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**THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW.** By Robert H. Bork. New York: The Free Press. 1990. Pp. xiv, 432. \$22.50. **THE COURT AND THE CONSTITUTION.** By Archibald Cox. Houghton Mifflin. 1987. Pp. viii, 434. \$19.95 (\$8.95 paperback).

Joel L. Selig

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## BOOK REVIEWS

**THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW.** By Robert H. Bork. New York: The Free Press. 1990. Pp. xiv, 432. \$22.50.

**THE COURT AND THE CONSTITUTION.** By Archibald Cox. Boston: Houghton Mifflin. 1987. Pp. viii, 434. \$19.95 (\$8.95 paperback).

*Reviewed by Joel L. Selig\**

A simultaneous reading of these two books will yield many rewards, including many interesting points of comparison between the authors and their approaches to constitutional law. Both Bork and Cox have had distinguished academic careers and held important positions in government. In these books, each author surveys the history of constitutional adjudication by the United States Supreme Court, and each presents his own ideas on the proper approach to judicial review.

Cox taught at Harvard, Bork at Yale. Cox was Solicitor General of the United States under Presidents Kennedy and Johnson; Bork held the same post under Presidents Nixon and Ford. Cox emerged as a national hero in the notorious "Saturday Night Massacre" when he was dismissed from his position as the first Watergate special prosecutor because of his tenacious quest for the Nixon tapes; it was Bork who, as third in line at the Justice Department, fired Cox after Attorney General Elliot Richardson and Deputy Attorney General William French Smith resigned rather than comply with Nixon's requests that they do so.

During the Democratic administrations of the 1960s, Cox's name figured in speculation concerning potential Supreme Court nominees, but he never was nominated. Bork's name was similarly mentioned during the subsequent Republican administrations, and he was finally nominated by President Reagan but defeated in one of the most bitterly fought confirmation battles in our history. Each of these books provides substantial insight into the kind of Supreme Court Justice the author would have been.<sup>1</sup> In addition, Cox's book includes his account of the Watergate episode, and Bork's provides his account of his confirmation struggle.

I studied criminal law and procedure under Professor Cox during his first year back at Harvard following his service as Solicitor General, and I studied constitutional law under him the following year. Those

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\* Professor of Law, University of Wyoming. A.B., 1965, J.D., 1968, Harvard University.

1. Bork, of course, served on the United States Court of Appeals for the District of Columbia Circuit prior to his Supreme Court nomination; Cox never served as a judge.

twelve semester hours were among the highlights of my legal education, and my admiration for Cox the teacher and Cox the man has no doubt influenced the view of his book that I will present here. I should also note that I was one of thirteen teachers at the University of Wyoming College of Law who publicly opposed Judge Bork's Supreme Court nomination,<sup>2</sup> although I would note as well that I had previously characterized him in the pages of this journal as a "highly intelligent, capable, and respected" individual.<sup>3</sup>

Bork's book, like Cox's, is written for a lay as well as a professional audience. Bork's prose, a powerful tonic for weary readers of some currently fashionable academic theorizing, is refreshingly clear and simple, frequently elegant, and always incisive. Bork has a razor-sharp mind and pen, an instinct for the jugular, and a commendable willingness, indeed desire, to confront directly and in detail the arguments against the positions he advocates. Cox's writing is polished, sophisticated, and cogent, though in style and substance it is far less argumentative than Bork's and not at all confrontational. Both books have lessons to teach and points of view reflecting years of scholarly contemplation, but Bork's is, in addition, a call to arms. Fresh from the disappointment of his rejection for the Court and with an understandable impulse toward self-justification, Bork sets out to prove his points with a vengeance, and the result is consistent with his longstanding taste for the intellectual equivalent of hand-to-hand combat. In contrast, Cox, who already is secure in history's favorable judgment, has no scores to settle, and has always maintained a patrician stance above the fray even when participating in it.

It is instructive how many points Bork and Cox have in common notwithstanding their differences in political and jurisprudential orientation. For example, both emphasize that the rule of law requires the Court's decisions to achieve legitimacy in the eyes of the people, and both believe that legitimacy can derive only from a process of decision according to law as opposed to personal preference.<sup>4</sup> Both express concern about politicization of the Court's decisionmaking process, and both see evidence of such politicization in the history of the Court's constitutional jurisprudence.<sup>5</sup> Both reject the concept of a Court free to roam, without restraint, unleashed from the text and the historical

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2. Our letter to the Senate Judiciary Committee was written "[a]s teachers of law and as citizens concerned about the preservation of balance and moderation on the . . . Court." It stated our view that "the nomination of Judge Bork ha[d] the potential to tip the delicate balance on the Court in a direction that would not be in the best interests of the Court, the law, or the citizens of this country." Letter from thirteen signatories to Senate Judiciary Committee (Sept. 15, 1987) (copy on file at Land & Water Law Review office).

