THE CONSTITUTION IS NOT "HARD LAW": THE BORK REJECTION AND THE FUTURE OF CONSTITUTIONAL JURISPRUDENCE

*Erwin Chemerinsky**

The recent battle over the confirmation of Robert Bork to the United States Supreme Court illustrated a central tension in constitutional jurisprudence: the conflict between wanting constraints on judges and desiring flexibility in decisionmaking. For many years, Judge Bork had argued that the rights protected by the Constitution should be limited to those enumerated in the text or clearly intended by the framers.[1] Bork had criticized virtually every Supreme Court decision protecting individual rights as exceeding the proper role of the judiciary in a democratic society.[2] Without a doubt, restricting the Court to safeguarding only those rights mentioned in the text or intended by the framers would be a substantial constraint on judicial decisionmaking.[3] However, such a restrictive approach to constitutional interpretation would be inconsistent with almost two centuries of Supreme Court precedents, from *Marbury v. Madison* to the more recent rulings desegregating schools, reapportioning legislatures, and protecting privacy. Furthermore,

* Professor of Law, University of Southern California Law Center. I am grateful to Stephen Siegel and Marcy Strauss for many thought provoking conversations which helped shape the ideas in this essay.

1. Bork, *The Constitution, Original Intent and Economic Rights*, 23 SAN DIEGO L. REV. 823, 827 (1986) (courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in framing the Constitution.) [hereinafter Bork, *The Constitution*]; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) [hereinafter Bork, *Neutral Principles*].

2. *See* Bork, *Neutral Principles, supra* note 1 (criticizing Supreme Court decisions protecting privacy, expanding state action, invalidating poll taxes, reapportioning state legislatures, and protecting speech).

3. Of course, even complete fidelity to the text and the framers' intent would leave substantial room in interpretation because of inherent ambiguities and uncertainties. *See* E. CHEMERINSKY, INTERPRETING THE CONSTITUTION 47-52 (1987); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 207-08 (1980); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 508-09 (1964). Nonetheless, an interpretive methodology which prevented the Court from protecting rights unless there was a clear intent from the framers' would drastically lessen the Court's discretion.

the strong public opposition to Bork reflected unhappiness with an approach to constitutional law that fails to protect a right to privacy, limits the first amendment to political speech, and omits protections for women under the equal protection clause. Thus, Bork faced a dilemma. He could champion judicial restraint, but at the cost of sacrificing protection of rights that are widely perceived as essential. Alternatively, he could shift to a more flexible method of interpretation, but at the expense of the constraints that he had advocated for so long.

At his confirmation hearings, Bork chose the latter course, contending that the Supreme Court need follow only the framers' abstract intent behind constitutional provisions, not their specific views.[4] But virtually any result can be justified as consistent with the framers' general objectives. At the highest level of abstraction, the framers sought justice, liberty, and equality. What Supreme Court decision could not be defended as advancing liberty or equality? Almost any result—from slavery to egalitarianism, from privacy to government regulation of matters of reproduction and personal autonomy—can be squared with the framers' overarching goals.[5]

In shifting from the framers' specific objectives to their general intent, Bork sacrificed constraint for flexibility. But once he embraced judicial review based on the framers' general intent, his methodology became indistinguishable from that used by even the most liberal Justices. Bork thus made himself indistinguishable from all other constitutional scholars, except that he preferred politically more conservative outcomes. No longer could he hide behind a claim of methodological superiority; his divergence from liberals was a matter of ideology, not as he long claimed, a better approach to interpreting the Constitution. Also, by deviating from a view that he had openly and repeatedly advocated for almost two decades, he made himself vulnerable to charges of a "confirmation conversion"—a convenient change of mind solely to please the Senate.

The issue of whether the equal protection clause protects women from discrimination is illustrative of Bork's dilemma and his

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4. *Senate Judiciary Committee Hearings on the Nomination of Judge Robert Bork*, Sept. 22, 1987, *quoted in* Fineman, *The Grilling of Judge Bork*, NEWSWEEK, Sept. 29, 1987, at 27 [hereinafter *Hearings*].

