause” and defined at “the level of generality that interpretation of the words, structure, and history of the Constitution fairly supports.” (p 150) Two judges engaged in this difficult task can arrive at opposite results in the same case (p 163); nevertheless, they are sufficiently constrained if they seek “the best understanding of the principle enacted.” (p 163)

Bork, then, should not be misunderstood when he repeatedly and confidently refers to what is actually “in” the Constitution. He does not conceive of our fundamental charter as a box that can be opened and examined; rather, the definiteness of his legal conclusions must be understood as expressing the rigorous and conscientious character of the mental process that has led to these conclusions.

Bork’s methodology, understood this way, is not frivolous or radical. In its essentials it is the conventional approach, aspired to by most justices and endorsed by mainstream theorists like Tribe and Dworkin. Its weakness is the same weakness that Bork identifies in other methods but does not recognize in his own version of the theory: It provides no significant constraint and thus raises the suspicion that interpretations reflect class and partisan biases. Moreover, Bork’s interpretative method invites the same serious charges that Bork makes against many others when he asserts that their interpretations are hypocritical and that their “law” represents deceit. This is because for Bork, as for mainstream theorists, interpretation is difficult and serious work, and its results

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4 He refers to the “actual Constitution” (pp 130, 171) and to meaning that “does not come out of the Constitution but is forced into it.” (p 114)


47 The definiteness of Tribe’s assertions about the content of the law apparently arises from this same sense of intellectual seriousness, for he agrees with Bork’s statement (at the close of his testimony) that a judge should “interpret the law and not make it.” Bork Hearings at 1274 (cited in note 24). For a few of Professor Tribe’s rather certain views on what the Constitution really means, see notes 27-28. Similarly, for all his sophistication
are properly framed in terms of true meaning. Given the inevitability of suspicions about political agendas, such elevated phrasing inevitably sounds manipulative to a non-believer.

Hence, Bork is similar to mainstream law professors not only in his vulnerability to the severe accusation of deceit but also in his willingness to make the charge. For example, a letter opposing Bork's confirmation from one hundred law professors, including Tribe, questioned whether Bork's views reflected "a consistent philosophy of judicial restraint rather than personal values."\textsuperscript{46} Ronald Dworkin has long insinuated that the idea of judicial restraint is a cover for Republican politics,\textsuperscript{49} and he has specifically identified the underlying purpose in Bork's approach to judging as the promotion of what he variously terms "right-wing dogma" and "the prejudices of the right."\textsuperscript{50} For reasons that require considerable explanation, Dworkin does not think he is conceding anything about his own commodious interpretative approach when he describes Bork's as sufficiently loose to permit a political agenda to masquerade as constitutional imperatives. But, then, exactly the same can be said of Bork and his assertions about Dworkin's political objectives.

Bork, Dworkin, and Tribe all point to the same kind of evidence in denying any covert political agenda. Bork tries to establish his good faith by repeatedly acknowledging that judicial usurpation of the idea of intent, Ronald Dworkin can write unequivocally about "the responsibility the framers imposed on [judges] to develop legal principles of moral breadth . . . ." Dworkin, \textit{The Bork Nomination} at 10 (cited in note 29). On the issue presented by \textit{Brown v Board of Education}, Dworkin writes: "The plaintiff schoolchildren are being cheated of what their Constitution, properly interpreted, defines as independent and equal standing in the republic." Dworkin, \textit{Law's Empire} at 389 (cited in note 5). Indeed, he firmly defends definite assertions about what the law "is" against the charge that those who speak in such terms, while pretending to have discovered more than what the law "is," have only discovered what it "should be." Id at 261-62. He replies:

The grounds of law lie in integrity, in the best constructive interpretation of past legal decisions, and that law is therefore sensitive to justice . . . So there is no way Hercules can report his conclusion . . . except to say that the law, as he understands it, is [as Hercules asserts it to be].

Id at 262 (emphasis in original). As it is with Hercules, so it is with Dworkin, Tribe, and Bork.

\textsuperscript{46} Bork Hearings at 1336 (cited in note 24).

