

## THREE

# Robert Bork: The Lessons to Be Learned

### 1

Robert Bork in his book entitled *The Tempting of America: The Political Seduction of the Law* reflects the lessons he learned from the Senate hearings on his nomination for a seat on the United States Supreme Court, culminating in a majority vote against him. The book attempts to teach the American public about the basic political opposition in this country between those on the conservative side of the conflict who understand and respect the principles of our constitutional democracy and Bork's opponents on the liberal side who, in his judgment, have little understanding or respect for those principles.

Judge Bork's book is testimony to the dismal failure of the Senate hearings to focus on the heart of the problem concerning his nomination. Though the negative decision reached was, in my judgment, a correct one, most of the questioning of the candidate that occurred and most of the overheated oratory directed against him could not help but give him the impression that the attack on him was entirely a political machination. It seemed to him all fire and fury, with little or no light thrown on the basic jurisprudential and

philosophical issues with respect to which a candidate for the Supreme Court should be expected to take a stand and defend his position.

The miscarriage of the Senate hearings as conducted is all the more difficult to comprehend and condone in view of the ample paper trail that the Senate was afforded, drawn from Robert Bork's many published articles written when he was a professor of law at Yale University. Readily available were his explicitly expressed views on how the Constitution should be interpreted, on specific constitutional questions, on the proper role of the Supreme Court in the judicial review of legislation enacted by the state governments, as well as on broader questions about natural rights and about the justice of laws enacted by legislative majorities.

On all these subjects, so relevant to the consideration of his fitness, there was not the slightest unclarity or doubt about where Professor Bork stood. He was not asked whether, in his subsequent career as a federal judge, he had changed his mind on any of these crucial points. He was not asked whether, as an appointed justice of the Supreme Court, he would decide cases before him in the light of his basic philosophy of law and government and his well-known views about human rights and liberties.

The crucial issue was not whether judicial restraint should be exercised in the Supreme Court's review of legislation by Congress and by state legislatures. Of course, it should be.

It was not whether trying to discover the original intent of the writers of the Constitution and of its amendments can always be followed by adhering strictly to the letter of the law. Reasonable men can disagree and have disagreed on this point.

It was not whether Bork would turn out to be a conservative or a liberal member of the Court or, perhaps, a moderate centrist, as these terms are currently understood.

It was not whether Judge Bork's prior judicial decisions indicated that he might be against legalized abortion under

any conditions, against the equal protection of women by our laws, against the civil rights of blacks, against affirmative action, against antitrust legislation, and so on.

Reasonable citizens—and reasonable justices of the Supreme Court—may disagree about where the Constitution stands on these substantive legal issues, and also about the reasonableness of dissent from judicial precedents on all these matters.

The lessons that should have been learned by the general public, and even by Robert Bork, were not learned because the right questions were not asked—questions about human rights and liberties; about the tyranny of the majority and whether an unjustly treated minority can appeal to the Supreme Court for the nullification of legislation because it is *unjust* even though it is not *unconstitutional*; about the objective validity of prescriptive judgments of what ought to be sought and what ought to be done; about what is good and evil, right and wrong.

The nominee might even have been asked whether he thought the eighteenth-century Constitution, allowing as it did for the disenfranchisement of women, blacks, and the poor who could not pay poll taxes, was or was not unjust; and if he said that no objectively valid principles of justice enabled him to answer that question, he might still have been asked on what grounds the Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-fourth amendments were adopted in subsequent years and whether they represented progress in the direction of social justice, regress, or neither. [1]\*

These are, of course, philosophical questions, but it is precisely Robert Bork's fundamental philosophical errors, manifest in the answers he would have given to these questions, that would have provided a sound basis for denying him a seat on the Supreme Court. In saying this, I must add at once that, in committing these philosophical mistakes, Bork

\* Endnotes for this chapter begin on page 212.

is in good company. He is no worse than Mr. Justice Holmes, Mr. Justice Frankfurter, and Judge Learned Hand. [2]

The writings and opinions of Mr. Justice Holmes clearly reveal the same brand of legal and philosophical positivism that Robert Bork's writings betray. Holding in reserve a fuller statement of what legal positivism entails, it is enough for the moment to say that legal positivism places law on a plane apart from any moral norms. It regards all such norms as being subjective in nature; thus they cannot be treated as having objective validity. Positive law, however, in the sense that it is the law of the state, can be ascertained without regard to moral considerations.

I have no hesitation in placing Mr. Justice Frankfurter and Judge Learned Hand in the same group in the light of arguments with them that Robert Hutchins and I had when he was president of the University of Chicago and I was professor of the philosophy of law in its law school.

Regarding the jurists just named, there is no question about their high degree of competence in dealing with cases arising in terms of the Anglo-American common law; nor is there any question about their judicial competence in dealing with many cases in which the strict constitutionality of a law is at issue. But there are still other cases that come before the Supreme Court in which it is not *unconstitutionality*, but *injustice*—the violation of human rights and liberties—that calls for rectification and redress.

