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I. INTRODUCTION

THE recent resignation of Justice William Brennan from the United States Supreme Court is merely the most dramatic symbol of a now-familiar truth: The Warren Court is dead. Its death is of course in large part a result of political victories by conservative presidents, victories that have produced a Supreme Court whose members self-consciously reject the methods of its recent predecessors. But the death of the Warren Court also represents a victory of ideas. The aggressive role of the Supreme Court in bringing about social reform—a role without precedent in the history of the adjudicative branch of government—has been criticized as a usurpation of democratic authority; as a departure from the original understanding, the cornerstone of judicial legitimacy; and most fundamentally, as hardly law at all. This con-

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stellation of ideas has played an important role in transforming the performance and self-conception of the federal judiciary.

In this essay I have two purposes. The first is to respond to a standard criticism of the sort of judicial role that was represented by the Warren Court. This form of criticism is stated most straightforwardly in Judge Robert Bork's bestseller, *The Tempting of America: The Political Seduction of the Law*.[1] Despite the Senate's rejection of President Reagan's nomination of Judge Bork for the Supreme Court, views similar to those of Judge Bork have increasing influence within the federal judiciary and perhaps the nation as well. In particular, there seems to be mounting agreement with Judge Bork's particular understanding of the distinction between the neutral, apolitical invocation of the original understanding on the one hand and the subjective, value-laden use of the judge's own preferences on the other. For Judge Bork, departure from the original understanding amounts to abandonment of the Constitution and political judging, that is, the illegitimate substitution of judicial values for democratic ones.

I want to suggest here that this position is barely an argument at all, serving instead as a misleading, albeit popular, rallying cry. Its principal defect lies in its failure to acknowledge the need for interpretive principles for use in construing any legal (or other) text. Because it relies on some such principles without defending or even recognizing them,[2] it provides no basis for its own approach.

My second purpose is to suggest that even for those sympathetic to many of the Warren Court's decisions, there are good reasons to be ambivalent about social reform through the judiciary. Judges are likely to be ineffectual in promoting social reform; their methods and procedures are best suited to compensatory justice. Reliance on the court system may divert resources from other, better channels for reform. Moreover, judicial involvement may well undermine the very causes that it purports to help. For example, the withdrawal of the Court from areas of discrimination on the basis of disability and race, and from abortion as well, appears to be fueling democratic engagement on those questions in ways that will have more substantial and healthy long-

1. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1989).

2. Judge Bork does of course recognize that his interpretive principle is the original understanding. What he does not recognize is: (a) that the decision to make that understanding decisive is itself an interpretive principle, one that must be defended rather than identified with the Constitution; and (b) that any characterization of the original understanding requires other, supplemental interpretive principles.

term implications for social reform than anything that could be expected from a Warren Court successor. These sorts of pragmatic, consequentialist considerations, I suggest, provide a legitimate basis for concerns about an aggressive role for the Supreme Court in promoting social reform. These concerns should in turn play a role in developing interpretive principles with which to give meaning to the Constitution.

In any case, it is those concerns, rather than the backward-looking arguments made by Judge Bork and others, that should be foremost in the minds of those interested in the appropriate role of the Supreme Court in the constitutional order. The rhetoric of "political seduction of the law" is a misleading and unhelpful diversion.

II. JUDGE-MADE CONSTITUTIONAL RIGHTS

A. *The Legacy of the Warren Court*

Now that the era of the Warren Court is over, it is worthwhile to pause briefly to examine its legacy. It is surprising but true that many of the principles of constitutional liberty most prized by Americans were created, not by the founders, but by the Supreme Court during this century. At the very least, the particular understandings of those principles—understandings that have given those principles their current life and content—are recent creations. Indeed, for most of the country's history the liberties for which our Bill of Rights is so widely celebrated and revered, here and abroad, were sharply circumscribed. The overriding reason for their expansion has been the interpretive practices of the modern Supreme Court.[3]

If contemporary Americans looked at the charter of constitutional freedom in America as it existed in 1940, or if they could imagine an emerging democracy (say, in Eastern Europe) committing itself to that charter, they would see a system falling far short of their ideals. It is because of the Warren Court that constitutional liberty includes the right to freedom from discrimination on the basis of race, including segregation; to broad protection of political speech, subject to a sharply limited "clear and present danger" exception; to political participation, including equality in voting; to hearing rights for those receiving government benefits, including employment, licenses, and social security; to freedom from sex discrimination; and to broad protection of religious conscience. Even those who reject—as almost everyone does—some as-

3. To say this is not at all to say that they have reached their appropriate place. *See infra* Part III.

pects of the Warren Court's legacy will probably treat the bulk of its work as an indispensable part of our constitutional heritage.

Speaking realistically, a return to a narrowly described "original understanding" would result in the elimination, in one bold stroke, of central parts of existing constitutional safeguards, producing constitutional protections that would be judged—both by Americans and by those who seek to emulate our practices—as extremely thin indeed. All this does not count by itself as a sufficient argument in favor of the role set by the Warren Court. But it is, perhaps, a useful prelude for understanding current disputes.