3. Selig, Book Review, 21 LAND & WATER L. REV. 613, 619 (1986) (reviewing L. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY (1985)).

4. See, e.g., R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1-2, 5 (1990); A. COX, THE COURT AND THE CONSTITUTION 1-2, 25-27 (1987).

5. See, e.g., R. BORK at 129-32; A. COX at 182-83.

background of the Constitution.<sup>6</sup> Both criticize the Court's original groundbreaking decision in the area of abortion rights,<sup>7</sup> and both perceive close similarities between the constitutional issues presented there and in the more recent case where the Court refused to extend the right of privacy to protect homosexual sodomy.<sup>8</sup>

Despite these and other substantial points of agreement, however, there are major differences between Bork's approach to constitutional adjudication and Cox's.

Bork's approach begins and ends with the theory of original understanding. This theory holds that the only correct way for the judiciary to reconcile the tension between the principle of democratic self-government and the courts' obligation to engage in countermajoritarian protection of individual rights is to apply the Constitution according to the principles intended by those who ratified the document.<sup>9</sup> "If the Constitution is law," Bork argues, "then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended."<sup>10</sup> Any other approach is impermissibly political and, therefore, illegitimate:

At some point, every theory not based on the original understanding (and therefore involving the creation of new constitutional rights or the abandonment of specified rights), requires the judge to make a major moral decision. That is inherent in the nature of revisionism. The principles of the actual Constitution make the judge's major moral choices for him. When he goes beyond such principles, he is at once adrift on an uncertain sea of moral argument.<sup>11</sup>

This does not mean, Bork assures us, that the proper application of the Constitution to modern circumstances is either self-evident or frozen in the perspective of the eighteenth century. "It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know."<sup>12</sup> But it does not follow from the recognition of the necessity of contemporary insight and application that the judge has a free hand. "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."<sup>13</sup> In the following passage, Bork ham-

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6. See, e.g., R. BORK at 251-52, 259; A. COX at 326, 375.

7. *Roe v. Wade*, 410 U.S. 113 (1973) (right of privacy protected by due process clause of fourteenth amendment includes woman's qualified right to terminate her pregnancy). See R. BORK at 111-16 (discussing *Roe*); A. COX at 322-34 (same).

8. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (constitutionally protected right of privacy does not include right to engage in homosexual sodomy). Cox, however, considers the parallel incomplete because of what he regards as the absence in the *Bowers* context of a competing state interest similar to the interest he sees in the *Roe* context in unborn human life. Compare R. BORK at 116-26 (discussing *Bowers*) with A. COX at 335-38 (same).

9. See R. BORK at 139-43.

10. *Id.* at 145.

11. *Id.* at 251-52.

12. *Id.* at 167-68.

13. *Id.* at 169.

mers this point home with the clarity and forthrightness that characterize much of his book:

When we say that social circumstances have changed so as to require the evolution of doctrine to maintain the vigor of an existing principle we do not mean that society's values are perceived by the judge to have changed so that it would be good to have a new constitutional principle. The difference is between protecting that privacy guaranteed by the fourth amendment — the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” — by requiring a warrant for government to listen electronically to what is said in the home and expanding that limited guarantee of privacy into a right not only to use contraceptives but to buy them, into a right to have an abortion, into a right, as four Justices of the Supreme Court would have it, to engage in homosexual conduct, into rights, as a number of professors would have it, to smoke marijuana and to engage in prostitution. If one cannot see where in that progression the adjustment of doctrine to protect an existing value ends and the creation of new values begins, then one should not aspire to be a judge or . . . a law professor.<sup>14</sup>

There is much in the foregoing with which Cox would agree. In his view, however, the matter is not nearly so simple. He portrays the Court and the individual justices as pulled between magnetic poles of contradictory institutional considerations each of which has a proper place in constitutional adjudication. In difficult cases, he believes the judicial enterprise should include a conscious and conscientious effort to locate the appropriate position between these polar considerations:

[T]he obligation to decide “according to law” always has presented an antinomy. The Court must preserve its legitimacy and the ideal of law by invoking a majestic sense of continuity, but it must also discover some composition with the dominant needs and aspirations of the present. Individual Justices and the Court as a whole from time to time have held very different views concerning the weight they should give to each branch of the antinomy. The dilemma was, and is, insoluble by any stated scale of relative values; but by careful attention to the discipline of legal reasoning a great Justice can minimize the danger of writing his personal values and preferences into constitutional decisions while also demonstrating that the new law which his court must make from time to time is linked to the basic ideals of inherited tradition and thus commands the authority of a majestic past.<sup>15</sup>

In Cox's view, the error of excessive judicial activism is mirrored by the error of applying excessively wooden concepts “with logical con-

14. *Id.* at 169-70 (footnote omitted).

