IN MEMORIAM
ROBERT H. BORK

ESSAYISTS

ANTONIN SCALIA
STEVEN G. CALABRESI
JOHN HARRISON
WILLIAM BRADFORD REYNOLDS
I was a friend of Bob Bork's for many years. I worked with him, under Attorney General Edward Levi, in Gerald Ford's Justice Department, where he was Solicitor General and I was Assistant Attorney General for the Office of Legal Counsel. Our other colleagues included Carla Hills and, later, Rex Lee as heads of the Civil Division, Richard Thornburgh as head of the Criminal Division, and Stanley Pottinger as head of the Civil Rights Division—a distinguished group, but none more distinguished than Bork. Later, I worked with Bob as a colleague on the United States Court of Appeals for the District of Columbia Circuit, where I very much liked the high diet of administrative law cases, and he not so much (I always thought he should have accepted the Administration's earlier offer to nominate him for the Second Circuit, where his interests in antitrust and business law would have had fuller play).

Robert Bork was a rare combination of integrity and intellectual brilliance. And it was both of those qualities that led to the regrettable rejection of his nomination to the Supreme Court. His integrity caused him, as the ranking officer at the Department of Justice after the resignations of the Attorney General and Deputy Attorney General, to execute President Nixon's directive to fire Archibald Cox. As he explained it, the President had the lawful authority to fire Cox (who had no independent status protected by law, as later Independent Counsels had); and while it was appropriate for some of the President's appointees to register their disagreement with that action by resigning, it was not appropriate, or, indeed, compatible with the Constitution, for all presidential appointees to denude the Justice Department of leadership, thereby frustrating lawful presidential action. I never knew Bob to be a man who deeply admired Richard Nixon, but he became The Man Who Fired Archibald Cox.

As for intellectual brilliance, Robert Bork's scholarship led the rationalization of antitrust law that has endured until today. And more importantly, he was the intellectual point-man for the movement to curb the pretensions of the Warren Court and return the meaning of the Constitution to what it said. All

* Associate Justice, United States Supreme Court, 1986–present; Judge, United States Court of Appeals for the District of Columbia Circuit, 1982–86.
discussions of "original intent" relied heavily upon his fertile and often combative scholarship. He became more than a leader of change; he became, for the opposition, the very symbol of change. His views were not, to tell the truth, much different from my own, but when his nomination to the Supreme Court came up, that symbol ("Robert Bork's America") had to be rejected.

History will treat Robert Bork more kindly than Congress has. Those of us who were his friends or intellectual allies are grateful that he was with us.
Judge Robert H. Bork was, like St. Thomas More, a man for all seasons. His brilliance, wit, charm, and sense of humor helped him to revolutionize constitutional law. Judge Bork was the first and, for a time the only, academic to challenge the judicial activism of the Warren and Burger Courts. Two years before the decision in *Roe v. Wade*, Judge Bork wrote a seminal law review article entitled *Neutral Principles and Some First Amendment Problems*, which laid the intellectual groundwork for the originalism of Justices Antonin Scalia and Clarence Thomas. Judge Bork’s criticisms of judicial activism were withering and effective. He transformed constitutional law just as earlier in his career he had transformed antitrust law, which he infused with the idea of promoting consumer welfare. Judge Bork was the rare academic whose work caught on, was read, and had a huge impact on the real world. He wrote and spoke eloquently, elegantly, wittily, and from the heart.

Judge Bork was a man of action as well as a man of ideas. He was thus a kind of platonic philosopher king—a label he would have vigorously resisted. Judge Bork was both an intellectual and a statesman. He began his service as Solicitor General of the United States under Presidents Nixon and Ford—a position from which he argued the government’s cases before the Supreme Court. As Solicitor General, Judge Bork played a key role in persuading the Supreme Court to reinstitute the death penalty in *Gregg v. Georgia*. Judge Bork became Acting Attorney General of the United States in 1973 after the Saturday night massacre—a key moment in the unfolding of the Watergate scandal. His integrity helped to hold the Justice Department together in one of its most trying moments.

In September and early October of 1973, Judge Bork played a central role in forcing Vice President Spiro Agnew to resign.

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*Class of 1940 Professor of Law, Northwestern University Law School; co-founder, The Federalist Society for Law and Public Policy Studies; Law Clerk, Judge Robert H. Bork, United States Court of Appeals for the District of Columbia Circuit, 1984–85.*

from office. These events are recounted with great wit and verve in Judge Bork’s memoir about his service as Solicitor General, *Saving Justice: Watergate, the Saturday Night Massacre, and Other Adventures of a Solicitor General*, published posthumously in 2013. Solicitor General Bork insisted in September and early October of 1973 that Vice President Agnew be indicted for taking bribes, and he refuted Agnew’s legal argument that a sitting Vice President could not be indicted. The end result was Agnew’s resignation and plea of *nolo contendere*, and Gerald R. Ford’s appointment to be President Nixon’s new Vice President. This event was of critical importance to the outcome of the Watergate scandal because it eliminated Vice President Agnew as President Nixon’s impeachment insurance. Since the only person Nixon’s enemies hated more than Nixon was Agnew, it was vital to get Agnew out of the Vice Presidency before removing Nixon himself.

