

REVIEW ARTICLE*

The Tempting of America: The Political Seduction of the Law by ROBERT H BORK (Free Press, 1990), pp i-xiv + 1-432. Cloth recommended retail price 42.95. (ISBN 002-90-3761-1).

In 1987, President Ronald Regan nominated for the United States Supreme Court a circuit judge from the US Court of Appeals for the District of Columbia Circuit and former Solicitor-General and academic. The Senate, after a heated battle, refused to confirm the nomination. The nominee resigned from the judiciary and wrote a best-seller entitled *The Tempting of America: The Political Seduction of the Law*. The book reads as the nominee's attempt to explain to himself, and to anyone else who cares to listen, why he failed to accede to the Supreme Court and why those who opposed his confirmation were wrong. The book does, however, touch on some important issues relating to constitutional interpretation and adjudication, issues which, while not raising as much public controversy here as in the United States, are certainly not unfamiliar to Australian lawyers.

Robert H. Bork's ostensible purpose in *The Tempting of America* is to defend a theory of constitutional adjudication known as "originalism" or, as Bork puts it, "the philosophy of original understanding".¹ Put simply, this theory is "that a judge is to apply the Constitution according to the principles intended by those who ratified the document".² The attraction of the theory is that it appears to cast the judge in a completely non-political role, the type of role which is commonly considered more fitting for unelected and unaccountable officials. Originalism is, therefore, based on the most fundamental aspirations of representative democracy.

* Elizabeth Handsley, BA LLB (NSW), LLM (Northwestern), Lecturer in Law, Murdoch University.

1 RH Bork *The Tempting of America* at p 143.

2 *Ibid.*

The main problem with originalism, however, is that it is not always easy to tell just what principles *were* intended by the ratifiers of a constitutional provision. One can have regard, presumably, to the historical circumstances which prompted the inclusion of a given provision in the constitution at hand, and to the records of debates and other proceedings which led to the ratification. However, even with the most sensitive and perceptive interpretation, these sources of constitutional authority can never yield an answer clear enough to resolve the most important controversies facing the American people today. Where there is room for interpretation there is room for disagreement; the ultimate question must always be how broad or narrow an interpretation a judge must place on historical sources in attempting to extract a principle. Bork's answer, in essence, is: the narrowest one possible. There is no suggestion in Bork's book that he has found this answer by reference to the intentions of the ratifiers; nor is there anything in the Constitution to support that or any other conclusion. Bork, like anyone purporting to have answered the question, must have developed a theory of the place of the Constitution in society, of its role and its meaning, not as a document, but as an institution. He has developed, in short, a theory of the political organisation of the nation, which must by definition be a political theory. Bork's originalism therefore fails to support his implied assertion that he would have been a non-political judge. His theory, like any theory of constitutional adjudication, must be based on a political world-view.

Another way of explaining the failure of Bork's theory is to focus on his habit of placing faith in the ability of the electorate to decide important moral and political issues. Of course, as long as an electorate can organise elections and exercise the franchise, it can make decisions, but will they be the right decisions? Bork's assumption is that that question is irrelevant: being (in theory, at least) consented to by a majority of free adults of full mental capacity, the decision is by definition right. This assumption conflicts with the fundamental assumption underlying any written constitution, and certainly any bill or rights, which is that the majority is *not* always right. Bork shows an inability to come to terms with the contradictions which exist between democracy and constitutional protection of rights and freedoms. The very purpose of a bill or rights is to frustrate the will of the majority, yet Bork argues that the Supreme Court's decisions have been deficient because they have done just that. As a judge, he would have been abdicating his responsibility by assuming that the majority was right.