15. A. Cox at 70.

sistency but little eye for the underlying facts."<sup>16</sup> Logic alone, he argues, will not supply an answer in the difficult cases:

As conscientious, open-minded judges, we have to reason it out as far as we can, and then decide intuitively where to strike the balance between the values of representative self-government and State autonomy, on the one side, and, on the other side, the values of national protection for individual human rights.<sup>17</sup>

Bork would draw a firm line between "justice according to law," which is for the courts to administer, and "justice in a larger sense, justice according to morality," which is for the executive and the legislature.<sup>18</sup> For Cox, so firm a line, and the almost total judicial self-abnegation it hypothesizes, is both unrealistic and undesirable: "The law, even as it honors the past, must reach for justice of a kind not measured by force, by the pressures of interest groups, nor even by votes, but only by what reason and a sense of justice say is right."<sup>19</sup> At the same time, Cox warns that "the easy and convincing proof that the Court can, does, and should make law in constitutional adjudication falls short of demonstrating that the Justices are in nowise limited by law."<sup>20</sup> "[J]udges can feel, and therefore be, limited by law even though there is room for choice. The task calls for judgments of balance and degree mindful of both branches of the basic antinomy."<sup>21</sup>

Both Bork and Cox discuss in detail a representative sample of the Court's most important constitutional decisions. Although their views on a number of these cases are the same, it is not surprising that they differ on many and that the differences are most pronounced on some of the more modern cases. For example, they agree with the Court's seminal decision declaring public school segregation unconstitutional,<sup>22</sup> but they disagree concerning the Court's subsequent equal protection jurisprudence, substantial portions of which Bork criticizes.<sup>23</sup> On the other hand, as previously mentioned, Cox reaches the same conclusion as Bork on the abortion case: whatever his personal views on the policy question, he does not see the Court's result in the Constitution, and he does not believe the Court should have put it there.<sup>24</sup> Although Cox shared some of Bork's reservations concerning the one person, one vote

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16. *Id.* at 136.

17. *Id.* at 327-28.

18. R. BORK at 6.

19. A. COX at 376.

20. *Id.*

21. *Id.*

22. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (state-enforced or state-sanctioned racial segregation in public schools violates equal protection clause of fourteenth amendment even if physical facilities and other tangible factors are equal).

23. Compare R. BORK at 74-83 (discussing *Brown*) and *id.* at 83-84, 90-93, 328-30 (discussing other equal protection cases) with A. COX at 252-60 (discussing *Brown*) and *id.* at 305-21 (discussing other equal protection cases).

24. See *supra* note 7 and accompanying text.

standard for apportionment cases<sup>25</sup> when he was participating in such litigation on behalf of the United States as *amicus curiae*, he subsequently came to the view that the Court's approach was correct.<sup>26</sup> Bork and Cox also are in marked disagreement in the area of affirmative action,<sup>27</sup> where Cox argued the seminal case on the subject as a private practitioner representing the University of California.<sup>28</sup> Other comparisons also are instructive but must be left to the reader. Bork's and Cox's discussions of the cases are thoughtful and enlightening.

From this reviewer's perspective, it is a stimulating and rewarding challenge for one who disagrees with Bork on many issues to subject himself to the rigors of this most recent excursion through Bork's arguments. To the extent that Bork's book is a tract against the excesses of substantive due process, it has much to commend itself. Even in its broader implications, it makes an exceptionally well-argued and relatively persuasive case for a jurisprudence of original intent. It articulates trenchant criticisms of some of the Court's decisions and of some contemporary theories of constitutional jurisprudence.<sup>29</sup> Yet, although many of Bork's points are well taken, and although original intent is an important and fundamental source for proper constitutional decision-making,<sup>30</sup> I remain unpersuaded of the wisdom or practicality of Bork's strictly limited jurisprudential approach: there is too much missing from his hermetically circumscribed view of the judicial function. Others who are not persuaded, as well as those who are and those who think they might be, will all profit from a full dose of Bork's medicine, as they will from the powerful antidote of a journey through similar territory in Cox's company.