B. *The Argument of* The Tempting of America

The Tempting of America sets out a distinctive approach to constitutional interpretation. In its broad outlines, the argument is quite straightforward. Some judges are "neutral";[4] they follow the law. Other judges are political; they participate in "a major heresy,"[5] that is, they deny "that judges are bound by law."[6] The line between the two depends on whether a judge "is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment."[7] No one who disagrees with this view "should be nominated or confirmed."[8]

According to Judge Bork, judges who reject this view "not only share the legislative power of Congress and the state legislatures, in violation both of the separation of powers and of federalism, but assume a legislative power that is actually superior to that of any legislature."[9] The heresy is particularly indulged by "people [who] see the Constitution as a weapon in a class struggle about social and political values,"[10] are "egalitarian and socially permissive,"[11] "hold only contempt for the limits of respectable politics,"[12] or invoke "a kind of restless and unprogrammatic radicalism that does not share but attacks traditional values and assumptions."[13] The "philosophy of original un-

4. R. BORK, *supra* note 1, at 2.
5. *Id.* at 4.
6. *Id.*
7. *Id.* at 5.
8. *Id.* at 9.
9. *Id.* at 6-7.
10. *Id.* at 8.
11. *Id.* at 6.
12. *Id.* at 11.
13. *Id.* at 10. The 1960s appear to loom large in *The Tempting of America*, which makes

derstanding"[14] has the large contrasting value of "political neutrality in judging."[15]

One might expect that the "fall"[16] from neutrality to politics would be a recent phenomenon, but in fact Judge Bork describes it as something that immediately followed the ratification of the Constitution. Not merely Justice Brennan, and not merely the "liberals" on the Warren Court, but also—to mention simply a few—Chief Justice Marshall and Justices Holmes, Brandeis, Frankfurter, Jackson, and Harlan were seduced by the temptation to substitute politics for law. They too were tempted to abandon the Constitution.

Judge Bork's position is thus uncomplicated. It begins with the proposition that the Constitution is law and that those who ignore the Constitution are acting lawlessly. It adds to this uncontroversial claim a thesis about interpretation, that is, an identification of "the Constitution" with the understanding about its meaning held by those who ratified it. On this view, a judge who rejects the original understanding of meaning rejects the Constitution itself, or is, in effect, in a free-fall in which meaning is supplied by his own predilections or value judgments. For such a judge, the Constitution becomes irrelevant. Only his own views count. It is here that neutrality, and hence legitimacy, is wanting on the judge's part. For Judge Bork, avoidance of value judgments is a crucial part of the task of law, and reliance on the original understanding alone serves that function.

Substantive outcomes follow from this conclusion. There is no right of privacy. Indeed, liberty receives no substantive protection under the fourteenth amendment. Rational basis review would apply to all forms of discrimination other than those based on race and ethnicity.[17] The consequence is that discrimination on the basis of gender, or on almost any other basis, is extremely likely to be upheld (though Judge Bork is not entirely forthcoming here).[18] Poll taxes are permissible,[19] as are violations of the principle of one person-one vote.[20] Be-

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some of the rhetoric appear out-of-date.

14. *Id.*

15. *Id.*

16. And it is described in very much these terms. Religious imagery—language of heresy, fall, and so forth—runs throughout *The Tempting of America* and of course is recalled by its title as well. There may be a connection between the repeated notion of heresy and the failure to offer substantive arguments against the heretical position.

17. *Id.* at 330.

18. *Id.*

19. *Id.* at 90-91.

20. *Id.* at 84-87.

cause the equal protection clause applies only to the states, the federal government can discriminate on the basis of race or indeed on any other ground. If it chose, it could segregate on the basis of race or exclude blacks from federal employment.[21] Compulsory sterilization of some criminals would be acceptable.[22] Many federal programs of the New Deal period and after would be unconstitutional.[23] Congress would have more limited authority under section five of the fourteenth amendment than it now does, and would be barred from invalidating state literacy requirements.[24] Affirmative action would be banned.[25]

Perhaps most dramatically, the Bill of Rights probably would not apply to the states, though here Judge Bork is unaccountably cautious.[26] Of course, flag desecration could be criminalized;[27] crèches could be displayed in public buildings;[28] states could exempt profits from the sale of Bibles and religious literature from taxation.[29] One need not disagree with all of these conclusions in order to recognize that Judge Bork's Constitution would be dramatically different from the document as it is now understood.

C. *Arguments for Adherence to Original Understanding*

It might be tempting, or even correct, to think that the meaning of the Constitution is settled by the original understanding held by its ratifiers. But surely an argument is necessary before one should accept that position, especially, perhaps, in view of its repudiation by so many leading members of the Court,[30] and of the extent to which that position would undermine principles of constitutional liberty that have and

21. *Id.* at 83. Judge Bork does argue that states cannot segregate and that Brown v. Board of Education, 347 U.S. 483 (1954), was therefore correct. R. BORK, *supra* note 1, at 81-83. But his discussion of the point seems rather tortuous, and many readers will emerge from the discussion with the firm impression that on Bork's own method, neutrally applied, *Brown* was wrongly decided. *See* Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

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

23. *Id.* at 56-57.

24. *Id.* at 91-93.

25. *Id.* at 107-10.

26. *Id.* at 93-95.

27. *Id.* at 127-28.

28. *Id.* at 128.

29. *Id.*

30. Many members of the Court, of course, have accepted the original understanding but characterized it differently from Judge Bork—as including, for example, principles whose shape changes over time. This category includes all justices who have treated the free speech clause in roughly this way—that is, all modern justices. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).

deserve widespread support.

Those who believe that the original understanding is not decisive do not, of course, reject the Constitution.[31] They do not believe that the Constitution is not binding. They do not reject the actual Constitution. Instead they suggest that the proper interpretation of the Constitution requires resort to other considerations. Often they claim that this conception of interpretation is itself historically required. In any case they propose, not to abandon the Constitution, but instead to understand its meaning by reference to something other than the original understanding conceived as Judge Bork does.

What argument does Judge Bork offer on behalf of his view? In only one place does he squarely address the question:

> It has been argued . . . that the claim of proponents of original understanding to political neutrality is a pretense since the choice of that philosophy is itself a political decision. It certainly is, but the political content of that choice is not made by the judge; it was made long ago by those who designed and enacted the Constitution.[32]

It is worthwhile to pause over this passage. In brief: The original understanding is binding because the original understanding was that the original understanding is binding. The historical claim is itself highly uncertain.[33] The text of the Constitution invites the view that its meaning is capable of change over time, and there is evidence that the framers did not believe that their original understanding would control the future.[34] But I want to put that point to one side. Judge Bork's claim is that the binding character of the original understanding is settled by the original understanding. This is not an argument at all; it is circular, or an axiom, or a rallying cry. To those who believe that it is necessary to defend the view that the original understanding is binding, it will be less than unpersuasive.