Given the profound failings of originalism in reaching its stated goal, one must look to other ends which it might serve, in order to see what attraction it might hold for an assumedly serious thinker like Bork. One practical outcome of Bork's originalism would be that the famous (or infamous) *Roe v Wade* decision of 1973³ would be overturned, leaving governments free to restrict

3 410 US 113 (1973).

women's access to abortion. Also overturned would be *Roe v Wade's* antecedents, establishing various rights of sexual and procreative freedom.⁴ There is serious doubt whether the Equal Protection Clause (Amendment XIV) would be read as extending to discrimination on the basis of sex.⁵ While a reasonably broad interpretation of the meaning of race discrimination would remain, affirmative action programmes would be well-nigh impossible to implement without falling afoul of the Constitution.⁶

The outcomes of originalism begin to look suspiciously like the ideological programme of the American New Right. Indeed, Bork makes no secret of his own political and moral leanings. He describes his decision to resign as Solicitor-General as a response to "what I regarded then and regard now as the peculiar taste in Presidents the American people displayed in 1976," adding parenthetically that "[t]he American people later came to agree about their choice and repaired matters in 1980".⁷ One instance of Bork's propensity to state or imply his moral position on constitutional issues is his description of the debate over abortion. The question, according to Bork, is "whether ... the fetus is fully human, and therefore not to be killed for anyone's convenience, or whether ... the fetus [is] less than human so that the desires of the pregnant woman should be paramount".⁸ Bork goes on to say that "the proper resolution of the moral debate" need not be addressed,⁹ but he has made it abundantly clear that he sees abortion as something in which selfish women indulge as a matter of convenience, rather than an agonising decision which a mature adult is capable of making in the interests of all concerned (including those of the "fetus") and living with for the rest of her life. One has no choice but to wonder whether it is a coincidence that Bork's originalism leads to consequences with which Bork would in any event agree, on political and/or moral grounds.

Senators and other sections of the community mobilised to defeat Bork's confirmation because of an apprehension of what the Bill of Rights would become in his hands. The decision to reject Bork was clearly based on a political judgment about what the Bill of Rights should mean and what it should do. This decision, being made by the people's elected representatives, should, it might be thought, be beyond reproach. Yet, when Bork comes to his discussion of the confirmation hearings, he becomes very sceptical of the democratic process.¹⁰ The people, it seems, can decide through their representatives

4 For example, *Griswold v Connecticut* 381 US 479 (1965).

5 The position since 1971 has been, broadly, that sex discrimination in a law attracts an "intermediate scrutiny" from the Court, whereas race discrimination attracts "strict scrutiny". See *Reed v Reed* 404 US 71 (1971).

6 Note 1 *supra* at pp 104-106.

7 *Ibid* at p 272.

8 *Ibid* at p 111.

9 *Id.*

10 See generally Part III: The Bloody Crossroads.

whether or not they are to have access to contraception, but not whether they should have the benefit of a broad reading of the Bill of Rights. Perhaps the distinction could be justified on the basis that the decision of how to read the Constitution is a legal decision, and thus should not be made by politicians. As we have seen, however, that decision must always be at least partly political. Perhaps Bork is correct in his scepticism of the ability of the confirmation process truly to reflect the will of the people. However, he cannot have it both ways. He cannot defend the restrictive and at times draconian legislation which has over the years been struck down by a broad reading of the Bill of Rights, on the basis that it was the product of the democratic process and therefore the will of the people, and in the next breath attack those politicians and others who participated in the campaign to keep him off the Supreme Court, on the basis that they did not truly represent the will of the people. This inconsistency itself bodies ill for Bork's capacities as a judge.

Robert Bork is a dangerous man, as is any person dangerous who claims to have found the "right" answer in the law by founding a legal theory on political world-view. His apparent referral of all constitutional controversies to the original intent of the ratifiers is itself a seduction: the lay public is seduced into believing that judges are impartial when in fact they are as influenced by politics as under any other "theory". This is surely far more pernicious than a frank avowal of the political and moral dimensions of constitutional adjudication. At least candour would allow the public through its representatives to choose judges on the basis of what they will actually be doing. One can only be grateful that Bork is now writing best-sellers rather than judicial opinions.