5. E. CHEMERINSKY, *supra* note 3, at 76-77; Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1092 (1981); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 378 (1981) (describing process of "conceptualizing original intent at a level of abstraction that, in effect, removes it as an institutional constraint").

choice. Prior to his Supreme Court nomination, Bork repeatedly stated that the equal protection clause only protected racial minorities, because they were the intended beneficiaries of the fourteenth amendment.[6] Bork repeated this position as recently as June of 1987.[7] Yet, Bork rightly perceived that such a position would make his confirmation quite difficult. Thus, at the confirmation hearings, Bork abandoned this position in favor of a sliding scale approach to equal protection that would provide constitutional protection of women.[8]

Bork's dilemma, played out before a national audience, has long plagued constitutional scholarship. Originalists, who claim that the Constitution's meaning is limited to that explicitly stated or clearly intended, contend that this alone can provide the needed constraint on the power of unelected judges.[9] Their view, that the Constitution only may evolve by amendment, does limit judicial power. Non-originalists, who believe that the Court may protect rights not specifically enumerated or intended, maintain that more flexibility is essential for society to live under a two hundred-year old document that was written for an agrarian, slave society.[10] Their view is that the Constitution must evolve by interpretation as well as through amendments. Originalists decry "government by judiciary,"[11] while non-originalists attack the unacceptable results under a Constitution narrowly confined to the framers' views.[12]

In this paper, I make three points about the lessons of the Bork rejection for constitutional jurisprudence. First, a complete separation between decisionmaking and the values of the individual justices is impossible without sacrificing results widely regarded as desirable and even essential. Second, the Senate's rejection of Robert Bork should be regarded, in Bruce Ackerman's terms, as a "constitutional moment" in which society clearly expressed its acceptance of a "living" Constitution. Third, the tension between desiring constraints and desiring flexibility is inherent in the Consti-

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6. Bork contended that since the framers of the fourteenth amendment meant to protect only "racial, ethnic, and religious minorities," they are the sole groups covered by the Constitution's guarantee of equal protection. Bork, *The Constitution, supra* note 1, at 832.

7. In his most recent statement on the subject, Judge Bork stated: "I do think the Equal Protection Clause probably should be kept to things like race and ethnicity." Worldnet Interview, in *United States Information Agency*, June 10, 1987, at 12.

8. *Hearings, supra* note 4.

9. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

10. *See, e.g.*, M. PERRY, THE CONSTITUTION, THE COURT, AND HUMAN RIGHTS (1982).

11. *See, e.g.*, Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 7 (1981); Rehnquist, *supra* note 9, at 695-96.

12. *See, e.g.*, E. CHEMERINSKY, *supra* note 3, at 66-74.

tution; it is a product of the inescapable conflict between wanting to entrench certain values to protect them in the future and desiring to preserve enough discretion that the Constitution can be adapted to govern an ever-changing world.

My conclusion is that we should accept the solution that this country has lived with for decades, if not centuries: a Supreme Court, loosely constrained by interpretive conventions and social values, with broad discretion to identify and protect those values that it deems crucial enough as to warrant safeguarding from majoritarian pressures.

I

The need to constrain the Supreme Court was a central theme in Robert Bork's writings and, in fact, is an obsession of constitutional law scholarship. Under Bork's philosophy adequate constraint exists only if there is a method of interpretation that yields results unrelated to the ideology of the judges.[13] Judicial decisions are illegitimate to Bork when they are based, even in part, on the political views of the judges. Thus Bork wrote: "[A] Court which makes rather than implements value choices cannot be squared with a democratic society. . . . We are driven to a conclusion that a legitimate Court must be controlled by principles exterior to the will of Justices."[14]

Bork is not alone in taking this position. From the opposite end of the political spectrum, Mark Tushnet has argued that liberalism "requires adjudication without regard to the values held by the adjudicators."[15] In fact, as Larry Simon noted, "[d]uring much of this century . . . the task of explaining the function of constitutional law came to be conflated with a search for a way of constraining the Justices."[16]

But constraint in this narrow sense is unachievable except at the cost of clearly unacceptable results. Any method of judicial interpretation that would not produce, or worse would prevent, the decision in *Brown v. Board of Education*, or the protection of women under the equal protection clause, or the right to privacy, or the reapportionment of state legislatures, should be dismissed as un-

13. Bork, *The Constitution, supra* note 1, at 827; Bork, *Neutral Principles, supra* note 1, at 6.

14. Bork, *Neutral Principles, supra* note 1, at 6.

15. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 685 (1985); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1057 (1980).