On October 20, 1973, ten days after the Agnew resignation and in the midst of the war between Israel on the one hand and Egypt and Syria on the other, Bork played the starring role in a chain of events, which came to be known as the Saturday Night Massacre. The then-Attorney General, Elliot Richardson had promised to appoint a special prosecutor to investigate the growing Watergated scandal as a condition of his Senate confirmation to be Attorney General. Richardson foolishly picked Archibald Cox, a former Kennedy Administration official who was very close to Senator Ted Kennedy to conduct what should have been an impartial and apolitical criminal investigation.

In July of 1973, it became known that Nixon had tape recorded all conversations and meetings held in the Oval Office, and Special Prosecutor Cox demanded to see all the tapes. Nixon refused, and when Cox insisted on seeing them, Nixon ordered Attorney General Richardson to fire Cox. Richardson resigned rather than carrying out this order because he felt Nixon was ordering him to violate the pledge he had made at his Senate confirmation hearings. Nixon then asked Deputy Attorney General William Ruckelshaus to fire Cox, and when Ruckelshaus refused, Nixon fired him. Solicitor General Bork, who was third in line in the Justice Department hierarchy, then became Acting Attorney General. Richardson and Ruckelshaus urged Bork to fire Cox and not resign so that the integrity of the Justice Department could be preserved. Richardson, Ruckelshaus, and Bork all feared at the time that if Bork were

to resign, the White House might appointed a legal hack like White House staffer Fred Buzhardt to be Acting Attorney General, and Buzhardt might have ended the whole Watergate investigation.

Bork became Acting Attorney General on October 10, 1973. He fired Cox, asked all of Cox's staff to stay on and finish their jobs, and then hired Leon Jaworski, a former American Bar Association President who had prosecuted some Nazi war criminals, to complete the Watergate investigation after Cox's firing in a professional and nonpartisan way. Leon Jaworski's criminal investigation pursued the Nixon Tapes, and ultimately the Supreme Court ordered that the tapes be produced on July 24, 1974.\(^5\) It immediately became public that the tapes revealed that Nixon was guilty of the crime of obstruction of justice. Facing certain impeachment and removal from office, Richard Nixon became the first and only President in American history ever to be forced to resign from office and to accept a pardon for his crimes. Judge Bork thus played an absolutely critical role in the complicated series of events that led to Gerald R. Ford becoming President after Richard M. Nixon in August of 1974.

Political leftists vilified Judge Bork during this period and, indeed for the rest of his career, for firing Archibald Cox, as Nixon had ordered, but Bork's critics overlook the central role he played in forcing Vice President Agnew to resign, in keeping Cox's staff from quitting, and in seeing Cox's investigation through to a successful culmination under Leon Jaworski. The fact of the matter is that it was Robert Bork who saved the Justice Department from a grave threat to the rule of law in 1973, and no-one has ever given him the credit he deserves for this!

President Ronald Reagan appointed Bork to the United States Court of Appeals for the District of Columbia Circuit near the beginning of his administration on February 9, 1982. Judge Bork was the leading and most famous of a number of law professors whom President Reagan appointed to the federal appellate courts including Antonin Scalia, Richard Posner, Ralph Winter, Frank Easterbrook, J. Harvie Wilkinson III, Stephen Williams, Douglas Ginsburg, and Pasco Bowman. Bork stood out among all these legal giants, and he was widely rumored to be a leading candidate for an appointment to the Supreme Court.

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Ironically, when Bork first met Nixon the morning after the Saturday Night Massacre, the first words out of Nixon’s mouth were something to the effect of “you will get the next seat that comes up on the Supreme Court.” Bork explains in his memoir that he did not have the heart to tell Nixon that after the Saturday Night Massacre neither he nor anyone else who Nixon might nominate could ever be confirmed.

Bork was considered for a Supreme Court appointment when President Gerald R. Ford appointed Justice John Paul Stevens, but he was passed over this time because of his role in the Watergate scandal. Ford was the only man ever to hold the presidency not having been elected President or Vice President by the American people, and he was in a very weak position politically. Bork was considered again for appointment to the Supreme Court when President Reagan filled his first Supreme Court vacancy in 1981, but this time he was passed over in favor of Sandra Day O’Connor because Reagan had vowed as a candidate to name a woman as his first Supreme Court pick. From 1981 to 1986, Bork seemed like the apparent front-runner for the next Supreme Court nomination, but when Chief Justice Warren Burger retired in 1986, Bork was passed over so that William Rehnquist could be elevated to be Chief Justice, while Antonin Scalia was appointed to the resulting vacancy. At this point, Bork was fifty-nine years old whereas Scalia was fifty.

Judge Bork served on the United States Court of Appeals for the District of Columbia Circuit with great distinction from 1982 to 1988, writing many eloquent opinions. He wrote an important opinion in *Dronenburg v. Zech*,6 which was joined by then-Judge Antonin Scalia and which rejected the whole *Griswold v. Connecticut*7 line of Supreme Court “right to privacy” cases. This opinion made it clear that Bork and Scalia would both vote to overrule *Roe v. Wade*8 if they were appointed to the Supreme Court. Judge Bork’s opinion in the case was a classic judicial exposition of originialism, which was the philosophy of judging that Bork and Attorney General Edwin Meese III both espoused.