\textsuperscript{49} In an early and famous essay against the idea of judicial restraint, Dworkin begins by associating the idea with Richard Nixon. Ronald Dworkin, \textit{Taking Rights Seriously} 131 (Harvard, 1977). He then adopts the McCarthy-esque device of using "'Nixon' to refer, not to Nixon, but to any politician holding the set of attitudes about the Supreme Court that he made explicit . . . ." Id at 132. He explains: "There was, fortunately, only one real Nixon, but there are, in the special sense which I use the name, many Nixons." Id. Yes, and some were named Thomas Jefferson, Abraham Lincoln, and Franklin D. Roosevelt.

\textsuperscript{50} Dworkin, \textit{The Bork Nomination} at 10 (cited in note 29).
pations have in the past had right-wing objectives and by criticizing people like Epstein and Siegan. (pp 36-49, 224-30) Similarly, while testifying against Bork, Tribe emphasized that he had supported the conservative nominees Sandra Day O'Connor and Antonin Scalia.\textsuperscript{51} Dworkin pronounces himself satisfied that Anthony Kennedy, although conservative, does have enough of a judicial philosophy to be fit for the Court.\textsuperscript{52}

Bork and the leading mainstream theorists, then, are alike in the fundamental riddle that they present (and in knowing that they present it). To what extent do they believe their own interpretive claims? To what extent are those claims coldly cynical? My opinion is that, at some level, they all believe their own claims and are not hypocrites or liars. I suspect that this opinion would be greeted by knowing guffaws in faculty lounges around the country; and, if I am right in this suspicion, then unfortunately there is more truth in Bork’s general assessment of our profession than we probably will care to dwell on.

The reason for my benign view is not especially benign. It seems likely to me that the inspirational but terrible hold that ideas can have over people is even stronger for those who especially value abstractions and pride themselves on intellect. Justice Brennan, I think, does believe that in the constitutional text there is a “sparkling vision” (p 219)\textsuperscript{53} that is inconsistent with the death

\textsuperscript{51} Bork Hearings at 1272 (cited in note 24).

\textsuperscript{52} Dworkin thought that, unlike Bork, Kennedy had adopted a tenet central to a legal philosophy. Kennedy would demand not only “some demonstrated historical link . . . [to] the announced declarations and language of the framers,” but would also look to “our ethical culture, our shared beliefs, our common vision.” Ronald Dworkin, \textit{From Bork to Kennedy}, NY Rev Books 36, 42 (Dec 17, 1987) (citation omitted). A few details of Kennedy’s philosophy, however, still remained to be worked out at the time of his confirmation. He disclaimed any “unitary theory of interpretation” and confessed to be “searching . . . for the correct balance in constitutional interpretation.” Report of the Senate Committee on the Judiciary, Nomination of Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court, S Exec Rep No 100-13, 100th Cong, 2d Sess (1988) (citation omitted). He did feel sure, nevertheless, that “[t]he Constitution cannot be divorced from its logic and its language, the intention of its Framers, the precedents of the law, and the shared traditions and historic values of our people.” Id at 10 (emphasis added, citation omitted). Depending on how a judge assesses our shared traditions regarding judicial power, of course, it is quite possible that this philosophy might turn out to be much like Bork’s. A hint in this direction is provided by Kennedy’s assurance that:

[T]his doesn’t mean the Constitution changes. It just means that we have a better perspective of it . . . . It just means that our understanding of it changes.

Id at 8 (citation omitted). Compare Bork in \textit{The Tempting of America} at 168 (“The world changes in which unchanging values find their application.”).

\textsuperscript{53} Speech by Justice William J. Brennan, Jr., to the Text and Teaching Symposium, Georgetown Univ (Oct 12, 1985), reprinted in \textit{The Great Debate: Interpreting Our Written Constitution} 11, 18 (Federalist Society, 1986).
penalty, just as Ronald Dworkin believes that constitutional principles prohibit restrictions on homosexuality. For them, as for Robert Bork and many other powerful minds, there is a real Constitution, and it would be a dereliction of duty not to enforce it no matter who disagrees or how many object. This fierce ambition, this submission to abstraction, can be viewed as a weakness, even as a dangerous weakness, but it does not differentiate Bork from those who define the mainstream of our profession. At any rate, the major alternative to intellectual imperialism in that mainstream is political deceit.

V.