16. Simon, *The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 606 (1985).

acceptable. These results are so much a part of the basic way in which this society constitutes itself, as to render unacceptable any approach to judicial review that declares them illegitimate.

These decisions must be understood as a reflection of the views of the Justices on the bench at the time about what values are truly important. Justice William Douglas wrote that had *Brown* been decided when it was first argued in 1952, the Supreme Court would have upheld, by a five to four vote, the doctrine of separate but equal.[17] The death of Chief Justice Vinson and his replacement with Earl Warren triggered a sequence of events that a year later produced the unanimous decision invalidating state-mandated school segregation.[18] Earlier Supreme Courts had refused to invalidate discrimination against women, malapportioned state legislatures, and laws prohibiting use of contraceptives.[19] The shift in results cannot be tied to an improvement in interpretive methodology. Obviously, the differences in outcomes were a product of changes in the composition of the Court and perhaps the passage of time and resultant changes in social attitudes.

Unless Justices are constrained in unacceptable ways, constitutional law inescapably is a product of the ideology of the members of the bench at any point in time. The open-textured terms provisions of the Constitution—clauses such as "freedom of speech," "cruel and unusual punishment," "due process of law," and "equal protection of the laws"—must be given content by the members of the Court. Although Justices may explain their decisions as advancing the framers' underlying objectives or as fulfilling American traditions, it is clear that these explanations do not meet Bork's demand for constrained decisionmaking.[20] There are so many different ways of stating the framers' abstract intentions and so many ways of applying them to particular cases as to make it inevitable that Justices of different political philosophies will come to divergent results although they all conscientiously seek to follow the framers' general objectives.

This idea—that constitutional decisionmaking often is a product of the Justices' values—is hardly new. John Adams worked hard to fill the courts with Federalists before he left office, while

17. W. DOUGLAS, THE COURT YEARS, 1935-1975 (1980).

18. *See* R. KLUGER, SIMPLE JUSTICE (1975).

19. *See, e.g.,* Poe v. Ullman, 367 U.S. 497 (1961) (rejecting on ripeness grounds challenge to Connecticut law prohibiting use of contraceptives); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding law preventing women from obtaining a bartender's license); Colegrove v. Green, 328 U.S. 549 (1946) (rejecting challenge to malapportioned state legislatures as posing a political question).

20. For a fuller argument as to how these methodologies cannot provide constraints in the sense Bork desires, see E. CHEMERINSKY, *supra* note 3, at 110-17.

Franklin Roosevelt or Ronald Reagan consistently appointed individuals committed to their ideological agenda. William Rehnquist and William Brennan both are conscientiously performing their responsibilities on the Court. Can anyone really deny that their frequently divergent results are a product of their sharply differing political views?

The interesting question is why is there such reluctance to accept the discretion that Justices have possessed and exercised throughout American history. In part, the desire to eliminate judicial discretion is a product of a misdefinition of democracy. Throughout the recent discussion of judicial review, democracy has been defined in purely procedural terms as a requirement that all value decisions must be subject to control by electorally accountable officials.[21] By this definition, judicial discretion to make value choices is undemocratic and unacceptable.

But as I have argued at length elsewhere, a definition of democracy in procedural terms as majority rule, is neither descriptively accurate nor normatively desirable.[22] Many aspects of the United States government, most notably the Constitution, are intentionally antimajoritarian. American society is as much committed to certain substantive values as it is dedicated to the importance of majority rule. Any accurate understanding of American democracy must include these substantive values as well as the concept of majority rule. Judicial review advancing these values thus furthers democracy even though it involves choices by individuals who are not accountable to the electorate.