On July 1, 1987, President Reagan nominated Judge Bork to the United States Supreme Court to replace retiring swing Justice Lewis F. Powell, Jr. The political landscape had shifted sharply and precariously from the preceding summer when Justice Scalia was confirmed by a vote of ninety-eight to zero

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7. 381 U.S. 479 (1965).
on September 17, 1986. President Reagan was enmeshed in the Iran-Contra scandal, and the Republican Party had lost its majority control over the Senate in the 1986 midterm elections. Moreover, whereas Scalia’s effective replacement of Warren Burger with William Rehnquist moving up to Chief Justice did not change the liberal-conservative balance on the Supreme Court, it was feared that Bork’s replacement of Powell could lead to a constitutional revolution. This fear was totally unwarranted because it assumed that Rehnquist, Byron White, Sandra Day O’Connor, Antonin Scalia, and Bork were five sure votes to overrule *Roe v. Wade* and possibly to strike down affirmative action programs as well. In fact, O’Connor provided a critical fifth vote to retain *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and she provided a critical fifth vote to retain affirmative action in *Grutter v. Bollinger*. Neither Reagan nor his enemies yet realized that the Powell seat was not in fact the swing seat.

Judge Bork’s nomination in this politically charged climate triggered a massive nationwide campaign by his supporters and opponents unlike any the nation had ever previously seen. The ferocity and viciousness of the campaign against Bork was stunning and more like a presidential campaign than it was like any prior Supreme Court confirmation process. Senator Edward Kennedy’s disgraceful behavior in the confirmation process caused Judge Bork’s name to become a verb: To “Bork” someone meant to engage in a vicious exercise in character assassination. Senator Kennedy was a close friend of Archibald Cox, the Watergate special prosecutor who Bork had fired on Nixon’s orders, and he was opposed to the rule of law both in his own personal life and in the nation’s courts.

The Bork confirmation fight turned into a gigantic but vicious circus in part because the judge had written so many speeches, articles, and a book, all of which were critical of various Supreme Court decisions. The same paper trail that made Bork the leading legal intellectual of his generation also gave his many result-oriented enemies ammunition, which they could use to attack him. Throughout it all, Bork maintained his grace, his wit, his eloquence and his composure. Bork became a hero to millions of Americans who were horrified to see the modern day equivalent of the killing of St. Thomas More—the original man for all seasons.

After leaving the bench, Judge Bork became a prolific author. He wrote a book on originalism and constitutional law, *The Tempting of America: The Political Seduction of the Law,* which became a New York Times bestseller, and he wrote an additional book about social and moral decay in American culture, *Slouching Towards Gomorrah: Modern Liberalism and American Decline.* Judge Bork also wrote three additional books in his retirement prior to the posthumous publication of *Saving Justice,* which books included: *Coercing Virtue: The Worldwide Rule of Judges;* *A Country I do not Recognize: The Legal Assault on American Values;* and *A Time to Speak: Selected Writings and Arguments.* He left behind a vast legal legacy and a committed movement of followers.

Judge Bork was succeeded on the D.C. Circuit by Justice Clarence Thomas who was deeply influenced by Bork’s thinking and who has had himself a stellar judicial career. One of Judge Bork’s closest protégés in the Solicitor General’s office, Ray Randolph became a highly distinguished judge on the D.C. Circuit, and another important Bork protégé from the SG’s office, Judge Frank Easterbrook, is now the highly esteemed Chief Judge of the United States Court of Appeals for the Seventh Circuit. Bork’s former law clerks include Harvard Law Professor John Manning, University of Virginia School of Law Professor John Harrison, and George Washington University School of Law Professor, Brad Clark. Judge Bork’s writing has had a huge impact in academia where it helped inspire not only conservative originalists but also some liberal originalists at Bork’s old home at Yale Law School, such as Akhil Reed Amar and Jack Balkin. Judge Bork’s intellectual imprint on constitutional law and antitrust law is incalculable.

I was lucky to be a student in the very last class that Judge Bork ever taught at Yale Law School, which was a seminar on the theory of judicial review. It was one of the very best classes I ever took. I will never forget the way then-Professor Bork en-

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engaged with me, the respect with which he treated his students, and the fun of having lunch with him or talking with him as a law clerk. Judge Bork was not only famous, prolific, and hugely successful, but he was also a wonderful and fun companion in good times and bad. Even in his retirement the Judge continued to have an enormous impact on politics, as occurred when he condemned the nomination of Harriet Miers to the Supreme Court, thus paving the way for the appointment, instead, of a brilliant conservative intellectual, Samuel Alito. Judge Bork’s loud public opposition to George W. Bush’s nomination of his crony Harriet Miers was of a piece with Bork’s speaking truth to power during the Watergate scandal. Robert Bork was brave and effective as well as being wise and witty.

Judge Bork converted to Catholicism in 2003, and this seems like a fitting point on which to end because of the extraordinary degree to which Judge Bork’s life was a living out of the seven cardinal and theological virtues as I understand them: wisdom, bravery, restraint (or temperance), justice, faith, hope, and love.