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31. *See* Dworkin, *Bork's Jurisprudence* (Book Review), 57 U. CHI. L. REV. 657 (1990).

32. R. BORK, *supra* note 1, at 176-77.

33. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 22-41 (1980) (discussing privileges and immunities clause, equal protection clause, and ninth amendment); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (discussing intended delegation to the courts); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (discussing framers' own failure to rely on original intent).

34. *See generally* sources cited *supra* note 33. It is most surprising that Bork says so little about the actual history. In fact, his historical references consist almost exclusively of sources that can be found in introductory casebooks. *See* Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990).

I have searched *The Tempting of America* for a more substantial justification for the book's central proposition. There appear to be several different strategies, whose relationship to one another is obscure, and whose role in defense of the original understanding is never clearly articulated.

On several occasions Judge Bork argues by shifting the burden of argumentation:

> Why should the Court, a committee of nine lawyers, be the sole agent for overriding democratic outcomes? The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution capable of wielding power. If the Court will not agree with him, why not argue his case to some other group, say the Joint Chiefs of Staff, a body with rather better means for enforcing its decisions? No answer exists.[35]

Judge Bork seems to be arguing here that a decision deserves respect if it can be connected to a judgment by "the people"; it does not if it cannot.

But this is a crude approach to the question of legitimacy. Obedience to the Court is not justified simply because its decisions are compelled by a judgment made in some sense by the people—especially when the relevant people died long ago. Ultimately obedience is justified, if it is, for some amalgam of substantive reasons: The Constitution is a good one; it has a fair degree of democratic pedigree, both in its original adoption and in the possibility of amendment; the consequence of a decision to abandon the Constitution would be intolerable chaos. By itself, the fact that there was agreement on some document by some people many generations ago is insufficient for "legitimacy." A decision by the Supreme Court does not warrant obedience for that reason alone.

So too, Supreme Court decisions do not lose their rightful claim of allegiance merely because they are not connected to a particular decision of the Constitution's ratifiers. To say that only Supreme Court decisions that are justifiable by reference to the original understanding warrant allegiance is to mistake a conclusion for an argument. On this score, Judge Bork's claims about legitimacy mirror his (circular) response to the contention that it is necessary to defend adherence to the

35. R. BORK, *supra* note 1, at 265.

original understanding in political terms. In fact, a judicial decision deserves allegiance, if it does, for a complex mixture of reasons, roughly analogous to those that support a decision to be bound by the Constitution itself. Those reasons involve the need for stability, the justness of the system as a whole, the possibility of democratic corrections, and (to some limited extent) the substance of the decision itself. A tight connection with a previous decision of the polity is neither a necessary nor a sufficient condition for legitimacy.

Judge Bork also suggests that adherence to the original understanding is justified because abandonment of that understanding will lead judges to make "moral choices" that they have not been authorized to make, and that cannot in any case be made in the face of moral disagreement among the populace. A key point, for Judge Bork, is that "revisionist" theorists require a judge "to make a major moral decision."[36] Legitimate judges, by contrast, are simply agents of the people. Because people cannot "all agree to a single moral system,"[37] judges cannot properly invoke morality at all, on which the citizenry is hopelessly divided: "Why is sexual gratification more worthy than moral gratification? Why is the gratification of low-cost electricity or higher income more worthy than the pleasure of clean air?"[38]

There is, however, no way to avoid "moral decisions," even major and controversial ones. The view that the original understanding is binding requires a moral or political theory, and thus acceptance of that view rests on a (disputable and disputed) moral foundation. The very fact that Judge Bork's theory of interpretation is controversial among the citizenry attests to the fact that it rests on such a foundation. In this respect his approach, like any other, relies on moral decisions that require substantive defense. Reliance on the original understanding does not avoid recourse to a moral system at all.

No text, constitutional or otherwise, has meaning apart from the precepts held by those who interpret it, and those precepts cannot be found in the text itself.[39] The selection of precepts must itself be justified in moral and political terms. To say this is not at all to say that language imposes no constraints or that meaning lies solely with the interpreter. But it is to say that meaning is a function of culture, and

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36. *Id.* at 252.

37. *Id.* at 253.

38. *Id.* at 258-59.

39. *See* Dworkin, *supra* note 31; for a detailed discussion in the context of statutory construction, see C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION ch. 3 (1990).

that aspects of culture are subject to evaluation.

In addition, it is impossible to decide how to characterize the original understanding without adverting to moral considerations. History itself will not do the job. To reiterate some familiar points: It is necessary to decide whether the clause embodied a general concept capable of change over time or instead the particular understandings held by those who ratified it. It is also necessary to translate the original understanding into conditions that the ratifiers could not have anticipated. To carry out both these tasks, interpreters must invoke something other than the historical record. No final answers can be found there.[40]

The claim of lack of authorization is merely another version of the claim of illegitimacy, and it is no more productive here than there. It is true that there is disagreement about morals and politics among the citizenry, but the fact of disagreement does not mean that the conflicting positions are not subject to mediation, as they in fact have been in multiple areas, including those of race and sex discrimination. The fact that a decision has moral dimensions does not imply that it is not subject to reason. As we have seen, Judge Bork's own view rests at bottom on moral and political choices, having broadly to do with the perceived value of (his conception of) democratic self-determination and fear of judicial willfulness. But *The Tempting of America* does not acknowledge that these are moral and political choices, and so spends almost no time in defending them.[41]