It is with respect to such cases that the Supreme Court's power of judicial review is the only remedy for the tyranny of the majority. The great nineteenth-century proponents of democracy, John Stuart Mill and Alexis de Tocqueville, declare that democracy's chief defect is the oppression of minorities by tyrannical majorities acting in self-interest. [3]

The United States is the only constitutional government in the world that has a remedy, in its power of judicial review, that can nullify majority legislation that is unjust. Constitutional democracy can strive to sustain in practice the two-

sided demands recognized by Thomas Jefferson in his First Inaugural Address when he said:

All . . . will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.

Holmes, Frankfurter, Hand, and Bork confess that they find no grounds for doing what must be done in these crucial cases in which the majority legislation is unjust without being unconstitutional. [4] That, in my judgment, is sufficient reason for being opposed to them, either as justices of the Supreme Court, or as candidates for that position.

2

If the senators conducting the inquiry concerning Bork's fitness for a seat on the Supreme Court had asked their staffs to do just a little research into the legal philosophy expressed in his professional writings, they would have readily discovered Bork's explicit answers to the questions they should have asked but did not.

Professor Bork declared that no "system of moral or ethical values . . . has [any] objective or intrinsic validity of its own." [5] He was indoctrinated with this skepticism about the objective validity of all value judgments when he was a young student at the University of Chicago, inculcated by a philosophy department committed to the twentieth-century doctrine of noncognitive ethics, which holds that value judgments are subjective prejudices, expressing wishes or commands:

This doctrine had its roots in early modern thought. The sixteenth-century French essayist Montaigne, echoing Shakespeare, wrote that "there is nothing good or evil, but thinking makes it so." The seventeenth-century Dutch philosopher Spi-

noza maintained that the word "good" applies to whatever we actually desire, and that what *appears* to us to be good changes with changes in our actual desires. For Spinoza there is nothing *really* good that we *ought* to desire, whether we actually do or not.

It follows that prescriptive judgments using the words "ought" and "ought not" are neither true nor false, and that statements about what is just and unjust, about what is right and wrong, are merely subjectively held opinions, changing with the changing circumstances of time and place.

Professor Bork declared that "if a right is not specifically listed in the Constitution, then it is just a preference or a 'gratification.'" [6] If an individual claims that something is a right that the state should secure, that claim is nothing but a wish for a certain kind of treatment, a desire that he and other individuals may strive to get the state to gratify.

In other words, the only rights that a constitutional government is called upon to secure are those that are in the provisions of its constitution or are enacted by legislators. What Bork calls "preferences" or "gratifications" may become legal rights by constitutional amendment or by legislative enactment, but until that happens all claims concerning rights not specifically covered by positive laws indicate political objectives on the part of one or another group in society, but their claims cannot be jeopardized by judicial decisions until they have gained the status of legal rights. What in contradistinction to legal rights are called "natural" or "inalienable" rights should not be acknowledged by any court that exercises judicial restraint in abiding by the letter of the law.

Professor Bork declared that "courts must accept any value choice the legislature makes unless it clearly runs contrary to the choice made in the framing of the Constitution." [7] The value choices made by any legislature, federal or state, are those adopted by the reigning majority in that legislature and, supposedly, represent a majority in that legislature's

body of constituents. The value choices made in the Constitution similarly represent the will of the reigning majority at the time that the Constitution was ratified or at the time its amendments were adopted.

Since the Constitution is the fundamental law of the land, the choices expressed in its provisions overrule contrary choices made subsequently by Congress or by the legislatures of the several states. In other words, the Supreme Court, in its judicial review of state legislation, should reject as unconstitutional (that is, as contrary to the specifically declared intent of the constitution) those contrary legislative choices.

Professor Bork declared that "every clash between a minority claiming freedom from regulation and a majority asserting its freedom to regulate [i.e., legislate] requires a choice between . . . gratifications." [8] In other words, in a constitutional democracy, the preferences and gratifications of the majority, popular or legislative, must prevail. Accordingly, those who speak of the "tyranny of the majority" and who think that an oppressed minority should be able to get redress for its grievances in any other way than by itself becoming a reigning majority are using words without meaning.

Why? Because, as Professor Bork declared, "there is no principled way to decide that one man's [or one group's] gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another." [9] The clash between minorities and majorities can be resolved by minorities becoming majorities and by majorities becoming minorities, not by unrestrained Supreme Court decisions that appeal to principles of natural law, justice, and natural rights as the basis for rejecting majority legislation that is tyrannical, that is, unjust because it violates the natural rights of the minority.

If a minority brings its appeal to the Supreme Court for redress from the tyranny of the reigning majority, its appeal must be rejected if the Constitution, in its framers' intent and according to the letter of its provisions, does not specifically

define the liberty that the minority claims has been encroached or the equal treatment that the minority claims has been denied.

As Professor Bork declared, "There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is desired." [10] Bork's repeated stress on the phrase "no principled way" expresses his denial of any principles for deciding cases before the Court that lie outside the intent and language of the Constitution. Philosophers may talk about the principles of law as opposed to positive or man-made law; they may talk about the principles of justice; but philosophers are not judges who, if they exercise judicial restraint, are bound to decide the cases before them by the letter of the law, not by what, for Bork, are questionable philosophical principles.