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25. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964) (equal protection clause of fourteenth amendment requires seats in both houses of bicameral state legislature to be apportioned substantially on a population basis).

26. Compare R. BORK at 84-90 (discussing apportionment cases) with A. COX at 288-304 (same).

27. Compare R. BORK at 101-10, 246 (discussing affirmative action) with A. COX at 269-87 (same). Also see generally Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301 (1988) (analyzing Supreme Court's affirmative action jurisprudence from 1978 to 1987); Selig, *Affirmative Action in Employment After Croson and Martin: The Legacy Remains Intact*, 63 TEMP. L. REV. 1 (1990) (analyzing Supreme Court's 1989 affirmative action cases).

28. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (University of California medical school admissions quota unlawful, but not unlawful to take race into account in admissions decisions).

29. Particularly to those who have practiced law for an extended period, some of Bork's attacks on certain genres of academic literature may seem deliciously on target. See, e.g., R. BORK at 134 ("Their concepts are abstruse, their sources philosophical, their arguments convoluted, and their prose necessarily complex. . . . [I]t should come as no surprise that, in what I am increasingly tempted to call the real world, the literature remains largely unread.") (footnote omitted).

30. Indeed, a persuasive case can be made that turns the original intent argument back on proponents such as Bork. See, e.g., Reinstein, *The Evolution of Individual Rights from the Constitution's Original Intent*, 61 TEMP. L. REV. 197, 198 (1988) ("[T]he theory of original intent is right; the way Judge Bork, Attorney General Meese and others of their political persuasion apply it is wrong. I think that this theory in fact provides the most powerful justification which exists for the very decisions of the Supreme Court that they criticize."); *id.* at 204 ("The best answer to those who claim

The reasons why I find Cox's approach more satisfying than Bork's may be summarized by a series of comparative characterizations whose validity may be judged by the reader of both volumes. Bork's approach often seems to amount to a single-minded pursuit of a narrow, closed, abstract theoretical system which is at best a vast oversimplification, and at worst a rationalization for a political ideology that overvalues majority interests and undervalues minority rights. Cox's approach, on the other hand, is balanced, pragmatic, and considerably more sensitive to complexity; it would evaluate each case in its individual context, with breadth of vision and appropriate awareness both of substantive results and of the need for judicial self-restraint and decision according to law. The difference is that between absolutism and moderation, logic in the abstract and logic informed by experience, rigid scholasticism and humane rationalism. Where Bork would insist on binding judges by an unyielding theory, Cox would inspire and rely upon wisdom, perspective, and judgment.

Bork's approach often seems profoundly anti-historical, as witness his negative appraisal of much of the Court's past and present jurisprudence,<sup>31</sup> while Cox's approach is informed by a sophisticated and sympathetic historical understanding. Bork's pronouncements can have an unmistakable flavor of arrogance: ideas or arguments that differ from his own are sometimes characterized as "preposterous"<sup>32</sup> and the like. Cox's analyses, on the other hand, tend to reflect a generous appreciation of both sides of every argument, and his own judgments are delivered with humility and hedged with careful qualifications.

Although Bork's theory of constitutional adjudication purports to abjure political considerations, his book frequently crackles with partisan ideological invective and sharp personal attack. This makes for lively and entertaining reading but ultimately detracts from Bork's credibility with any but the already converted; the antagonism that seems to propel many of Bork's fusillades is foreign to Cox's temperament and is nowhere to be found in his narrative. Bork does deliver his analysis, including its more scathing elements, in a generally good-humored fashion, and his more aggressively critical judgments frequently contain at least a grain of truth. But the kind of demonology in which he indulges is seldom consistent with objectivity.<sup>33</sup>

Cox, on the other hand, offers a central political insight that is more balanced and perceptive:

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that judges exceed their authority when they bravely and vigorously enforce the Bill of Rights and the fourteenth amendment . . . is that those judges are acting precisely the way the Framers of the Constitution originally intended."

31. See, e.g., R. BORK at 129-32, 155, 176, 215-16 (characterizing Court's tradition of departures from original understanding as illegitimate).

32. E.g., *id.* at 164, 203, 235.

33. See, e.g., *id.* at 337-43 (describing a cultural war in which an alienated left-liberal elite minority desperately seeks to impose its unpopular egalitarian and socially permissive intellectual class values through its control of countermajoritarian institutions such as the federal courts).