Judge Bork sometimes defends his position by general references to democratic self-determination, and here he is on firm ground. Any plausible theory of constitutional interpretation must pay a great deal of attention to the democratic aspirations of the American constitutional tradition. But the principle of democracy is too vague, standing by itself, to justify any particular conception of the judicial role. For example, that principle might call for an exceptionally aggressive judicial role in protecting rights of political participation and in safeguard-

40. Thus, for example, Brown v. Board of Education, 347 U.S. 483 (1954), cannot be resolved by reference to the original understanding; it is necessary to translate the requirement of equal protection into the conditions of the 1950s, in which public education had attained a quite novel status. So too, the original understanding that the equal protection clause does not forbid sex discrimination need not resolve the question in light of the generality of the framers' language, the difficulty of determining whether they understood by that language a general concept or their particular conceptions, and the extreme difficulty of sorting out that question without resorting to extratextual and extrahistorical considerations.

41. *See supra* text accompanying notes 26-29.

ing the interests of groups likely to be disfavored in politics.[42] Without much more, the principle of democracy does not require adherence to the original understanding.

It is, I think, no accident that the position set out in *The Tempting of America* is not so much defended as proclaimed. If the position were actually to be defended, its central claims would take on entirely new dimensions. The rhetoric of heresy and seduction would have to be abandoned; the line between neutrality and moral judgments would be unsettled; the defense would have itself to partake of moral and political judgments. An argument for originalism, or (what is not the same thing) for a modest judicial role, will have to speak of political theory, and not only of the framers. To make that argument would be to abandon the moral high ground on which *The Tempting of America* tries to stand.

I want to conclude this section with a summary that slightly generalizes the point. Every text requires interpreters to draw on background norms or principles that they themselves must supply. To say that a text has a plain meaning, or that there is no room for interpretive doubt, is often to say something true; but when it is true, it is because there is no disagreement about the appropriate background principles. Those who deny the existence of such principles are in fact without self-consciousness. They believe that their own views are so self-evident that they do not amount to interpretive principles at all but instead are "part" of the text. Interpretive principles are, however, always operative. That is no embarrassment to constitutional law, or indeed to law itself, but instead an inevitable part of the exercise of reason in human affairs.

The question is not whether interpretive principles exist, but whether they can be defended in substantive, value-laden terms. Many imaginable Supreme Court decisions would not be susceptible to such a defense, and surely some of Judge Bork's particular conclusions are sound. But because he never defends his own interpretive principles, asserting instead that those who do not share them would abandon "the Constitution," he offers no reason for anyone to agree with him.

I conclude that originalism is merely the latest version of formalism in the law. It represents the pretense that one can decide hard cases in law by reference to value judgments made by someone else. Those who indulge in that pretense usually end up not by abandoning

42. *See* J. ELY, *supra* note 33, at 24-41.

value judgments but by making them covertly. The real fault of Judge Bork's version of originalism is that it attempts to mask its own foundations.[43]

I have not dealt in detail with the particular positions on constitutional questions set out by Judge Bork, but it is revealing that those positions generally line up, not with some original understanding, but with the conservative wing of the Republican party: no affirmative action, fewer restrictions on governmental power to aid religion, no abortion rights, greater constraints on national power, greater constraints on pornography, fewer intrusions on presidential power, and greater protection of property rights.[44]

D. *Legal Authoritarianism*

The Tempting of America is the most prominent recent illustration of what might be called "legal authoritarianism," a term that I use in a special sense. I mean the term to refer to all approaches to law that ultimately trace legal legitimacy exclusively to an exercise of power, or to the view that might makes right, or to some prior settlement among those with political power. On this view, legal legitimacy need not, and indeed must not, be justified by reference to substantive claims about the right or the good. Thus understood, the category of authoritarianism is a broad one, encompassing highly democratic approaches as well as others that are far less palatable. Authoritarianism in law has no necessary alliance with liberalism or conservatism. Indeed, democratic authoritarianism finds prominent expression in Justices Oliver Wendell Holmes and Hugo Black, both of whom emphasized, as a centerpiece of their approaches to law, the need for judges to ratify prior agreements among those with political power.[45] For Black in particular, interpretive principles seemed unnecessary and indeed hubristic, since they introduced a measure of discretion and nonneutrality into law.[46] For Black, the constitutional text was usually self-interpreting.[47]

If legal authoritarianism is understood in these terms, its antonym

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43. *Cf.* the very different approach in Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (acknowledging criticisms of originalism and attempting to defend it on substantive and institutional grounds).

44. *See supra* text accompanying notes 17-29; *see also* R. BORK, *supra* note 1, at 205.

45. *See* Adamson v. California, 332 U.S. 46 (1947) (Black, J., dissenting); Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

46. *See Adamson*, 332 U.S. at 70-71.

47. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

is not democracy. For this reason, the term will be misleading to those who identify authoritarianism with an absence of legitimate electoral processes. But I hope that it is not unfair to contrast authoritarianism, as understood here, with all approaches that demand of law, and of government through law, some justification that goes beyond the exercise of political power. Such approaches also span a wide range. The antonym of authoritarianism is not allied with any political program. Because such approaches require governmental action to be justified by something other than the will of the majority, and because they emphasize the need for interpretive principles, which often must be justified in substantive terms, they frequently appear, from the authoritarian perspective, to be irremediably antidemocratic.