In other words, if the law in question is clearly constitutional, it cannot be rejected as unjust because at that time the Constitution was itself unjust and in need of further amendment. For example, the time of Mr. Justice Taney's *Dred Scott* decision, the Constitution had not been amended to rectify the injustice of chattel slavery. [11] Hence Chief Justice Roger Taney's decision that runaway slaves were property that had to be returned to their owners was constitutionally correct, but it also was unjust. [12]

Chattel slavery did not become unjust until the adoption, after the Civil War, of the Thirteenth, Fourteenth, and Fifteenth amendments. In terms of the natural right to liberty, it was always unjust, but on Professor Bork's positivistic jurisprudence, it only became unjust when, by the enactment of positive laws, it became unconstitutional.

In other words, it is positive or man-made law that, at any time and place, determine what is just and unjust at that time and place. Since positive laws—constitutional provisions or legislative enactments—are the *only* basis for declaring what is just or unjust at a given time and place, there cannot be any possible way to declare that constitutions themselves

are unjust and in need of amendment, or to declare that legislative enactments are unjust when they are clearly not unconstitutional.

3

The issue on which Robert Bork definitely takes one side runs throughout the history of Western jurisprudence. It is the most fundamental issue in the philosophy of law and justice. It is the issue between the positivists and the naturalists—between

- a. those who hold that positive or man-made laws are prior to and determine what is deemed to be just and unjust in any community at any time and place and who, accordingly, also hold that what is deemed just and unjust changes with changes in the positive laws and government of a given community; and
- b. those who hold that there are principles of natural law, criteria of justice, and natural rights that enable us to determine whether laws and constitutions are just or unjust and, if unjust, in need of rectification and amendment.

Participants in any well-conducted Aspen Executive Seminar become acquainted with this age-old issue when they read and discuss the first two books of Plato's *Republic*. There they find the sophist, Thrasymachus, arguing against Socrates, saying that "justice is nothing but the interest of the stronger" and Socrates trying to refute Thrasymachus by defining justice without any regard to the edicts or laws of those with the might to enforce them. [13]

According to Thrasymachus, those with the power to ordain and enforce the laws of the land call those who by obey their laws just subjects, and those who disobey them unjust. The words "just" and "unjust" have no other meaning, certainly no meaning whereby a despotic tyrant or a tyrannical

majority, ruling in self-interest, not for the good of the ruled, can be called unjust.

With the statement that justice is nothing but the interest of the stronger, we have the origin of the doctrine that might is right, for those with the might to govern are the only ones who can determine what is right and wrong. [14]

The position taken by Thrasymachus is taken later by the Roman jurisconsult Ulpian for whom "whatever pleases the prince has the force of the law," and still later by Thomas Hobbes in his *Leviathan* where he declares that, in any community, what is just and unjust is wholly determined by the positive or man-made laws enacted by those with the power to ordain and enforce them. In the nineteenth century, the positivist view is advanced by Jeremy Bentham in his *Principles of Morals and Legislation*, and by John Austin in his *Province of Jurisprudence Determined*, and in the twentieth century it is advanced by professors in American law schools who call themselves legal realists.

On the other side, the naturalist view initiated by Socrates in his dispute with Thrasymachus finds amplification in Aristotle's distinction between natural and legal justice; in Cicero's discussion of natural [15]; in Augustine's statement that "an unjust law is a law in name only" (representing might without right, power without authority); in Aquinas's philosophy of law wherein principles of justice are antecedent to, independent of, and applicable to positive or man-made laws; and in the doctrine of modern philosophers, such as John Locke and Immanuel Kant, for whom natural rights preexist positive, man-made laws and become the basis for assessing their justice and injustice.

## 4

In our own century, representatives of the positivist and the naturalist sides of this basic issue in jurisprudence have occupied positions in our federal judiciary—on the pos-

itivist side, Oliver Wendell Holmes, his disciple Felix Frankfurter, Learned Hand, and Robert Bork; and on the naturalist side Louis Brandeis, Benjamin Cardozo, William Brennan, and Harry Blackmun.

This recitation of the names of eminent philosophers and jurists who, over the centuries, have engaged in disputing this issue does not by itself give the slightest indication on which side the truth lies. Readers must decide that for themselves. However, I think I can be of some help by presenting a clear statement of the consequences that follow from embracing the positivist or the naturalist side of the issue.

If the positivist view of the relation between law and justice is correct, it follows:

1. that might is right;
2. that there can be no such thing as the tyranny of the majority;
3. that there are no criteria for judging laws or constitutions as unjust and in need of rectification or amendment;
4. that justice is local and transient, not universal and immutable, but different in different places and at different times;
5. that positive laws have force only, and no authority, eliciting obedience only through the fear of the punishment that accompanies getting caught in disobeying them; and
6. that there is no distinction between *mala prohibita* and *mala in se*, namely, between
  - a. acts that are wrong simply because they are legally prohibited (such as breaches of traffic ordinances) and
  - b. acts that are wrong in themselves, whether or not they are prohibited by positive law (such as murdering human beings or enslaving them).

If the naturalist view of the relation between law and justice is correct, it follows:

1. that might is not right;
2. that majorities can be tyrannical and unjust;
3. that principles of justice and of natural right enable us to assess the justice or injustice of man-made laws and constitutions and to direct us in their rectification and amendment;
4. that justice is universal and immutable, always the same everywhere and at all times, whether or not recognized at a given time and place;
5. that positive laws have authority as well as force, obeyed only by criminals because of fear of punishment if caught disobeying them, but obeyed by just individuals by virtue of the authority they exercise when they prescribe just conduct;
6. that there are *mala in se* as well as *mala prohibita*, that is, acts that are wrong in themselves whether or not they are prohibited by positive, man-made laws.