It is potentially dangerous for any judge to hold a firm belief that an interpretive method is sufficiently constrained to protect against a covert political program, because this kind of confidence can create self-delusion. Entranced by the apparent strength of historical evidence (or the power of a principle or the clarity of a moral vision), judges might not anticipate or be attuned to the subtle influences of their own desires. Although *The Tempting of America* contains much that is useful and admirable and even courageous, its deficiencies provide a number of reasons for doubting whether Bork should have been elevated to the Supreme Court—or indeed, whether those mainstream scholars he resembles should be in the future. The book displays, as I have said, an overconfident intellectualism, a stridently critical instinct, an attachment to theory that subordinates the wisdom of experience and the weight of practice, an affinity for the novel and audacious that verges on the fanciful and conspiratorial, and an excessive devotion to independent judicial power.

Given this array of deficiencies, which were to some degree evident in Bork’s earlier writings, one of the reasons frequently given for opposing Bork is startling. Judith Resnik, for instance, testified that Bork “is hostile to the very act of adjudication . . . [and] disdains and distrusts judging itself.”\(^\text{54}\) Resnik was referring to Bork’s judicial opinions, in which she saw a tendency to decide more issues than necessary and to limit the extent to which courts hear claims of wrongdoing. Since many great jurists have displayed one or another of these tendencies, Resnik’s accusation is perplexing. (Does Justice Brennan hate judging? Did Justice Holmes?) It seems even more perplexing after reading *The Tempting of*
America because the book is such an urgent effort to save judging—and law itself—from an oblivion that Bork plainly and intensely fears.

In at least one way, however, the book does suggest that Bork may be "hostile to the very act of adjudication." Bork savages not only exotic judicial inquiries proposed by academics, but also ordinary doctrinal analyses of the sort judges actually employ every day. Consider, for instance, the requirements that legislation serve a legitimate governmental interest and be substantially related to its objectives. Bork says of the first: "No theory of the legitimate and important objectives of government . . . is even conceivable." (p 226) Of the second, he says that usually the social sciences cannot evaluate the means-ends connection (p 227) and that in important cases, "[d]epending on which way the government states the objective, the law will be impossible to strike down or impossible to uphold." (p 228) Bork writes as if he is making a rebuttal to a limited theoretical proposal, but, of course, his rebuttal calls into question a great mass of constitutional doctrine. Accordingly, it might be fair to say that he hates (or, at least, rejects) judging as it is now usually practiced and that the implications of this rejection are wider than Bork seems to recognize.

Like so much of what can be criticized in Bork's writings, the nature of this "hostility" to judging confirms how indistinguishable he is from the mainstream. Bork himself often chides scholars for not facing up to the implications of their arguments on judicial review. For example, he quotes Paul Brest's assertion that "all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral." (pp 148-49) Bork replies that if this were correct, "we must either resign ourselves to a Court that is a 'naked power organ' or require the Court to stop making 'constitutional' decisions." (p 149) Similarly, in responding to Justice Brennan's skepticism about the possibility of accurately determining the intent of the framers, Bork writes:

The result of the search [for intent] is never perfection; it is simply the best we can do; and the best we can do must be regarded as good enough—or we must abandon the enterprise of law and, most especially, that of judicial review. (p 163)

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In short, both Bork and mainstream theorists can be accused of coming very close to the conclusion that judicial review is illegitimate and should be abandoned. Bork claims that he (but not most other theorists) can avoid this conclusion because he believes that objective determinations of intent are possible.

But what if Bork in fact does not believe that intent can bind? This seems unlikely, but it is worth some consideration. (Remember that Bork concedes that intent is not always knowable and that two conscientious judges can apply historical principles to reach opposite conclusions in a case; also note the phrasing “the best we can do must be regarded as good enough.”) Then Bork would have to be hostile, not just to current doctrines, but to judicial review itself—for the same reasons that the positions of many mainstream scholars effectively make them (according to Bork) opponents of judicial review.