Legal authoritarianism has a number of characteristic features. It sees laws as deals among self-interested actors. It is commonly skeptical of normative argument altogether, or of efforts to reason about social and economic problems. It commonly disparages such efforts as a mere mask for self-interest, or as incapable of mediating social and political disputes, which it treats as based on premises too fixed and incommensurable to be a subject of deliberation. Mediation is possible only by warfare or compromise among self-interested bargainers. Disagreements about ethical and political problems are, for the legal authoritarian, not an occasion for shared reasoning but instead proof of its impossibility. Value judgments, understood as prejudices, are seen as the consequence. Authoritarianism thus tends to have a positivist understanding of law and legal authority. The source of law is an exercise of sovereign power, constituted as such by other people with sovereign power, in a chain ultimately connected to some foundational exercise of power. The disjunction between law and politics is understood in these terms.

There is a distinctive authoritarian style in constitutional law as well. Authoritarianism provides the foundation for one conception of judicial restraint. Because ordinary legislative outcomes reflect the play of social forces, they should not be disturbed unless the interference is itself the result of some other, superior decision by such forces. Authoritarianism is also drawn to firm linguistic anchors—"the text"—and for two reasons. First, the text is the best evidence of how the social forces in the community have resolved themselves. Second, departures from the text leave interpreters in the world of unfettered value judgments, or prejudices. Moreover, the authoritarian position tends to see social outcomes expressed in authoritative texts as embodying the will of

some collective "us"—even if the text were written many years ago and even if important segments of the community were excluded from the decision.

Finally, and perhaps most important, the authoritarian position treats most of its claims as axioms, in need of no real defense. The very call for a defense is often said to mark people as heretics or as demanding their exclusion from the relevant community. When defended in substantive terms, the authoritarian claim takes on altogether new dimensions and ceases to be authoritarian at all. And for the next generation of legal studies, perhaps the most crucial task is the development of modes of analysis that resist the authoritarian temptation and do not purport to be purely deductive, but that nonetheless recognize and exemplify the possibility of mediating social disputes through good reasons rather than poor ones.

III. New Constitutional Principles?

I want now to shift gears. Judge Bork's nomination was of course defeated, but his ideas are shared, perhaps increasingly, by influential members of the legal community, and the position of the current Court has many commonalities with that of Judge Bork. We might obtain a useful angle on the problem by exploring the sort of constitutional agenda that would be set by a modern-day successor to the Warren Court. If the Supreme Court, for our time, brought to bear on current practices the kind of critical eye that the Warren Court brought to the 1950s and 1960s, what kinds of changes might be expected? I do not mean to endorse all of these proposed results, some of which strike me as inadvisable or even preposterous; I do mean to obtain a sense of what has been lost or gained by the abandonment of an aggressive role for the Supreme Court in the area of social reform. One of the unfortunate consequences of the constitutional attack on the Warren Court is that it has preoccupied its participants so much as to distract them from the task of imagining the ingredients of a different constitutional order, mandated judicially or not. The following is an admittedly hypothetical agenda.

(1) The area of sex discrimination is probably the place to start. Under current law, principles of "formal equality" bar attack on a number of candidates for serious constitutional review. Consider the problem of reproductive freedom, which is now treated as a matter of "privacy," even though issues of sexual equality loom at the surface of the debate. Legal control of women's reproductive capacities has been

central to sex discrimination, and the effort to forbid abortion is closely connected (simply as a matter of actual legislative motivation) with fears about women's rejection of their traditional role. A Warren Court successor might well have seen public and private behavior that bears on pregnancy—in the workplace and in the criminal law—as raising serious problems of sexual equality.

There are many other examples. It is widely reported that the criminal justice system deals inadequately with domestic violence, sexual harassment, rape, and abuses in the production of pornography. Often it is alleged that the inadequate treatment is a reflection of discrimination. It would not be at all difficult to imagine a constitutional attack, rooted in principles of equality, against police practices that fail to redress domestic violence. Such attacks might be based on a prominent part of the original understanding of equal "protection" of the laws, which was designed to ensure equality in the administration of the criminal justice system.

Another example is provided by the current rules of family law, which ensure that after divorce, the welfare of most men will increase dramatically and the welfare of most women will decrease correspondingly.[48] The current rules do not reward women but indeed punish them for their contributions to childcare and housework. Because most women receive custody of children but low support payments upon divorce, a constitutional attack would be quite plausible here.

Additional illustrations are provided by the presence, in the United States, of a social security system that benefits people the more closely they come to traditional male career paths, and that keeps weakest and most defenseless those who have assumed traditional female roles;[49] and of workplaces that continue to be structured on the basis of male norms and expectations, captured in, for example, the exclusion of fertile women from certain jobs and halfhearted childcare policies in general.[50] All of these problems could be seen as raising issues of sex discrimination.

(2) As currently interpreted, the Constitution has little or nothing to offer the handicapped. Discrimination against the mentally retarded

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48. In California, for example, a man's standard of living increases by 42% after divorce, while a woman's falls by 73%. *See* L. WEITZMAN, THE DIVORCE REVOLUTION 338 (1985).

49. *See* Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's* Constitutional Law, 89 COLUM. L. REV. 264 (1989).

50. *See* International Union v. Johnson Controls, 110 S. Ct. 1522 (1990); Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986).

is subject to rational basis review.[51] Moreover, disabled people face numerous obstacles in a world made by and for the able-bodied; many of these obstacles are embodied in law. An attack on seemingly neutral standards, based on able-bodied norms that effectively exclude disabled people, could well be marshalled under principles of constitutional equality.

(3) The sexual privacy of homosexuals is unprotected.[52] Probably the best guess is that the current Court would find discrimination on the basis of sexual orientation, including wholesale exclusions from governmental employment, to raise no serious constitutional question. A different Court would have taken this issue much more seriously.

(4) People who are homeless, poor, starving, or victims of domestic violence have no right to relief in the Constitution, which is said to be exclusively a charter of negative liberties.[53] Another Court would have made at least some inroads on the positive-negative distinction, furnishing a degree of protection here. At a minimum, the Court might have said that selective exclusions from funding programs have to be persuasively justified. Such a Court would have been closely attuned to the ways in which selective funding can pressure the exercise of constitutional rights.