In its creative aspects, wise constitutional adjudication seems to me to draw additional legitimacy from, and is limited by, a delicate symbiotic relationship. The great opinions of the past shaped the Nation's understanding of itself. They told the people what they were by reminding them of what they might be. But while the opinions of the Court can sometimes be the voice of the spirit reminding us of our better selves, the roots of such decisions must be already in the people. The aspirations voiced by the Court must be those that the community is willing not only to avow but in the end to live by. The legitimacy of the great creative decisions of the past flowed in large measure from the accuracy of the Court's perception of this kind of common will and from the Court's ability, by expressing the perception, to strike a responsive chord equivalent to the consent of the governed. To go further — to impose the Court's own wiser choice — is illegitimate.<sup>34</sup>

This insight does accord legitimacy to some instances of creative constitutional adjudication by nine Platonic Guardians, and it does lead Cox to approve of some Supreme Court decisions of which Bork disapproves. For these reasons, Bork would probably lump it with the "heresy" that he so vehemently deplores.<sup>35</sup> But Bork's failure to appreciate the paradox that some seemingly countermajoritarian decisions may not be countermajoritarian in the long run — a failure that flows naturally from his devotion to rigid theoretical systematics — also accounts for his inability to acknowledge the legitimate reasons why his Supreme Court nomination was defeated.

Looking back upon his defeat, Bork reaches the following conclusion: "I had criticized the Warren Court, and this was the revenge of the Warren Court."<sup>36</sup> This assessment is correct, but not in the way Bork means it. He is referring to what he calls "the wreckage wrought by the Warren Court,"<sup>37</sup> that is, what he considers its illegitimate politicization of the law and the process of constitutional adjudication. Cox, for one, agrees that "[t]he reforms and reaction [set in motion by the Warren Court] . . . tended to politicize both the law and the courts, and so, to some extent, to impair their legitimacy."<sup>38</sup> He further agrees that "[w]e must face the question whether the price paid was too high,"<sup>39</sup> and one of the outstanding virtues of his book is that he, like Bork, does face that question. But Cox firmly believes that "[t]he [Warren Court's] use of constitutional adjudication as an instrument of reform

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34. A. Cox at 377.

35. See R. BORK at 6 ("The heresy, which dislocates the constitutional system, is that the ratifiers' original understanding of what the Constitution means is no longer of controlling, or perhaps of any, importance."); *id.* at 6-7 (deploring the heresy he describes).

36. *Id.* at 349.

37. *Id.* at 193.

38. A. Cox at 183.

39. *Id.*

made ours a freer, more equal, and more humane society.”<sup>40</sup> This also was the belief of those who opposed Bork’s confirmation, and in defeating Bork, the Senate ratified a popular consensus in support of the Warren Court’s handiwork which is difficult to reconcile with Bork’s continuing view of that legacy as a contermajoritarian usurpation.<sup>41</sup> The “Impeach Earl Warren” signs came down many years ago, Reagan, Meese, and Bork to the contrary notwithstanding.

There is present in some of Bork’s writing an imperious spirit akin to that which he attributes to some of his critics.<sup>42</sup> It is worth noting in this connection that Cox concludes his volume with an insight which seems to me to state accurately both the fundamental constitutional question and the fundamental political question that we currently face:

In the end, among a free people, both constitutionalism and the belief in law require an extraordinary degree of tolerance and cooperation — the instincts to which the British philosopher Alfred North Whitehead attributed the extraordinary success of the American people. Tolerance and the will to cooperate flow from a larger belief in the worthwhileness of the common enterprise — despite its faults, despite our selfishness, and despite our dim perception of the goal. For me, belief in the value of the enterprise is an article of faith. Whether enough of us still have enough belief in the worthwhileness of our common fate for the spirit of tolerance and cooperation to prevail, and whether we share sufficient common ideals with sufficient confidence, along with the extent of belief in the rule of law, will determine the survival of constitutionalism.<sup>43</sup>

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40. *Id.* at 182-83.

41. Of course, Bork’s contention is that senators and their constituents were misled by a vicious propaganda campaign. *See* R. BORK at 268-69, 282-93, 308-09, 323-36 (describing the campaign and responding to various charges that were made). There surely were a number of instances of vicious and misleading propaganda, and in the verbal fencing at his confirmation hearings Bork did run rings around many senators. But Bork and some of his supporters are themselves unjust when they hold all those who opposed his confirmation responsible for every instance of specious legal argument or unfair political attack, and when they dismiss all those who opposed his confirmation in good faith and for respectable reasons by questioning their motives or their intelligence.

42. *See* R. BORK at 205-06, 337-43 (characterizing and caricaturing some of his critics).

43. A. Cox at 378.