One point more should be added. Only on the naturalist view does the great second paragraph of the Declaration of Independence proclaim self-evident truths. On the positivist view, it is, as Jeremy Bentham claimed at the time, a piece of flamboyant rhetoric, aimed at winning converts to the cause of the rebellion, but without an ounce of truth in its pious proclamations about unalienable rights and how governments, which derive their just powers from the consent of the governed, are formed to make preexisting natural rights more secure.

## 5

There are other considerations that have a bearing on the issue and may help readers to decide which side they should favor. Let me call attention to some of them.

In this century, the government of the United States, under both Democratic and Republican administrations, with the

approval of a majority of its citizens, has introduced a new note in its conduct of international affairs and in its diplomatic relations with other countries. It has been, almost alone among the great nations, a stalwart proponent of human rights. Its stance has been the same everywhere in the world—in Eastern Europe, in South America, in Central America, and in the Far East—because human rights, not being legal or civil rights, are the same everywhere in the world. The United States government has hinged its relations with and action toward other countries on their eliminating their abuse and violation of human rights.

Let me dwell a moment more on the sharp distinction between human and civil or legal rights, rights that are explicitly proclaimed in constitutions (as in the first eight amendments to our Constitution), and in the positive laws enacted by legislatures. Such rights differ from century to century and they change from time to time, as they have changed in this country with the nineteenth- and twentieth-century amendments to our Constitution. But human rights are not local and mutable. If they are everywhere the same, and at all times the same, it must be because they have their foundation in human nature, which is also everywhere the same and at all times the same. [16]

If one understands what it means to speak of human rights, one understands that “natural rights” and “human rights” are two ways of referring to the same set of rights, identical also with the “inalienable rights” proclaimed in our Declaration of Independence.

What does the word “inalienable” add to the adjectives “human” and “natural” as applied to rights? Since the rights in question are rooted in the nature of man and not established by the positive enactments of governments, they are inalienable in the sense that governments cannot take away what they do not bestow. These rights can be violated and transgressed by governments, as they have been over the course of centuries, but governments cannot abrogate or re-

scind them. Their unalienable existence is an irremovable basis for dissent from governments that transgress them.

It is paradoxical, to say the least, that in the politics of the United States, the leading proponent in the world of human rights, there should be strict constructionists, represented by the positivists in jurisprudence, who deny the validity of appeals to human, natural, and unalienable rights in the making of judicial decisions on constitutional questions. Admittedly, the words of our eighteenth-century Constitution did not explicitly name such rights in the listing of the rights to be safeguarded and implemented in the amendments regarded as our Bill of Rights. However, though not explicitly named, human or natural rights *are* presupposed in our Bill of Rights. I will return to this point in the section to follow.

I wish to call attention here to another twentieth-century phenomenon that manifests the prevalent belief in this country that rights exist, rights that are nowhere legally enacted, but the transgression of which deserves judicial trial, sentencing, and punishment. Consider the Nuremberg Trials of the so-called Nazi war criminals. The trials were held in a court that had no jurisdiction under any body of positive law. The charge against the defendants was that they had committed "crimes against humanity," which obviously is still another phrase that refers to the violation of human rights. Consider also the trial, sentencing, and execution of the Japanese military leaders who were similarly charged and similarly tried.

If there are no natural rights, there are no human rights; if there are no human rights, there cannot be any crimes against humanity. The Nuremberg trials and the trial of the Japanese military should never have occurred, for the judges in these trials could not exercise the judicial restraint advocated by Robert Bork and his fellow strict constructionists, by not going beyond the letter of positive laws that could give them legitimate jurisdiction.

I said in the preceding section that there are clear grounds for holding that the eighteenth-century drafters of the first ten amendments had the natural, inalienable, and human right to liberty in mind when they listed, in what they regarded as a Bill of Rights, the specific rights they sought to protect. Rights, civil or natural, were not mentioned in the main body of the Constitution's seven articles. That defect deeply concerned those who had drafted those articles in the long summer of 1787. The adoption of a Bill of Rights in 1791 was intended to remedy that defect. In formulating its provisions, those who drafted it had in mind the excesses of government that had encroached upon individual liberty in the Great Britain with which they were acquainted. Look, for example, at the wording of the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The intention of the First Amendment is obviously to restrain Congress from making laws about those aspects of human conduct in which human beings have a right to be free in the choices they make and in the actions they perform: freedom of religious worship, freedom of speech, freedom of the press, freedom of peaceable assembly, freedom to petition the government for the redress of grievances. All these specific liberties to be enjoyed by citizens living under a government thus constitutionally restrained are enumerated aspects of the inalienable rights named in the Declaration of Independence.