Judge Bork exhibited great practical wisdom throughout his life, as anyone who reads Saving Justice17 or The Tempting of America18 will quickly realize. He was an intellectual who transformed antitrust law and constitutional law, but he was also a savvy wielder of political power during the 1973 Watergate crisis, during his Supreme Court confirmation fight, and during then-Judge Sam Alito’s nomination instead of Harriet Miers to the U.S. Supreme Court. He loved to live in the tidal zone where ideas and power meet, and he had a strong sense of duty and character that guided his brilliant mind in practical ways. Judge Bork had no patience for armchair philosophizing or speculation, and he also had no patience with the career-climbing politicians who he repeatedly knocked heads with in Washington, D.C. I have never known a man more devoted than Judge Bork to practical wisdom, and I fully expect I never will.

To say that Judge Bork was brave is akin to saying that Jesus was and is love. Saving Justice19 repeatedly illustrates Judge Bork’s bravery during the Watergate scandal, and the whole nation saw his bravery on display during the confirmation fight over his nomination to the Supreme Court. Judge Bork is obviously one of the bravest public servants this nation has ev-

17. See BORK, supra note 4.
18. See BORK, supra note 11.
19. See BORK, supra note 4.
er had. But, it should be added that Judge Bork’s bravery was on display in many other areas of his life as well, such as during his service in the marines or when he was ridiculed by his colleagues at the Yale Law School for his unfashionable views or by academics for his ideas about antitrust law or originalism, all of which turned out to be true.

The third cardinal or classical virtue is temperance or restraint, and Judge Bork epitomized restraint during his career as a lawyer. He thought lawyers, and Attorneys General, and Presidents, and Supreme Court Justices should all follow the law and not make it, and it was his public advocacy of judicial restraint, which led his enemies to try to burn him at the stake. Judge Bork’s enemies knew that he could not be seduced by money or power from his duty to follow the law, and it was for this virtue that they especially hated him. If he would only have kowtowed a little bit toward the intelligentsia, they might have accepted him, but they knew from Watergate, from his revolutionizing of antitrust law, and from his service on the D.C. Circuit that he would always keep his passions in check to his duty to follow the law.

The fourth and final classical virtue is justice, and if ever there was a just man it was Robert Bork. Every federal judge is required to swear the following oath when he or she embarks on their judicial duties:

I . . . do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me . . . under the Constitution, and laws of the United States. So help me God.\textsuperscript{20}

Judge Bork was passionately committed to the vision of justice that this oath epitomizes, and this is the reason why he fought like such a tiger for the rule of law during Watergate and in his confirmation ordeal. Judge Bork would not agree to let Spiro Agnew or Richard Nixon off the hook if they were guilty of crimes just because they were powerful and well-connected. Nor would Judge Bork let Supreme Court Justice Harry Blackmun off the hook for his poorly reasoned and morally atrocious opinion in \textit{Roe v. Wade}. It did not matter to Judge Bork that Justice Blackmun was a powerful man, or that he had even more powerful friends in the senate and in academia.

Robert Bork cared about doing justice, and he knew that that required him to criticize *Roe v. Wade*.

The next three virtues are faith, hope, and love, all of which are interrelated and which are indispensable supplements to the four Greek and Roman virtues already discussed.

Throughout his life, Judge Bork had a rock hard moral character of the kind that is often associated with faith, and this faith eventually led him in 2003 to convert to Catholicism with its associated religious faith. But, Judge Bork was always throughout his life a firm believer in the idea that there was right and wrong, and he held to his faith in that idea in the face of all temptations and obstacles with a tenacity that none can surpass.

Judge Bork was also full of hope because notwithstanding all the setbacks he suffered and notwithstanding his own occasionally wry prophecies of doom, he never gave up hoping that the rightness and force of his ideas could help him prevail. I am sure that if I had ever told Judge Bork that he was full of hope he would have denied it, but I am equally sure that it was true.

Finally, Judge Bork was full of love, expressed with kindness and consideration for everyone around him. He was a wonderful teacher because of the love he had for learning and for his students; he was a wonderful judge to clerk for because of the devotion and affection with which he took up the role of mentor; and he was a wonderful and loving friend in his retirement. Many leftists did not understand in 1987 why Judge Bork was loved so passionately by his supporters, nor did they appreciate that that love would still be evident even after twenty-five years. The answer is not only that Judge Bork was a kind, witty, fun, and entertaining person to be with who you could always count on to help you in a crunch. Judge Bork was all of those things, but there was something more as well. Judge Bork loved the law and the nation and the lawyers he knew too much to take the pieces of silver that the intelligentsia would have given him if only he had backed down from speaking truth to power.

Judge Bork will be sorely missed by all of us who believe in liberty, the rule of law, and constitutional government. We must carry on with the same love, hope, faith, wit, dignity, intellect, character and devotion to principle that he exuded throughout his life.

21. *See* *1 Corinthians* 13:13 ("So faith, hope, love remain, these three; but the greatest of these is love.").
Robert Bork said there was an antitrust paradox. Was there a Robert Bork Paradox?

Bork was not a legal formalist. He was not a textualist, and he was an originalist only in a quite limited sense. He was also not himself a paradox. Bork's thinking was systematic and consistent. He believed that principled judging consisted in the identification of values external to the judge and the derivation from those values, which might be quite abstract, of more specific doctrines that would implement them. That process could be creative and would require many judgments, but it must not rest on the judge's own values if it was to be neutral and principled, as to be legitimate it had to be.

Bork was also a leading figure in American law, and here there is a paradox. The thinkers who are most closely identified as his followers are noteworthy for being legal formalists and textualists. They generally do not follow Bork by thinking of law as consisting fundamentally of basic values from which specific conclusions can be deduced or derived.