(5) Under current interpretations, the Constitution has no bearing on efforts to control environmental degradation. In the 1960s and 1970s, environmental groups argued that the founding document imposes on government some obligation to protect the citizenry against the environmental damage brought about by industrial development. Although such arguments attempted to draw on common law ideas about the integrity of property and person, they were unsuccessful in the courts. Of course there would be considerable difficulties in marking out a judicial role in this setting. But one might have expected some success from a different set of judges and justices.

(6) In the area of race discrimination, seemingly neutral practices that have the effect of excluding blacks from important arenas of public life are subject to little scrutiny. Tests, educational qualifications, electoral systems, and other requirements are permitted so long as they are minimally rational.[54] Another Court would have subjected these

51. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

52. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

53. *See* DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) (no right to protection against domestic violence).

54. The key case here is of course Washington v. Davis, 426 U.S. 229 (1976). *See also* Rogers

rules—in such areas as education, employment, and welfare—to a requirement of justification or to a showing that alternatives without discriminatory consequences would be less effective.

Taken as a whole, an agenda of this sort would provide an impressive set of proposals for constitutional reform; this is so even if, as seems likely, some of the proposals should not be accepted by a court. Such an agenda would confront the contemporary Constitution with the same sorts of pressures, dilemmas, and opportunities that were furnished to the Warren Court in the period beginning in the 1950s. If the agenda seems overly ambitious, perhaps we might remember how much more ambitious were the changes that the Court actually brought about in the period between 1950 and 1980—changes that would indeed have seemed inconceivable to observers in, say, 1940.

IV. Against Social Change Through Courts

Would it be desirable for the Court to embark upon courses of this sort? Should the Supreme Court engage in social reform in such areas? If what I have said thus far is correct, the Court's unwillingness to involve itself in these issues cannot be justified by reference to "legitimacy," at least not without substantial additional arguments. A judicial role in some or many of these areas would fall within the boundaries of the text. Moreover, invocation of the Constitution in many of these settings could be connected to the general understandings for which the document stands; for at least most of them, there would be no greater strain here than in cases creating (for example) a wholesale prohibition on racial discrimination and a right to be free from discrimination on the basis of gender.

I want to argue that judicial involvement in most of these areas would indeed have been unjustified, and that in any case the shift from constitutional adjudication to constitutional politics has a great deal to be said in its favor. I want, in short, to outline some of the considerations that Judge Bork avoided in his argument for a constrained judicial role. These arguments do not sound in neutrality; they are self-consciously value-laden. But they suggest that an aggressive role for the Supreme Court in social reform carries with it significant disadvantages, and that a judicial withdrawal promises significant benefits as well. The relevant considerations fall into three overlapping categories:

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v. Lodge, 458 U.S. 613 (1982) (voting). A greater burden is, however, imposed under federal statutes. *See, e.g.*, 42 U.S.C. §§ 2000e to 2000e-17 (1982) (employment).

efficacy, democracy and citizenship, and the narrowing focus of adjudication.

A. *Difficulties in Court-Led Reform*

1. Efficacy

The first point is that judicial decisions are of limited efficacy in bringing about social change. Study after study has documented this basic conclusion.[55] *Brown v. Board of Education*[56] itself is usually taken as a counterexample, but it is in fact the most conspicuous confirmation of the point.[57] Ten years after the decision, no more than about two percent of black children in the South attended desegregated schools.[58] It was not until 1964, after the involvement of Congress and the executive branch, that widespread desegregation actually occurred. The Court is far more effective in vetoing a decision than in attempting to bring about social change on its own.[59]

The decision in *Roe v. Wade*[60] may be another illustration, though the picture here is mixed. It is undoubtedly true that the decision increased women's access to safe abortions,[61] and to some extent increased the legitimacy of the practice of abortion. Surprisingly, however, it did not dramatically increase the actual rate of abortions.[62] It is thus inaccurate to say that there have been significantly more fetal deaths as a result of the Supreme Court's decision. Perhaps more fundamentally, the decision may well have created the "moral majority," helped defeat the Equal Rights Amendment, prevented the eventual achievement of consensual solutions to the abortion problem, and severely undermined the women's movement both by spurring and organizing opposition and by demobilizing potential adherents.

Some evidence for all of these propositions has been provided rela-

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55. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); R.S. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); G. ROSENBERG, THE HOLLOW HOPE (forthcoming 1991).

56. 347 U.S. 483 (1954).

57. *See* G. ROSENBERG, *supra* note 55.

58. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 474 (1986).

59. Of course it is possible that the legislative and executive actions would not have occurred without the spur of *Brown*, but even this is uncertain. *See* G. ROSENBERG, *supra* note 55, at 107-156.

60. 410 U.S. 113 (1973).

61. G. ROSENBERG, *supra* note 55, at 175-201; *see also* H. RODMAN, B. SARVIS & J. BONAR, THE ABORTION QUESTION (1987).

62. H. RODMAN, B. SARVIS & J. BONER, *supra* note 61, at 23.

tively recently, with the extraordinary public reaction to the *Webster v. Reproductive Health Services*[63] decision.[64] The Court's partial retreat from *Roe* may well have galvanized the women's movement in a way that will have more favorable and fundamental long-term consequences for sexual equality than anything that could have come from the Supreme Court. To say this is not to say that *Roe* was necessarily wrongly decided, either as a matter of constitutional interpretation or as a matter of principle. But it is to say that its effectiveness has been limited, largely because of its judicial source.