It should be remembered that the Declaration said that the three inalienable rights it named—life, liberty, and the pursuit of happiness—did not exhaust the number of such rights. It should now be noted that the Ninth Amendment

similarly calls our attention to the fact that the rights enumerated in the first eight amendments must not be understood as exhausting all the rights that deserve protection. The Ninth Amendment provides:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

What can the words "others retained by the people" refer to except (a) the rights that are inherent in human nature and so are human natural rights, or (b) rights previously possessed under the charters of the several states that had just ratified the federal constitution, or (c) both? Is not (c) the most reasonable answer in view of the fact that the men who drafted the Bill of Rights in 1791 could hardly have forgotten the words of the Declaration of Independence in its proclamation of the the inalienable rights with which all human beings are equally endowed?

It is, in my judgment, damningly significant that Robert Bork regards the Ninth Amendment as a serious blemish on the Constitution, and wishes that it had never been included in the Bills of Rights. He would certainly not condone any appeal to it by Supreme Court justice in deciding whether certain aspects of the the right to liberty, itself not specifically mentioned in the first eight amendments, should be made the basis for deciding cases that could not have arisen in the eighteenth or nineteenth century. [17]

Robert Bork repeatedly raises questions about principles. Let us, therefore, consider the principle underlying all the specific aspects of the right to liberty, not only those aspects explicitly mentioned in the eighteenth-century amendments, but also other aspects of the right to liberty that have emerged under the quite different conditions of the twentieth century.

That principle has been stated by two great philosophers of liberty, John Locke and John Stuart Mill. In Locke's phrasing, liberty is the freedom of the individual to follow his own

will in all matters where the law of the land prescribes not. In Mill's formulation, the individual should be free to do as he wills or wishes unless he is restrained from doing as he pleases by laws that protect other individuals from being injured by his actions and that also protect the common good of the political community from being disserved. Mill goes on to say that as the realm of conduct regulated by positive law enlarges, the sphere of conduct left to liberty diminishes. [18]

The line that divides the sphere of liberty from the sphere of law is the same line that divides conduct that is private from conduct that is affected with the public interest. Robert Bork has made much of the fact that the right of privacy, to which recent Supreme Court decisions have appealed, is not specifically mentioned in any amendment to the Constitution. Of course it is not there mentioned, nor need it be named there, because the "right of privacy," properly understood, applies to any act within the sphere of liberty itself, *any act that should not be regulated by law because it is in no way affected with the public interest*, in other words, does not result in injury to other individuals or detract from the public good. [19]

The principle that separates the sphere of liberty from the sphere of law, in terms of (a) conduct that is private because it does not affect anyone not engaged in that conduct, and (b) conduct that affects other individuals or the organized community, has a corollary. The corollary is that governments should not make laws aimed to prohibit actions that are thought by some, or even by all, to be immoral, if they are not affected with the public interest. Private morality should not be prescribed; nor should private actions be subject to prohibition as crimes when the crimes prohibited have no victims.

The Fourth Amendment stands on the same ground. It also protects matters that are essentially private from the intrusive and arbitrary action of government.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Despotic governments abridge and abrogate the liberty of their subjects by the power of their secret police to invade and ransack private homes, remove private papers, and seize their inhabitants, without warrants issued upon probable cause and supported by oath or affirmation.

The natural, human, and inalienable right to liberty does not lie solely in individual choice and conduct in all matters that are private. [20] The freedom to choose and act as one pleases is only one of the two forms of circumstantial freedom, a liberty that can be affected by what governments do, what constitutions proclaim, and what positive laws prescribe or prohibit.

There are also two forms of freedom that cannot in any way be so affected. One is the natural freedom of self-determination, the freedom of the will itself. That human beings either have or do not have as an inherent property of their specific nature. The other, the acquired freedom of self-perfection, is the moral liberty of those in whom reason dominates the passions, enabling them to will as they ought. Finally, there is a fourth form, a circumstantial freedom, that, like the freedom to choose and act as one pleases in the sphere of private conduct, can be bestowed upon individuals or withheld from them by constitutions or by legislative enactments. This fourth form is often called "political liberty."

Political liberty is the freedom of enfranchised citizens who are governed with their own consent and with a voice in their own government. The right to citizenship with suffrage is another aspect of the natural, human, inalienable right to liberty. In the eighteenth and nineteenth centuries, the United States would not have dared to adopt the protection

of human rights as part of its foreign policy. In the centuries in which this country's blacks, its women, and its poor were disenfranchised, it could not, without serious embarrassment, have embraced a foreign policy so divergent from its policy in domestic affairs.

7

When we consider the changes brought about with respect to political liberty by the Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-fourth amendments (the last as recent as 1964), we cannot avoid returning to the question asked earlier. Does this series of amendments, which constitute a slow march toward universal suffrage (universal except for infants, the hospitalized mentally incompetent, and imprisoned felonious criminals), also constitute progress toward the justice that recognizes the political liberty of enfranchised citizenship as an aspect of the natural, human right to liberty?

To answer this question affirmatively, as most Americans would answer it today, is to affirm the existence of principles of justice not embodied in the positive law of the land, either in its Constitution or in its legislative enactments. Otherwise it would be impossible to say that our Constitution has become progressively more and more just and that it may still have further to go to become completely just.