This Essay will describe the basic structure of Bork's thinking, briefly discuss its intellectual origins and affinities, and then pose and address the paradox that his followers differ from him on seemingly basic issues.

In *Neutral Principles and Some First Amendment Problems*, Bork proposed a free speech doctrine that, he acknowledged, was far from the Supreme Court's: only political speech should be protected, and even such speech should not be protected if it advocates violent overthrow of the government or

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This essay deals with the substance of Judge Bork's thought, and not with the Judge as an individual. By being about ideas, it is an instance of the principle that imitation is the sincerest form of flattery. As to Robert Bork himself, having already likened him to Socrates, Newton, and Gauss in this Journal, see John Harrison, *On The Hypotheses That Lie At the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL'Y 473 (2008). I could only repeat myself.


the violation of any law.  

He did not rest that proposal on any strong claim about the text. After observing that the First Amendment need not be an absolute because "'freedom of speech' may very well be a term referring to a defined or assumed scope of liberty," Bork quickly turned from text to history.  

He then just as immediately turned away from history, after a single paragraph setting out the claim that "the framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."  

Having dealt with text and history in just over a page, he concluded, "We are, then, forced to construct our own theory of the constitutional protection of speech."  

Bork's theory was derived from two propositions. First, the Constitution contemplates a representative democracy, and second, judges must be principled. The second postulate was the burden of the first part of the article, in which Bork found inherent in the Constitution a requirement that judges be neutral in the derivation, definition, and application of the principles they employ.  

Judicial neutrality, he found, was established not in the concept of the judicial power or the history of the Constitution, but in its "Madisonian" structure. A Madisonian system avoids either minority or majority tyranny by giving substantial power to the majority while preserving basic rights for the minority.  

In such a system, the judges are simply imposing their own values, and engaging in judicial tyranny, unless they can derive their conclusions from the Constitution's values and not simply their own.  

He was as unconcerned with text or history in deducing a value of free speech as in deducing the requirement of princi-
pled judicial decisionmaking. What mattered was that the Constitution creates "a representative government, a form of government that would be impossible without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment." That constitutional value provided judges with a principle by which to distinguish political speech from all other forms of conduct, and hence to say that it is constitutionally protected without having to rest that judgment simply on their own beliefs.

One reason Neutral Principles gave rise to so much controversy when Bork was nominated to the Supreme Court is that it addressed not only the First Amendment, but a wide range of controversial topics in constitutional law. On many of those topics, Bork directed withering criticism at the Supreme Court. He criticized Griswold v. Connecticut and Reynolds v. Sims, the substantive results of which turned out to have substantial popular support. On the most fraught issue of all, though, he was entirely orthodox as to the outcome: Brown v. Board of Education was right. Brown was right, and the scholar from whom Bork had borrowed part of his title, Herbert Wechsler, was wrong, because Brown could be derived by neutral principles. It could be derived, not by careful reading of the text or long inquiry into the history, but from some basic facts and "purely juridical" considerations. The basic fact was that the Equal Protection Clause was somehow about racial equality between blacks and whites. The purely juridical principle was that the courts are not permitted to choose one version of equality over another, because judges may not choose one gratification over another without a legal warrant, and the legal materials did not indicate any particular conception of equality. Hence, the courts had to use a general principle of equality, one that required both physical equality, which by itself would permit separate-but-equal schools, and also psychological equality,

11. Id. at 23.
12. Id. at 26.
15. Bork, supra note 1, at 7–19.
19. Id. at 15.
20. Id. at 14.
which would forbid them and lead to Brown.\textsuperscript{21} The requirement of judicial neutrality, combined with the “impulse” of equality, banned segregated schools. Basic values plus judicial neutrality equals rigorous and principled constitutional decisionmaking.

When he wrote \textit{Neutral Principles}, Bork was a typical law professor in that he had two fields: his own, and constitutional law. His own was antitrust law. The structure of his thinking about constitutional law is virtually identical to that of his thinking about the Sherman Act. In Bork’s view, that act’s basic impulse, combined with the requirement that judges be neutral, yielded a quite general and abstract value that courts could and should implement through elaboration, that was at once creative and principled. From the various values that might be found in the Sherman Act, Bork selected one and only one: maximizing consumer welfare.\textsuperscript{22} That sole value should guide the courts, he argued, because implementing the others would require that judges make non-neutral choices, preferring some distributional claims over others.\textsuperscript{23} Although the value was fixed and the reasoning was to be rigorous, the actual doctrinal results would change over time as the economy changed and judges learned more about economics.\textsuperscript{24}

According to Bork, the Sherman Act was a directive to put into practice Chicago-style neoclassical welfare economics, at least until some better form of economics came along. Bork realized that his interpretation required a distinctive understanding of the concept of restraint of trade, a term used in English and American common law in a way that had no particular connection with consumer welfare. Bork’s derivation of that concept would horrify many textualists today:

It is clear from the debates that ‘the common law’ relevant to the Sherman Act is an artificial construct, made up for the occasion out of a careful selection of recent decisions from a variety of jurisdictions plus a liberal admixture of the senators’ own policy prescriptions. It is to this ‘common law,’ holding sway nowhere but in the debates of the Fifty-first

\begin{footnotes}
\footnotetext{21} Id. at 14–15.
\footnotetext{22} Robert H. Bork, \textit{The Rule of Reason and the Per Se Concept: Price Fixing and Market Division}, 74 YALE L. J. 775, 781 (1965).
\footnotetext{23} Id. at 838–39.
\footnotetext{24} “Courts charged by Congress with the maximization of consumer welfare are free to revise, not only prior judge-made rules, but, it would seem, rules contemplated by Congress.” Robert H. Bork, \textit{Legislative Intent and the Policy of the Sherman Act}, 9 J. L. & ECON. 7, 48 (1966).
\end{footnotes}
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Congress, that one must look to understand the Sherman Act.25

Today's intentionalists should not conclude, however, that Bork meant to endorse inquiry into subjective intention in any simple or ordinary sense. In his view, legislative intent was itself a construct that had to be used with care.26 Its function was to give judges the basic value from which to reason. With that value in place, the antitrust judge's "responsibility is nothing less than the awesome task of continually creating and recreating the Sherman Act out of his understanding of economics and his conception of the requirements of the judicial process."27

Bork is perhaps best known today as one of the founders of contemporary constitutional originalism. Originalism is itself a large-scale principle, but for Bork it rested on the more basic requirement of judicial neutrality. Only adherence to the original understanding, he argued, can make the Constitution "law that binds judges."28 The requirement that judges be bound by law was the foundation of Bork's originalism, as demonstrated by his claim that if decision according to the original understanding were impossible, the only alternative would be to abandon judicial review altogether. Without the original understanding to guide judges, "the choice would be either rule by judges according to their own desires, or rule by the people according to theirs."29 For Bork, that was no choice at all, for reasons on which his commitment to the original understanding was founded.

As a judge, Bork believed that his job was to turn quite abstract values into determinate but possibly mutable doctrines through principled decisionmaking. On the question of mutability, he clashed with then-Judge Scalia in Ollman v. Evans,30 a defamation case that the D.C. Circuit decided en banc. Bork argued that the existing common law privilege for statements of opinion was inadequate to implement the First Amend-

25. Id. at 37.
26. That construct had to be treated gingerly because of its "inherent artificiality." Id. at 47. Its artificiality arose because "the attribution of any intent to a legislature involves a number of problems and assumptions." Id. at 7 n.2. Bork thus rejected any "attempt to describe the actual state of mind of each of the congressmen who voted for the Sherman Act, but merely as an attempt to construct the thing called 'legislative intent' using conventional methods of collecting and reconciling the evidence provided by the Congressional Record." Id.
27. Id. at 48.
29. Id.
30. 750 F.2d 970 (D.C. Cir. 1984) (en banc).
ment's values, and should be replaced with a judicial inquiry into the totality of the circumstances designed to ensure adequate protection for free expression.\(^{31}\) His conclusion reflected, not a detailed inquiry into text or history, but the basic values as they applied to changing circumstances.\(^{32}\)

Although Judge Bork found history of little use in *Ollman*, he conducted a more substantial historical inquiry in another influential opinion, his concurrence in *Tel-Oren v. Libyan Arab Republic*.\(^{33}\) That case involved Section 1350 of Title 28 of the United States Code, a descendant of a provision in Section 9 of the Judiciary Act of 1789. Bork's historical inquiry was explicitly guided and bounded by a principle about judicial decisionmaking that he derived from the constitutional structure. He began with a presumption against finding causes of action for parties like the plaintiffs in that case.\(^{34}\) That presumption came from a structural principle governing the judicial role: Courts should not make policy choices that might interfere with American foreign policy.\(^{35}\) Neither the specific presumption nor the general principle appears explicitly in the text of any of the sources Bork relied on, including of course the Constitution. He found it, not in any particular words, but in the entire structure.

Bork's view that scholars and judges could rigorously deduce powerful conclusions from a few general and basic principles in part reflected his time at the University of Chicago. In studying law and economics with Aaron Director, Bork, as he described it, "underwent what can only be called a religious

31. *Id.* at 997 (Bork, J., concurring).

32. "We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of these clauses." *Id.* at 996. Bork defended "evolving constitutional doctrine" against then-Judge Scalia's objections. *Id.* at 995. Judge Scalia, in dissent, said that Bork was not engaged in the "application of existing principles to new phenomena... but rather alteration of preexisting principles in their application to preexisting phenomena on the basis of judicial perception of changed social circumstances." *Id.* at 1038 n. 2 (Scalia, J., dissenting).

33. 726 F.2d 774 (D.C. Cir. 1984).

34. The presumption arose from Bork's requirement that any cause of action for a plaintiff like Tel-Oren be explicit and not implied. See *id.* at 801 (Bork, J., concurring) (stating, "For reasons I will develop, it is essential that there be an explicit cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.").

35. *Id.* at 801–02. Bork derived his presumption from general principles of separation of powers and analogies to related doctrines like the act of state and political question doctrines. He did not argue that any existing doctrine required his conclusion. *Id.*
conversion.\textsuperscript{36} The economic approach represented "an enormous rigorously and logical way\" of analyzing problems.\textsuperscript{37} Bork was proud of his position in the Chicago tradition. His turn to constitutional law, however, took place in New Haven, and that part of his work bears some of the hallmarks of the Yale Law School. His claim that free speech protections can be derived from structural features of the Constitution, for example, echoes that of Charles Black.\textsuperscript{38} Indeed, the affinities between Black and Bork as structural thinkers are such that this Essay might well be titled, \textit{Structure and Relationship in the Legal Thought of Robert Bork}. 