Ultimately, I contend, the problem in much of the current debate is that it begins with a too simplistic and unrealistic definition of constraint. As argued above, if constraint mandates a method of decisionmaking that yields results wholly apart from the ideology of the Court's members, this can be achieved, if at all, only at the price of unacceptable results. If, however, the definition of constraint is broadened to include all of the limitations that exist on the Court, then it is clear that Justices do not have complete flexibility to interpret the Constitution to mean literally anything. There are numerous broad limits on the Court.[23] Justices must justify their decisions under the language of the Constitution; it is doubtful, for example, that the Court could mandate arms control by interpret-

21. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 5-7 (1980); M. PERRY, *supra* note 10, at 9 nn.2 & 4.

22. *See* Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984).

23. For a fuller description of some of the broad limits on judicial review, see E. CHEMERINSKY, *supra* note 3, at 117-28.

ing the due process clause. Justices must rely on the other branches of government to implement their decisions. Justices sit for a finite amount of time and are often replaced by a subsequent president with an individual of different political views. I emphasize that none of these mechanisms achieves constraint in the sense in which Bork desires it; but all together draw the outer boundaries on judicial flexibility. "Constraint" cannot mean a set of determinative principles exterior to the values of the Justices. It must be understood as the boundary limits within which the Court possesses substantial discretion.

II

In a recent article, professor Bruce Ackerman spoke of the need to understand "constitutional moments,"[24] those events that shape future views of the Constitution. Professor Ackerman writes that "[t]ime and again, we return to these moments; the lessons we learn from them control the meanings we give to our present constitutional predicaments."[25] Although it is risky to predict that an event which is so recent will have lasting significance, I contend that the rejection of Robert Bork for a position as a Supreme Court Justice is such a constitutional moment.

For decades, Justices and commentators have spoken of the need for judicial restraint in order to preserve the Court's public credibility and legitimacy. The decisions of Justice Felix Frankfurter and the writings of the late Alexander Bickel were animated by a belief that the Court's public acceptance was fragile, so that the Court needed to conserve judicial political capital.[26] More recently, commentators have warned that the public never would accept judicial decisions if they were thought to be a reflection of the individual Justices' values. For instance, Professor Daniel Conkle wrote that public recognition of substantial judicial discretion "would undermine . . . the fragile legitimacy that attaches to Supreme Court pronouncements of constitutional law; shorn of their legitimacy the Court's constitutional decisions would face all but certain popular repudiation and the Court's powerful voice would fall to a whisper."[27] Similarly, Richard Saphire remarked that a "candid confession of the policymaking nature of noninterpretive review

24. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

25. *Id.* at 1052.

26. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting); A. BICKEL, THE LEAST DANGEROUS BRANCH 201-68 (1962).

27. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 588 (1985).

may not only undermine its ability to protect human rights . . . but may also adversely affect its ability to perform an interpretive function."[28]

The Senate's overwhelming rejection of Robert Bork, despite his impeccable professional credentials, and the opinion polls showing strong public sentiment for his defeat, reveal that people recognize the existence of judicial discretion.[29] The Senate and the public knew that Bork's presence on the Supreme Court could affect results in many cases. They obviously did not believe that the Court decides cases by employing a methodology that produces results apart from the identity of the Justices. It was obvious to all that Ronald Reagan selected Robert Bork because of his conservative views and that the issue before the Senate was whether an individual with these opinions should sit on the nation's highest court. Everyone recognized and openly discussed the fact that Bork's presence on the Court could mean the swing vote on key issues such as abortion, affirmative action, and school prayer.

But not only did Bork's rejection reflect the public's recognition of judicial discretion, it also embodied a clear repudiation of a Constitution that is narrowly limited to the framers' specific intentions. Even conservative Democrats and moderate Republicans expressed their dissatisfaction with a constitutional interpretation that excluded protection for women, a right to privacy, and vigorous protection of freedom of speech. The Bork nomination was the chance for a larger audience to witness and participate in the interpretive debate which has divided constitutional scholars for decades. The Bork rejection was a resounding defeat for originalism.