To answer this question negatively is, of course, to deny, as Robert Bork denies, that there are any principles of justice by reference to which it can be said that our eighteenth-century Constitution was unjust and that it has slowly become more just with the aforementioned amendments in the nineteenth and twentieth centuries. In addition, the burden of explaining the constitutional changes effected by the aforementioned amendments falls heavily upon Robert Bork's shoulders, a burden difficult, if not impossible, to discharge.

If in terms of justice the changes are neither from worse to better, nor from better to worse, what do they reflect? The

only possible answer is that what was thought inexpedient by the reigning majority in the eighteenth century was thought expedient in the nineteenth or in the twentieth century. But it must be observed that the changes in question, thought inexpedient at an earlier time and expedient at a later time, were so assessed by reigning majorities at these different times. The oppressed minorities or portions of the population that the changes favored did not have the political power to bring about these changes.

In other words, the emancipated black slaves after the Civil War, the militant suffragettes in the first decades of the twentieth century, and the poor who were disenfranchised by poll taxes did not have the political clout needed to get the Constitution amended in their favor. If no principles of justice and of natural right were involved in the adoption of these amendments, it is extremely difficult, if not impossible, to set forth the considerations of expediency that led to their formulation and adoption by the reigning majorities of their day.

## 8

Law in relation to liberty and liberty in relation to law—each setting limits to the other—appear in the First and Fourth amendments. Liberty is not the freedom to do anything one pleases, but only freedom to perform actions that do not injure others and are not affected with the public interest. Legal regulation is limited to that sphere of conduct which eventuates in injury to others and is affected with the public interest.

Accordingly, the Supreme Court's annulment of laws that go beyond this limitation to encroach upon the sphere of conduct that is private, or judicial decisions that safeguard the right to liberty in that sphere, are in line with the spirit of these two amendments even if they do not conform to the letter of the law because there is no explicit mention of a right to privacy.

Section 1 of the Fourteenth Amendment generalizes what the First and Fourth amendments imply but do not explicitly state, when it declares,

No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Here for the first time the unqualified word "liberty" appears in the Constitution (except, of course, in its Preamble). Immunities involve rights not to have one's conduct encroached upon by improper legislation; privileges involve rights to freedom of conduct in all matters that are private.

The principle of justice that obliges a just government to treat equals equally appears for the first time in the Fourteenth Amendment as late as 1868. The closing words of Section 1 declare that no government shall "deny to any persons within its jurisdiction the equal protection of the laws."

Robert Bork has enthusiastically endorsed the 1954 decision of the Warren Court, in *Brown v. Board of Education of Topeka* [Kansas], to integrate the schools of the country. That decision held that segregated schools violated the "equal protection of the laws" called for in Section 1 of the Fourteenth Amendment. It can be presumed that Bork also approves, on the same grounds, the Supreme Court's more recent decisions annulling Jim Crow laws in Southern states and laws that prohibited blacks from taking seats at lunch counters.

The question to be asked here is whether this endorsement and approval by Robert Bork of the unconstitutionality of laws that segregated blacks from whites is consistent with his insistence that Supreme Court decisions should not depart from the letter of the law as originally intended by those who drafted it. In 1896, before the conscience of the nation had become sensitized to the injustices suffered by blacks under laws enforced by the Southern states, the Supreme Court, in

*Plessy v. Ferguson*, decided in favor of those laws. The opinion accompanying that decision held that equal but separate facilities—segregated black and white restrooms in the railroad stations—conformed perfectly to the Fourteenth Amendment’s mandate that all citizens of the United States be accorded the equal protection of the laws.

The diametrically opposite decisions rested on the same words in the Sixteenth Amendment. How did those words come to mean “equal but separate” facilities in the earlier case and “equal and not separate” facilities in the later cases? How can the Constitution be read, in the manner of a strict constructionalist, to intend that the words “equal protection of the laws” gave approval at one time to laws that called for segregated facilities and at a later time called for annulling such laws to establish integrated facilities?

The answer is that one must go beyond the letter of the law to understand this change in the interpretation of its words. Equal protection of the laws means that the law must apply to all citizens without discrimination based on considerations irrelevant to their equality as citizens; as, for example, their being racially different, or different in gender. The earlier Supreme Court decision in *Plessy v. Ferguson* had an understanding of the injustice of racial discrimination radically different from the understanding underlying the later decisions of the Warren Court.

Which was the correct decision? That question cannot be answered by an appeal to the letter of the law or to the original intent of its framers. It can be answered only by determining which is the better understanding of the principle of justice that demands equal treatment for equals.

That there is no discrimination in laws requiring integrated facilities for blacks and whites is undeniable; nor can it be denied that laws requiring segregated facilities, however equal the separate facilities may be, do involve a significant discrimination between blacks and whites.

Hence, if any significant discrimination in the application

of the laws to persons who are equal as citizens is unjust, then it is a principle of justice, not the letter of the law, that determines which is the correct decision. The decisions of the Warren Court annulling laws requiring segregated facilities were not based on the unconstitutionality of such laws, but upon their injustice.