Although there are clear connections between Bork's thoughts and those of his intellectual antecedents and contemporaries, his successors present a paradox. Bork's conception of law as consisting of basic values is anti-formalist; it treats legal norms as transparent to their purposes. It is anti-textualist; the specific words of enactments matter hardly at all. And history's relevance to it is quite limited.

Today, though, Bork's most important followers in American constitutional law and theory are generally text-formalists of one kind or another who rely extensively on history. If Bork has any one intellectual heir it is Judge Frank Easterbrook—a dominant figure in law and economics, a leading figure in constitutional law and theory, a judge on the Court of Appeals for the Seventh Circuit, a University of Chicago graduate, and former Assistant to Solicitor General Bork. Easterbrook is probably the most important textualist on or off the bench.\textsuperscript{39} Two of Bork's former law clerks, John Manning and Steven Calabresi, are among the most important scholars of the Constitution's text and history.\textsuperscript{40} All three are formalists in that all

\begin{itemize}
\item \textsuperscript{37} \textit{Id.} at 201.
\item \textsuperscript{38} \textit{See} CHARLES L. BLACK, JR., \textit{STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW} 39 (1969) (freedom of speech on questions of national politics can be derived from the federal structure of the Union).
\item \textsuperscript{40} Professor Manning has defended textualism as a methodology, \textit{see, e.g.,} John F. Manning, \textit{Textualism and the Equity of the Statute}, 101 COLUM. L. REV. 1 (2001), has elaborated it, \textit{see, e.g.,} John F. Manning, \textit{The Absurdity Doctrine}, 116 HARV. L. REV. 2387 (2003), and has applied it to important issues, \textit{see, e.g.,} John F. Manning, \textit{The Eleventh Amendment and the Interpretation of Precise Constitutional Texts}, 113 YALE L.J. 1663 (2004). Professor Calabresi has developed an account of the original understanding of the Fourteenth Amendment's text as it applies to sex discrimination, Steven G. Calabresi & Julia Rickert, \textit{Originalism and Sex Discrimination}, 90 TEX. L. REV. 1 (2011), and interpretations of the Constitution's structural provi-
three distinguish sharply between the content of legal norms and their purposes or the values they reflect.

Reading those scholars, and others of their contemporaries who might be thought of as Borkian originalists, one might think that they were followers, not of Robert Bork, but of Bork's own constitutional law teacher, William Winslow Crosskey. The first two volumes of Crosskey's great work, Politics and the Constitution In the History of the United States, have as their epigraph Justice Holmes' formulation of objective textual interpretation: "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." But unlike scholars like Easterbrook, Manning, and Calabresi, Bork was in no sense a Crosskeyite. His methodology was fundamentally different from his teacher's, and my impression is that in Bork's view Crosskey was, to put it gently, highly eccentric.

The paradox is that Bork's closest and most prominent followers are not Borkians in fundamental ways. The resolution of the paradox, insofar as there is one, is to be sought in the common impulse, as it were, behind Bork and his followers. That impulse is the conviction that law is objective. In particular, it is the convention that law is distinct from the normative views of those who implement it. The interpreter's task is to find out what the law is, not to discover that it is the best that it can be.

Formalists find objectivity in rules as opposed to the reasons for having them, and textualists find it in the meaning of words rather than speakers. Robert Bork found it elsewhere, in values and purposes that were posited by and for—but not made by or for—judges. Those values and purposes, he thought, gave the law its content and provided its justification. Quite possibly he thought that inquiry into formal rules, and close readings of texts, were often nothing but a game, a distraction from the real point of law. I would say that law is fundamentally about rules. For that reason, as another of Bork's colleagues from Yale in the 1970s said, if law is not a game, it is not not a game either.


Bob Bork was a man of chosen words and high principle. Some described him as hard nosed and rough hewn, but that is simply grudging acknowledgment that the man said what he meant and meant what he said. I first met Bob more than forty years ago. It was a fleeting encounter. He had been nominated by President Nixon to succeed Erwin Griswold as the next Solicitor General of the United States and I was about to leave the Office of the Solicitor General after three wonderful years as an Assistant to the Solicitor General. Bob was making his rounds in the Justice Department, courtesy calls at the various offices. He was wearing a rumpled jacket—invariably a rumpled jacket—and smoking a cigarette (never newly lit and never totally spent, but always in his grasp). In those days, smoking inside government offices was still allowed. The introduction was pleasant enough, but certainly not effusive. I remember thinking that the man was not exactly typecast as the government’s principal Supreme Court barrister, but there was a presence about him (undoubtedly influenced by foreknowledge of his towering intellect) that left little doubt he was more than up to the task ahead. As events unfolded, the task rapidly grew far more complex, and demanded a measure of courage and integrity rarely seen before or since. Others far closer than I to Watergate, the “Saturday Night Massacre,” and Bob’s abrupt elevation to Acting Attorney General of the United States can best testify to the man’s remarkable fortitude, unyielding integrity, and superb leadership as he guided the Justice Department through what were, in the opinion at the time of virtually everyone, its darkest hours.