This possibility would seem to make Bork’s argument on behalf of neutral judging a sham and, therefore, would be inconsistent with the evident sincerity of Bork’s commitment to a constrained judiciary and the rule of law. But wait a moment more: In the past, similar “shams” have been given a respectable defense. Recall, for instance, Justice Hugo Black’s forcefully expressed view that the Free Speech Clause should be read literally as an absolute protection of all speech. This position is at least as implausible as Bork’s theory of original intent, and commentators early on said that the highly intelligent Justice Black must have understood the insuperable difficulties underlying his absolutist position. Black’s declarations came to be explained as an apparent intellectual ruse and were eventually defended on the grounds that the difficulties of his position were matters of logic, while the reasons for his position were rhetorical; his purpose was to communicate, and thereby create, a psychological predisposition or mindset appropriate for protecting speech.

The same explanation could certainly be used to defend Bork’s insistence—in the face of all the analytic difficulties—on the possibility of neutral derivation and application of historical intent. Indeed, the Black analogy is the most obvious way to understand the vehemence of the jurisprudential debate over the place of intent and principle in constitutional law. Like the debate

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between Black and the interest balancers, the positions in the debate between Bork and the “mainstream” sound as if they are far apart, but under examination they quietly converge. Bork approves of using moral philosophy to apply principles under modern conditions, and Tribe insists that judges should apply, not make, law. The sense that much is at stake depends on the assumption that both positions, even if descriptively and analytically similar, are accurate expressions of profoundly different emphases and inclinations.

The analogy to Black’s absolutism is not by itself, of course, a defense of the weight Bork puts on original intent. Black’s rhetorical purposes could be justified as consistent with the underlying objectives of freedom of speech. What purpose would be served by insisting on the highly general rhetoric of original intent? Near the end of his book, Bork says this:

The attempt to define individual liberties by abstract moral philosophy, though it is said to broaden our liberties, is actually likely to make them more vulnerable. I am not referring here to the freedom to govern ourselves but to the freedoms from government guaranteed by the Bill of Rights and the post-Civil War amendments. Those constitutional liberties were not produced by abstract reasoning. They arose out of historical experience... Attempts to frame theories that remove from democratic control areas of life our nation’s Founders intended to place there can achieve power only if abstractions are regarded as legitimately able to displace the Constitution’s text and structure and the history that gives our legal rights life, rootedness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only the abstract propositions of moral philosophy. To do that is, in fact, to display a lightmindedness terrifying in its frivolity. Our freedoms do not ultimately depend upon the pronouncements of judges sitting in a row. They depend upon their acceptance by the American people, and a major factor in that acceptance is the belief that these liberties are inseparable from the founding of the nation. (p 353)

This powerful passage suggests that if Bork’s jurisprudence is a rhetorical argument, his purpose might be to sustain a set of mythical beliefs and emotional ties necessary for the protection of individual liberty. Viewed this way, the book has both appeal and gravity; it would be an argument, made for a high purpose, based
on plausible assumptions about the deep underpinnings of successful democratic institutions.

Considering that Hugo Black was a respected figure (criticized, to be sure, but never cast out as a heretic), this interpretation might make both Bork and his book more attractive to law professors and jurists. But relative acceptability would be accomplished in deeply ironic ways. The Black analogy requires characterizing Bork, who rejects the propriety of most available political checks over the judiciary, as someone who believes the people are the ultimate guardians of their rights; it would turn a man who overvalues logic and abstraction into someone whose aim is to shape and reinforce the sentimental bases of political community; it would convert an author who disdains expressive writing into a rhetorician. That is, Robert Bork's views might be made more intellectually and morally acceptable to the legal academy if he were conceived of in a way that significantly differentiated him from the profession that once turned on him in indignant recognition.

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58 Bork criticizes political demonstrations directed at the Court (pp 3-4, 116), the influence of public opinion generally (p 313), political confirmation hearings (pp 313-14, 346), and congressional efforts to change judicial interpretations of the Fourteenth Amendment (p 325).

59 Bork writes that judges should "apply law and not emotion" (p 62); he criticizes Justice Douglas's lyricism in Griswold as "incoherent" (p 97); he calls "ordered liberty" "a splendid phrase but not a major premise" (p 118); he condemns the idea, expressed in Moore v City of East Cleveland, 431 US 494, 503 (1977), that a liberty might be "deeply rooted in this Nation's history and tradition" as "pretty vaporous stuff" (p 118); and his retort to claims about Justice Blackmun's "passion" and "eloquence" is that they are "poor substitutes for judicial reasoning." (p 120)