More generally, it is not clear that in terms of civil rights and civil liberties, the United States has developed significantly differently from other liberal democracies that lack judicial review (most notably France, England and, until recently, Canada) or those that have such review but have quite different constitutions (most notably West Germany). Of course judicial review has, in some settings, accomplished considerable good and even introduced important changes into American society. But the post-Warren Court focus on the rulings of the Supreme Court has often been myopic. The fate of civil rights and civil liberties in a democracy depends more fundamentally on a range of cultural, social, and economic factors than on the nine justices.

2. Democracy, Citizenship, Compromise, Legitimacy

In two ways, reliance on the courts may operate as an alternative to democratic channels. It might divert energy and resources from politics, and the eventual judicial decision may foreclose a political outcome. On both counts, the substitution has large costs. The resort to politics can produce a kind of citizen mobilization that is a public and private good, inculcating political commitments, broader understanding, feelings of citizenship, and dedication to the community. An emphasis on the judiciary that compromises these values will carry with it large attendant disadvantages. In this connection it is important to recall that Martin Luther King was quite possibly a far more important source of constitutional change than any or even all of the Warren Court's decisions concerning race.[65]

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63. 492 U.S. 490 (1989).

64. Thus many of the 1988 elections featured abortion as a central issue, and considerable pressure was imposed by the pro-choice movement.

65. The common view that the Court's decisions helped to mobilize political actors and protest, or to pave the way for King, appears to have strikingly little empirical support. *See* G. ROSENBERG, *supra* note 55, at 107-156.

In any case, political channels are often a far better channel for sensible and effective reform. Individual preferences, and their intensities, can more easily be reflected in mutually advantageous accommodations.[66] And if questions of morality tend to become questions of constitutional law, their resolution before nine judges can be harmful to the practice of citizenship. As noted, some of this effect is already visible in the context of the abortion controversy.[67] The same may also be true in the context of race discrimination, though the evidence is mixed here.[68]

The Court, in short, is not the only "forum of principle" in American government.[69] On the contrary, the major reflections of principled deliberation in the history of American government have come from Congress and the President, not from the judiciary. In the last generation it has become commonplace to contrast a principled, deliberative judiciary with a reflexive, interest-ridden political process.[70] But this position amounts not merely to a counsel of despair. It disregards the phenomenon, frequently observed in practice, of deliberative politics, in which existing conventions are subject to critical scrutiny. The belief in deliberative politics through institutions other than courts has, of course, been central to American constitutionalism since its inception.[71]

To say all this is not to deny that judicial review can make up for systemic inequalities in majoritarian processes or introduce principles that come to such processes only with difficulty. But it is to say that an aggressive Court is, on traditional liberal grounds, the furthest thing from an unambiguous good, and this is so even if the Court's goals are sound.

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66. Two qualifications are necessary here. First, I do not mean to suggest that preference-aggregation is an appropriate model for politics. Second, systemic disabilities in the political process—collective action problems and other disparities in political influence—make it hazardous to identify a deferential judicial role with democratic self-government.

67. *See* G. ROSENBERG, *supra* note 55, at 175-201.

68. The Civil Rights Act of 1990 passed the Senate on July 18, 1990. S. 2104, 101st Cong., 1st Sess. (1990). It passed the House on August 3, 1990, with one amendment. H.R. 4000, 101st Cong., 1st Sess. (1990). President Bush vetoed the Act on October 22, 1990, and the Senate sustained the President's veto on October 24, 1990. 48 CONG. Q. 3672 (Oct. 27, 1990).

69. *See* R. DWORKIN, A MATTER OF PRINCIPLE (1985), which defends an aggressive judicial role by reference to the need to insert principle into political processes, a defense that seems plausible but perhaps historically myopic and insufficiently ambitious with respect to politics itself.

70. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); R. DWORKIN, *supra* note 69; M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

71. *See* THE FEDERALIST No. 10 (J. Madison).

3. The Narrowing Focus of Adjudication

Adjudication is an exceptionally poor system for achieving large-scale social reform. Courts are rarely expert in the area at hand, and the focus on the litigated case makes it hard for judges to understand the complex systemic effects of legal intervention. A decision to require expenditures on school busing might, for example, divert resources from an area with an equal or greater claim to the public fisc. Creation of a legal right against pollution may have a variety of harmful and unintended effects on the public and private sectors, including unemployment and higher prices—effects that are difficult, especially for courts, to anticipate. Ideas of this sort provide some support for the Court's aversion to the recognition of positive rights.

Moreover, legal thinking and legal procedures are most comfortable with ideas, growing out of the tradition of compensatory justice, that are poorly adapted to the achievement of serious social reform.[72] In the compensatory model, if A injures B, B must restore the status quo ante by making payment. But this model is ill-suited to many issues of social reform that might be treated as a matter of law. Consider, for example, problems of pollution, in which numerous people are harmed to a small degree. Here the purpose of legal controls is not to ensure compensation, but to manage and reduce risks. The inevitability of complex trade-offs, involving impositions on numerous other people, usually makes a rights-based approach highly unrealistic.[73] So too, the problem of discrimination is usually not the commission of tort-like acts of discrimination by identifiable actors at identifiable times to identifiable victims. It is instead the existence of structures or systems of subordination that should be reformed. Constitutional adjudication is ill-adapted to undertaking the necessary changes.

4. Summary: The Difficulties of Social Reform Through the Judiciary

These criticisms of the judiciary are hardly novel. Though voiced principally by conservatives in the last decades, analogous complaints played a major role in the New Deal period, in which it would have seemed extremely peculiar to suggest that social reform on behalf of

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72. *See generally* Sunstein, *The Limits of Compensatory Justice*, COMPENSATORY JUSTICE: NOMOS (forthcoming 1991).

73. *See* Reaume, *Individuals, Groups, and Rights to Public Goods*, 38 U. TORONTO L.J. 1 (1988).

the disadvantaged should come from the courts.[74] Indeed, the rise of modern regulatory agencies was largely a product of a belief that the judiciary lacked the will, the means, and the democratic pedigree to bring about social reform on its own. The period that we are entering will see a similar constellation of ideas.