Moreover, the Senate and the public demonstrated that they not only could live with, but embrace judicial protection of rights not specifically stated in the text or intended by the framers. The Court's legitimacy is a product of many factors, but it is neither fragile nor dependent on a popular belief that judicial decisions are the product of something external to the Justices. The Bork rejection reflects public acceptance that the Constitution is a commitment that certain areas of public life should be governed by unelected judges with the authority to decide what values are so important that they should be protected from majority rule. As such, it is a moment—a moment when public acceptance of a Con-

28. Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 MICH. L. REV. 782, 796 (1983).

29. Fifty-eight Senators voted against Bork. A Roper Poll, conducted after Bork's week-long committee appearance, found that among southern voters, fifty-one percent opposed Bork's confirmation and only thirty-one percent supported it.

stitution that evolves via judicial interpretation was registered—that should shape future debates about constitutional law.

III

The very existence of a Constitution creates the tension between constraint and flexibility. A Constitution exists, above all, to entrench certain values, protecting them from easy change by social majorities.[30] The primary difference between the Constitution and a statute is the comparative difficulty of changing the former. Whereas a statute generally can be modified by a majority of both houses of the legislature, the Constitution can be altered only through an elaborate process usually necessitating approval of two-thirds of both the House and the Senate and three-quarters of the states.

Why does a nation generally committed to majority rule choose to govern itself by a document intentionally made difficult to change?[31] The simple answer is that a Constitution offers a way to enshrine and protect widely shared values—separation of powers, freedom of speech, due process of law—from easy violation by majorities. Judicial review exists to uphold and enforce these values. In short, the Constitution exists to constrain society.

At the same time, it is essential that the constraint not be too great. There must be sufficient room to allow adequate evolution so that the Constitution can survive and govern in a world far different from when it was drafted. Long ago, Chief Justice John Marshall recognized that the Constitution must leave discretion for future interpretations. Marshall wrote: "[W]e must never forget that it is a Constitution we are expounding . . . . [A Constitution] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[32]

Thus, the Constitution embodies society's commitment to fundamental values. If the legislature could overrule those values at will, there would be little preservation of the precommitment. Alternatively, if there was no opportunity for evolution by interpretation, technological and moral progress would make the Constitution outdated and a failure at protecting its basic values. As explained earlier, a Constitution narrowly confined to its drafters' specific intentions would be unacceptable.

Judicial interpretation offers a compromise between the two

30. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 9 (1978).

31. For a fuller development of the functions of the Constitution in American society, see E. CHEMERINSKY, *supra* note 3, at 25-43.

32. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

undesirable possibilities. There is evolution by interpretation, yet there also is a check on the majority in its ability to disregard the Constitution. The commitment to basic values is preserved and enhanced by the judiciary's ability to give them contemporary meaning, and at the same time there is some insulation from majoritarian pressure. This is not to say that the tension between wanting constraint and desiring flexibility is resolved; nor is it to say that the Court will always find the right balance. The Court, itself, might fall prey to social pressures or it might fail to adapt sufficiently to changed circumstances. Yet, I believe that the best way to mediate the fundamental tension between commitment and change is through a Constitution and a judiciary whose role is to preserve, protect, and advance the Constitution's values.

Tradeoffs and tensions are inherent to the human existence. The conflict between wanting both constraint and flexibility, both stability and the possibility of change, is a part of every aspect of human existence. Whether it is two people deciding whether to marry, or two businesses negotiating the content of a contract, or a society deciding to create a Constitution, the tension between constraint and flexibility is omnipresent.

The notion of the Constitution as "hard law" reflects a view of limited judicial discretion and constraints capable of assuring that decisions are not a product of the values of the individual Justices. Judge Bork, like many conservatives, argued for this position. Bork's rejection reflects the fact that this view simply does not allow sufficient flexibility to preserve results that are widely regarded as essential. Bork's rejection may lead to a richer debate over constitutional interpretation: one that will advance from the simplistic notion of judicial constraint, the erroneous definition of democracy in purely procedural terms as majority rule, and the unrealistic assumption of the fragile legitimacy of judicial review that have preoccupied recent discussions.