Fast forward to the mid-1980s, into the second term of Ronald Reagan’s Presidency. I was back in the Justice Department, serving as an Assistant Attorney General and Counselor to then-Attorney General Meese. Bob Bork was a federal judge on the United States Court of Appeals for the District of Columbia Circuit, having been nominated in the first term of the Reagan Presidency and confirmed without much fanfare by the
United States Senate. One of my responsibilities was to assist the Attorney General in the selection and confirmation of federal judges, including Supreme Court Justices. With Chief Justice Warren Burger’s departure from the High Court the previous term, we had successfully moved then-Justice William Rehnquist to the “center seat” and elevated Antonin Scalia to the seat left vacant by then-Justice Rehnquist’s elevation. At that time, there was much discussion and enthusiasm for nominating Judge Bork to the vacant chair, with President Reagan among Bob’s strongest advocates. When it was decided that a Rehnquist-Bork tandem would draw more political fire from the Left than a Rehnquist-Scalia tandem, the President opted for the latter, but only after making it clear to all in the room that, given another opportunity to name a Supreme Court Justice, Bob Bork was his choice.

That opportunity came sooner than expected, when Justice Lewis Powell announced his intention to step down at the end of the Court’s 1986 Term. Judge Bork was the immediate choice to fill the seat. He was unquestionably the best qualified legal scholar among the short list of impressive potential candidates developed by the Administration; he had twice been comfortably confirmed by the United States Senate, once for the position of Solicitor General of the United States and once to be a judge on the D.C. Circuit; and his overall reputation was impeccable, both personally and professionally. Although it was recognized that some opposition would likely come from the Democratic side of the aisle, those of us well versed in the confirmation ritual had little doubt that Judge Bork would be confirmed by the full Senate.

As is now well known, that was not to be! The confirmation process turned ugly almost from the outset. Senators on the Left, and most of their staffs, launched a relentless campaign of character assassination, fed by lies, half-truths, and innuendo, all calculated to demonize Bob Bork in the public’s eye. The mainstream media unapologetically joined the fray, not as neutral observers factually reporting the judge’s opinions and positions, but as dishonest brokers content to knowingly mischaracterize Bob as a woman-hater, a closet racist, and an enemy of the poor and downtrodden. It mattered not to the Judge’s detractors that their assertions had not a kernel of truth—they were on a mission to defeat his nomination to the Supreme Court by any means necessary, and, dedicating themselves to that cause, they shamefully abandoned Senate decorum, honest debate, and moral decency.
In the end, it was not Bob Bork's character they had assassinated, but their own. Sadly, what was left of the confirmation process lay in shambles. No longer was it a thoughtful inquisition calibrated to take the true measure of the nominee. Instead, senators charged their staffs to dig for the smallest indiscretion (don't we all have one or more of those) and build it into an apparent character flaw of monumental proportions. If little could be found, total fabrication was encouraged, as we witnessed but a few years later in the despicable display during the confirmation proceedings of Supreme Court Justice Clarence Thomas. In back room parlance, the marching orders to staffers on the Democratic side were, more often than not, "Bork the candidate"; if successful, they gloated among themselves that the nominee "had been Borked."

Remarkably, Judge Bork remained stoic throughout the ordeal. Do not misunderstand: He was intensely frustrated, principally with some of his White House “handlers” who continuously insisted that he undergo a confirmation makeover—shave his beard, smile more, even soften some of his stated positions in decided cases. There also was the mainstream media, which was decidedly in the opposition camp and cared little about what the law actually said and everything about policing political correctness—according to what it perceived to be politically correct—a failing then that has reached epidemic proportions among journalists today. Nonetheless, Bob remained true to his convictions.

Fortunately, he had beside him two pillars of strength: his lovely wife, Mary Ellen, whose enduring faith and devoted caring were indispensible, and Raymond Randolph, now a judge on the D.C. Circuit and one of the very few individuals I know who is universally regarded as Judge Bork's intellectual equal. I spent many hours during the confirmation process listening to Bob and Ray discuss the law, Judge Bork's controversial decisions, the baseless criticism from the likes of Senators Kennedy, Leahy, and Biden, and how best to respond. There were no apologies considered, as Bob had nothing to apologize for; there was no thought of modulating legal positions, as Bob had already considered and discarded possible modulations in arriving at his decisions; and there was no serious thought of undergoing a confirmation makeover, as such a charade would present the Judge as something and someone he was not.

There are many who, with hindsight, insist that a softening and bending of both personality and legal insight would have served Bob Bork well with the Senate and likely secured his confirmation. But such afterthoughts disregard the character of
the nominee. Judge Bork was not a man to come to his views lightly, nor to conveniently abandon them when they invited controversy. That was his strength, not his weakness, and were the men and women who judged him in the Senate Chamber of similar metal, he would have served the nation with distinction as a Supreme Court Justice.

The vote went the other way, and though the jurisprudential loss was immense, there was a silver lining which in the ensuing years burned ever brighter. Bob Bork immersed himself in his writings as the years passed, and in the books he since authored we have a wealth of wisdom that he might well have never shared with us, and certainly not as extensively, if he had sat as a Supreme Court Justice. As underappreciated as he seemed to be to many while he was with us, it is inevitable that Bob Bork's legacy will continue to grow, and the full measure of appreciation he deserves will certainly be more widely embraced in the years ahead.