These considerations bear on the development of interpretive principles with which to give meaning to ambiguous constitutional provisions. They suggest that courts ought to be cautious in giving broad meaning to open-ended phrases, at least if such a meaning would require courts to undertake large-scale social reform on their own. Together with the obvious fact that interpretive principles should attempt to reduce judicial discretion, they indicate that a constitutional democracy ought not to place heavy reliance on the judiciary for such tasks.

If all this is correct, there are significant advantages to the current institutional shift. It is important to recall here that of the three most dramatic periods of aggressive social reform in the twentieth century, two occurred during the progressive period and the New Deal.[75] Here the Supreme Court was mostly hostile to the relevant changes, but it was unable to stop them, and its very hostility may have fueled them.[76] And in the third period—the environmental, consumer, and antidiscrimination movements of the 1960s and 1970s—by far the most important changes, of both degree and kind, were driven principally by Congress. The courts played a subsidiary role.

B. *Other Institutional and Democratic Possibilities*

If social reform in the various areas discussed thus far is to happen outside of the courts, on what institutions might reliance be placed? There are many possibilities. States and localities have shown, in the last decade, an impressive degree of initiative and imagination, going well beyond the Supreme Court and the Congress in many areas—by, for example, enacting aggressive measures forbidding discrimination on the basis of disability, sex, and sexual orientation. At the national level, the principal civil rights gains have occurred through legislative action in the context of discrimination on the basis of sex, disability, age, and race. It is important to recognize that the Supreme Court is not the only institution in government charged with fidelity to the Constitution.

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74. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 123-55 (1938).

75. *See* C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION ch. 1 (1990).

76. *See, e.g.*, Adkins v. Childrens Hosp., 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).

If the Court, for institutional or other reasons, interprets the Constitution narrowly, this responsibility becomes all the more insistent.

The principal constitutional sources of national legislative power here are the commerce clause—granting Congress the authority to regulate all actions having a significant effect on interstate commerce—and, perhaps most notably, the great underused provision of the Constitution, section five of the fourteenth amendment. The fourteenth amendment has, of course, been the source of the overwhelming majority of the important Supreme Court decisions in the area of civil rights and civil liberties, including the application of the Bill of Rights to the states, *Roe v. Wade*,[77] and all discrimination cases. It is too infrequently remarked that the last sentence of this amendment says that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Despite this injunction, Congress has taken up the invitation exceptionally rarely. Indeed, the judicial rather than legislative enforcement of the fourteenth amendment may qualify as the most profound irony in the history of American constitutionalism.

But the Supreme Court has itself concluded that Congress's power under section five is extraordinarily broad.[78] Indeed, the Court has permitted Congress to invoke section five to proscribe practices that the Court has itself upheld. In allowing Congress to invalidate literacy tests that the Court had permitted, the Court explicitly said that Congress could, under section five, strike down practices that the Court would allow.[79]

This conclusion turns out to be no puzzle if it is recognized that the Court's decisions are a product not only of substantive theory but also of institutional constraint. Precisely because of its lack of democratic pedigree, the Court is sometimes unwilling to enforce the Constitution as vigorously as it would if it were not so constrained. Congress faces no such constraints.[80] However ironic it might seem, there would be little reason for surprise if the Court found that Congress acted well within its constitutional authority in using its powers precisely in order to overrule the most restrictive recent decisions of the Court itself.

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77. 410 U.S. 113 (1973).

78. Katzenbach v. Morgan, 384 U.S. 641 (1966). Ironically, *Katzenbach* is a principal target of *The Tempting of America*. R. BORK, *supra* note 1, at 91-93.

79. *See Katzenbach*, 384 U.S. at 648-49, 658.

80. *Cf.* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (discussing judicial underenforcement of the Constitution for institutional reasons).

V. CONCLUSION

The Constitution does not contain the instructions for its own interpretation. Those who see the original understanding as decisive should not claim that people who disagree are abandoning the Constitution. Instead they bring to bear on the document a different set of interpretive principles. A commitment to the original understanding reflects a commitment to a particular set of interpretive principles, and those principles, like its competitors, must be justified in substantive terms.

Because *The Tempting of America* does not defend its own interpretive principles, instead treating them as self-evident, it provides no reason for anyone to accept them. In this sense, it is one version of legal authoritarianism: the view that legal outcomes are legitimate if and because they are traceable to a prior exercise of power. Because it does not acknowledge its own dependence on interpretive principles, this approach to constitutional interpretation is not an argument at all.

These considerations do not, however, provide a reason for rejecting the original understanding or for accepting an aggressive judicial role in social reform.[81] The limited efficacy of the courts, the consequences of such a role for self-government and citizenship, and the adjudicatory form all suggest that such a role is at best a mixed blessing. Concerns of this sort do not by themselves point in the direction of a particular set of interpretive principles. But they do suggest that an aggressive judicial role should not be seen as representing the natural or best form of constitutional democracy in America. A withdrawal of the federal judiciary from social reform in the name of the Constitution might ultimately amount to an important, albeit partial, step in reviving democratic forms; and it might aid in spurring passive or weak groups toward greater participation in resolving the important questions of the day. Such a step would constitute a movement—ironic, modest, ambiguous, and tentative, to be sure—in aligning constitutional practices in America with the far more conspicuous developments in self-government now occurring throughout the globe.

81. R. DWORKIN, *supra* note 69, powerfully challenges believers in the original understanding on the ground that they assert rather than defend their interpretive practices; but it perhaps fails sufficiently to explain why a constitutional democracy should be committed to an aggressive judicial role, aside from reasonable but conjectural remarks about comparative competence.