

ROBERT BORK

Robert Bork has been the leading spokesman for an interpretivist theory of constitutional law and judicial restraint for over 20 years, spearheading the at-times lonely conservative reaction to the excesses of the Warren Court. Moreover, Bork played a seminal role in developing the "Chicago School" revision of antitrust law that shapes this Administration's policy of giving the free market relatively uninhibited play to maximize consumer welfare.

His judicial philosophy is that of the President's: interpretivism and strict construction. That is, the judicial branch should interfere with the policy choices made by elected representatives at the state or federal level only when the majority seeks to infringe on those freedoms expressly enshrined in the Constitution. If the judiciary overrules democratically sanctioned choices by creating rights not found in the constitutional text, it has engaged in an illegitimate--indeed, tyrannical--suppression of self-government through an assumption of powers the judiciary clearly does not possess in our tripartite system of government. Accordingly, Bork has consistently denounced, from the bench and elsewhere, the judicial creation of any "right" not traceable to the Constitution, such as the right of privacy to abort one's child or engage in homosexual conduct. See Dronenburg.

With respect to rights that are found in the Constitution, such as freedom of speech, Bork's analytical method of discerning the limits of these liberties is less clear. His analysis is generally rooted in but explicitly not limited to the constitutional text, drawing heavily on the structure of the Constitution as a whole and history, but without absolute allegiance to the original intent of the Framers. That is, it seems that Bork, after determining the precise libertarian value enshrined in general phrases such as freedom of speech, would give full force to this value, apparently even in specific contexts and ways that the Framers had not intended. This nuance of Bork's jurisprudence slightly distinguishes him from Scalia and led to his only disturbing opinion on the appellate court. In the Ollman libel case, Bork wrote a concurring opinion holding that, at least with respect to political speech, the court should expand the already extraordinary protection afforded the media by New York Times v. Sullivan in certain libel actions because of the proliferation of libel suits. Scalia, in dissent, rightly criticized this opinion as inappropriate "sociological jurisprudence", but perhaps it is best viewed as an isolated misstep attributable to Bork's normally laudable devotion to granting absolute protection to political speech.

Bork also favors a strong Executive in the context of a limited national government possessing only enumerated powers and is generally inclined to grant administrative agencies broad discre-

tion over matters within their ambit. He has also demonstrated a healthy lack of respect for unprincipled precedent and while he recognizes that stare decisis is an important value, he would not hesitate to overturn constitutional aberrations such as Roe v. Wade. Finally, one other substantive shadow hangs over Bork's career. As Solicitor General, he filed a number of briefs, particularly in the civil rights area, that were clearly erroneous on important issues. Some of these filings are attributable to the institutional constraints of the Solicitor General's office, but others are not, and thus reflect at least a lack of diligent oversight and aggressiveness.

As the foregoing indicates, Bork possesses monumental intellectual and scholarly credentials and has personally reexamined many of the broad, fundamental legal and jurisprudential issues of our time. He has served as Solicitor General under Presidents Nixon and Ford, a Yale law professor, an appellate litigator in private practice, and an appellate judge on the District of Columbia Circuit since 1982. At that time, the American Bar Association gave him its highest rating, "exceptionally well qualified". He is extremely eloquent and persuasive, both in print and in person, a talent that will serve him well in building a consensus supporting conservative principles on the Court. Moreover, his acknowledged scholarly credentials and pre-existing personal relationships with many of the justices should lead to his automatic acceptance on the Court, while others would need to go through at least a brief transition period.

There are other miscellaneous factors that bear on the desirability of appointing Bork to the Court. First, if he is passed over for the next opening on the Court, he may be insulted and resign from the District of Columbia Circuit. This will not only weaken that appellate court, but will deprive us of an extremely attractive nominee if a second slot becomes available. Further, he is 59 years old, smokes heavily, drinks somewhat and engages in little if any exercise. This indicates that his tenure on the Court may well be of a shorter duration than other potential candidates. It should also be noted that Bork, as Solicitor General, was responsible for firing Archibald Cox during the Watergate "Saturday Night Massacre". This will be raised at his confirmation, although it played a surprisingly limited role during his hearing for the District of Columbia Circuit. Conflicting views have been expressed on the warmth of his personality and the extent of his humility, but all agree on his eloquence and skills of advocacy. Some have suggested a certain lack of energy and organization during his initial years on the D.C. Circuit, but others minimize this and all agree that he has recently improved in these areas. Finally, some concern was expressed over his administrative expertise and experience, but, true or not, administrative skills are of minimal significance, even for the job of Chief Justice.