9

Let us return briefly once more to recent cases before the Supreme Court, one of which involved a majority decision in which the opinion cited the right to privacy and another in which the dissenting opinion cited that right. [21]

Robert Bork maintains that the majority decision in *Griswold v. Connecticut* and the dissenting opinion in *Bowers v. Hardwick* were illegitimate extensions of the rights specifically mentioned in the First and Fourth amendments. He thinks that the Constitution does not protect rights not specifically enumerated in its language. The right to privacy is such an unenumerated right. [22]

In my judgment, this contention by Bork is completely wrong. There is no way of reading the Constitution without understanding that it aims to limit the sphere of conduct subject to legal regulation to actions that involve injury to others and action affected with the public interest. The correlative understanding is that the Constitution, in the First and Fourth amendments, enumerates *some* examples of liberties that should not be encroached or fettered by government regulation and interference because they are entirely within the sphere of private conduct, involving no injury to other individuals or to the common good.

It is impossible to demarcate the proper spheres of liberty and of law without drawing a line between private and public. The so-called right to privacy expresses this understanding of the sphere reserved for the freedom to do as one pleases, whether what one wishes to do is regarded as immoral or

moral and whether or not it has the approbation of some segment of the community, large or small.

To make laws that prohibit the purchase and use of contraceptive devices by married couples or that prohibit homosexual relations between consenting adults is to create crimes that have no victims. The fact that such actions may give offense to some segment of the community does not turn them into victims of truly criminal behavior.

When Robert Bork castigates the "right to privacy" as an unenumerated right and when he maintains that the rights enumerated in the First and Fourth amendments are not just *examples* of the right to privacy, but an *exhaustive* enumeration of the rights that the Constitution aims to secure, he espouses the view that a Constitution written and amended in the eighteenth century should be read as applicable without extension to types of action that did not occur at that time and could not even be imagined then. Nothing, in my judgment, could be more preposterous. To hold this view is to confine oneself to eighteenth-century thinking for the solution of twentieth-century problems.

The issue about the legality of abortion is a twentieth-century issue that was not and could not have been in the minds of the framers of the eighteenth century. Mr. Justice Blackmun's decision in the case of *Roe v. Wade* invokes the right to privacy, which is nothing but the freedom of an adult woman to do as she pleases with her own body in the first trimester of the pregnancy.

The crucial question here is a factual one: Is the fetus a viable organism outside the mother's body during that time? If it cannot live by itself as an independent organism, it does not have a life of its own. The life it has is as a part of the mother's body, in the same sense that an individual's arm or leg is a part of a living organism.

An individual's decision to have an arm or a leg amputated falls within the sphere of privacy—the freedom to do as one pleases in all matters that do not injure others or the public

welfare. Accordingly, an adult female's decision to abort the fetus during the first trimester should not be subject to legal regulation by the federal government or by state legislatures.

10

Finally, a brief word about the Supreme Court's power of judicial review in connection with the system of checks and balances that Robert Bork thinks calls for severe judicial restraint on the part of the Court. If the Supreme Court did not have the power and did not exercise it to nullify laws that are either unconstitutional or unjust, the only check on legislation by Congress would be a presidential veto. But Congress can, by a two-thirds vote, override a Presidential veto, from which checkmate on his power the chief executive has no recourse.

In politics, as in chess, the process of checking must end in a checkmate. A constitution that sets up a system of checks does not eliminate all checkmates and imbalances. Just as the executive branch is checkmated by the congressional override of a presidential veto, so Congress is checkmated by the Supreme Court's nullification of its legislation. It has no recourse from such action by the Court. The imbalance at this point can be remedied and balance restored by the presidential power of appointment to the Court and by Congress's power of approval or disapproval of such nominations.

To wish to give Congress an unchecked power to make laws, because the laws it enacts represent the views of a reigning majority, is to forget that majorities can act in their own self-interest and thus be tyrannical and unjust in their oppression of minorities. There is no safeguard against such tyranny in a constitutional democracy where majorities prevail in the making of laws except through the institution of judicial review, which, though not established by the Constitution, has become through tradition an integral and unique feature of the government of the United States.

## ENDNOTES

1. See Robert H. Bork: *The Tempting of America* (New York, 1990), pp. 1-11. His book appears to imply that the United States was established on democratic principles that we should be vigorous in upholding. But if he thinks our Founding Fathers were democrats or that the eighteenth-century Constitution was the charter of a truly democratic society, his conception of democracy deprives the post-Civil War amendments—the Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-fourth—of any rational foundation or justification.

2. Justice Oliver Wendell Holmes, as the founding father of the school of legal realists, defined law itself in the following way:

What constitutes the law? You will find some text writers telling you that . . . it is a system of reason, that it is a deduction from principles of ethics or admitted axioms, or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or the deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law (O. W. Holmes, "The Path of the Law," *Collected Legal Papers* [1920], pp. 167, 172-73).

For Justice Holmes's direct attack on the conception of natural law, see Holmes, "Natural Law," *Harvard University Law Review* (1918), p. 40.

3. Tocqueville noted the unlimited power of the majority in the United States and its consequences:

I regard it as an impious and detestable maxim that in matters of government the majority of a people has the right to do everything, and nevertheless I place the origin of all powers in the will of the majority. Am I in contradiction with myself? . . .

... When I refuse to obey an unjust law, I by no means deny the majority's right to give orders; I only appeal from the sovereignty of the people to the sovereignty of the human race.

There are those not afraid to say that in matters which only concern itself a nation cannot go completely beyond the bounds of justice and reason and that there is therefore no need to fear giving total power to the majority representing it. But that is the language of a slave.

What is a majority, in its collective capacity, if not an individual with opinions, and usually with interests, contrary to those of another individual, called the minority? Now, if you admit that a man vested with omnipotence can abuse it against his adversaries, why not admit the same concerning a majority? Have men, by joining together, changed their character? By becoming stronger, have they become more patient of obstacles? For my part, I cannot believe that, and I will never grant to several that power to do everything which I refuse to a single man (Alexis de Tocqueville, *Democracy in America*, trans., G. Lawrence; ed., J. P. Mayer [New York, 1969], pp. 250-51).

4. For example, while on the D.C. circuit, Judge Bork wrote that judges "administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law" (*Hobri v. United States*).

5. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal*, 47 (1970), p. 10.

6. *Ibid.*, p. 8.

7. *Ibid.*, pp. 10-11. Also cited by Ronald Dworkin in *The New York Review of Books*, November 8, 1984. The statement corresponds to the sense if not the precise language of Justice Felix Frankfurter's dissent in *West Virginia State Board of Education et al. v. Barnette et al.* (1943), known as the "second flag salute case." In this case the Court overruled its prior decision in *Minersville School District v. Gobitis* (1940), which held that a state could not require children of the Jehovah's Witness faith, contrary to their belief, to

salute the American flag. Frankfurter, author of the *Gobitis* opinion, now found himself in dissent:

As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a state to enact and enforce laws within its general competence of that of an individual to refuse obedience because of the demands of conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review (*Barnette*).

8. Bork, *Tempting of America*, p. 257.

9. Dworkin, *op. cit.*

10. *Ibid.*

11. See *Dred Scott v. Sandford* (1857).

12. In saying this, I am referring only to the *Dred Scott* decision as applicable to the "underground railway" in the Atlantic states by which runaway slaves were aided in getting to the abolitionist North, not as applicable to the Western territories that had become free states.

13. The full text reads:

The different forms of government make laws democratical, aristocratical, tyrannical, with a view to their several interests . . . [which] are the justice [that] they deliver to their subjects, and him who transgresses them they punish as a breaker of the law, and unjust. And that is what I mean when I say that in all states there is the same principle of justice which is the interest of the government; and as the government must be supposed

to have power, the only reasonable conclusion is that everywhere there is one principle of justice which is the interest of the stronger (Plato, *Republic*, Book I).

14. The thesis has two implications. It means the stronger have the right, so far as they have the might, to exact from the weaker whatever serves their interest. Their laws or demands cannot be unjust, nor can they do injustice, because the laws they enact by virtue of their superior force are what defines justice. The thesis also means, for the weaker, that injustice on their part consists in disobeying the law of their rulers. Further, they are likely to suffer if they try to follow their own interests rather than those of the stronger. This thesis is the same as the one which sounded more than two millennia later in the Nazi chamber of legal horrors, and then from the lips of the Nazi defendants in the war crimes trials. Nazi law, they said, defined what was just. As good citizens, they obeyed the law and applied it as prescribed. They could not, therefore, be accused of being a party to any crime.

15. According to Cicero,

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even

if he escapes what is commonly considered punishment (Cicero, *De Re Publica*, trans., C. W. Keyes, Book III, p. 211).

16. See the criticism of the contemporary error on this point in my essay "Human Nature, Nurture, and Culture" in *The Aspen Institute Quarterly* 1:1 (Autumn 1989). That essay is reprinted here as Chapter Five.

17. I have in mind here the Connecticut law prohibiting the use of contraceptives by married couples and the Georgia law prohibiting certain sexual relations between consenting adults in a residence they occupy.

18. As Mill states it,

The object of this Essay is to assert one simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that . . . the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant" (J.S. Mill, *On Liberty*, Chapter 1).

19. In a column in *Newsweek* magazine in which he lavished unstinted praise on Robert Bork's recent book, George Will inadvertently gave the case away. He wrote: "The Constitution's fundamental distinction is between what is public and what is private—between the spheres where majorities may or may not rule" ("The Tempting of America," December 4, 1989). Will is quite correct. The First Amendment's restraint of government from making laws about matters that should be left to freedom of individual choice and individual action draws a line between the sphere of private liberty and the sphere of conduct that governments should regulate because the conduct affects the public interest.

20. In *The Idea of Freedom* (vol. I, 1958; vol. II, 1961) I distinguished four main types of liberty: (1) the natural

freedom of self-determination, or freedom of the will; (2) the acquired freedom of self-perfection, or moral liberty; (3) the circumstantial freedom of self-realization, or doing as one pleases; and (4) the circumstantial freedom of citizenship with suffrage, or political liberty.

21. The first case was *Griswold v. Connecticut* (1965), in which the Court annulled a Connecticut law prohibiting the purchase and use of contraceptive devices by married couples. The second case was *Bowers v. Hardwick* (1986), the Georgia case in which the dissenting opinion argued that homosexual relations between consenting adults in the privacy of their own residence should not be prohibited by a law of that state.

22. See Bork, *Tempting of America*, p. 120. "... The *Bowers* dissent, the natural outcome of *Griswold v. Connecticut* and *Roe v. Wade*, is a constitutional debacle."