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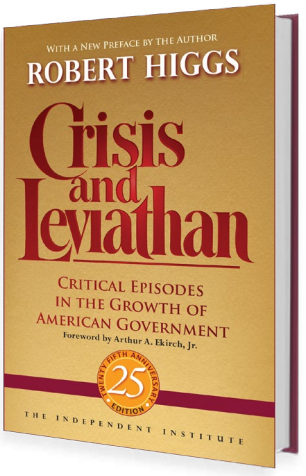

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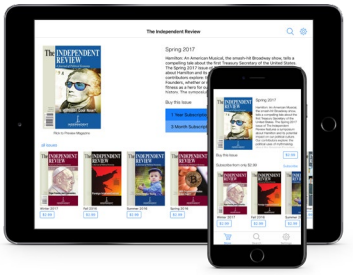

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CONTROVERSY

Bostan, Bork, and the Jurisprudence of Limited Government

ANDREW RUTTEN

Richard Bostan offers a spirited and witty critique of Richard Posner's constitutional jurisprudence. He argues that Posner is not a real conservative, but a poseur who plays the part when it suits him. Like a real conservative, Posner embraces economic theory and free markets when discussing economic policy. But unlike a real conservative, Posner embraces pragmatism as the method of interpreting the Constitution. According to Bostan, a real conservative follows Robert Bork and embraces originalism as the method of interpreting the Constitution. In his words, "conservative intellectuals in the United States [with one exception] line up behind Robert Bork." They do so not out of blind hero worship but because any other interpretative approach gives judges far too much autonomy, thus leading us farther down the path toward tyranny of the majority—the majority of the Supreme Court, that is.

This approach has its merits. Most obviously, because Posner wrote an unfriendly review of Bork's The Tempting of America (Posner 1995), he has given Bostan ready material from which to build his case. Thus, there is little

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need to worry that Bostan has misconstrued Posner. Unfortunately, arguing that because Posner disagrees with Bork he is not a conservative also has serious drawbacks. Most salient, it simply is not true that originalism is the only jurisprudence of those who espouse limited government. Nor does pragmatism imply a lack of respect for American constitutional traditions. To the contrary, Posner's position has a long and honorable history in the United States. Even today, many libertarians adopt it instead of the strict originalism favored by Bostan and Bork.

More distressing to Bostan's argument is that Bork provides a weak foundation on which to try to build a case for originalism. On closer inspection, Bork's defense of originalism turns out to be a house of glass built on the sand. Bork has built on the sand by relying on fictive history, a past that happened only in textbooks, not in the real world. And he has built out of glass by adopting, at crucial points, the methods he rejects in others. Taken together, these design flaws should make readers wary of Bostan's claim that Bork's is the only fit house for free men.

These are strong criticisms, but they are easy to prove. Because Bostan's question—What should guide constitutional interpretation?—is important, and his answer—the original intentions of the founders—is propagated by scholars as distinguished as Bork, it is worth going over the contrary case in some detail.

Is Originalism Really the Jurisprudence of Constitutional Government?

Yes, according to Bostan. As already noted, he claims that agreement with Bork provides a litmus test of one's jurisprudential fitness. Indeed, his whole argument turns on the claim that rejection of Bork entails rejection of conservative values. Is this true? Do only originalists believe in limited government? No. In fact, plenty of proponents of limited government argue for other interpretive approaches.

It is hard to see why Bostan makes his claim. Even Bork does not go so far; he openly admits that many conservatives disagree with him. Indeed, he devotes an entire chapter of Tempting to the topic: chapter 10, "The Theorists of Conservative Constitutional Revisionism" (Bork 1990, 223–40). In it, Bork analyzes, and then rejects, the constitutional theories of two libertarians, Bernard Siegan and Richard Epstein. Though focusing on two very different clauses of the Constitution—Siegan (1980) stresses due process, and Epstein (1985) the takings clause—both Siegan and Epstein reject Borkean precepts about how to read the Constitution.[1] Yet, as Bork notes,

1. For a fuller discussion of the differences between Epstein and Bork, see Epstein's (1996)

they do so in the name of many of the same political values that Bork advocates. Nor are they alone; many other libertarians have explicitly rejected Bork's reasoning. For instance, Stephen Macedo, wrote an entire book, The New Right v. the Constitution, criticizing Bork's constitutional theory (Macedo 1986). Unlike Bork, Macedo embraces the Court's recent decisions protecting personal rights. He just wants the Court to extend those protections to economic rights as well.

Moreover, two of the best-known conservatives on the bench today, Justice Antonin Scalia and Judge Frank Easterbrook, have argued against originalism as an approach to statutory interpretation. They advocate a rigorous adherence not to the original intent but to the words of the text. Although many (especially their critics on the Left) portray this radical textualism as a variant of originalism, it is not. Indeed, Scalia and Easterbrook explicitly developed their approach as an alternative to intentionalism.[2] Contra Bork, they argue that because the original intent of a collective body is inaccessible (if it even exists), originalist judges can pick and choose from among the detritus of politics for evidence supporting their policy preferences. Under these conditions, the only way to constrain judges is to restrict them to the words of the text. Any other materials will give them a de facto license to legislate. Although Scalia and Easterbrook couch their arguments with reference to statutes, it would seem that these same arguments would apply even more directly to the Constitution.

And, of course, there is Posner. A self-described "classical liberal" who takes his "stand with the John Stuart Mill of On Liberty," Posner seems to fit any sensible description of conservative (Posner 1995, 22). Yet, throughout his writings, Posner has also argued for a pragmatic approach to interpretation. Moreover, in contrast to Bork and Bostan, he argues that pragmatism is the interpretative approach most consistent with his political vision! In making his argument, Posner does not, as Bostan suggests, claim that judges are free to do as they please.[3] Instead, he argues that they should pay attention to the consequences of their decisions. He admits that when they do so, they might often decide to follow Bork and practice originalism. However, he believes that sometimes they should (or must) eschew originalism and take other factors into account when reading the Constitution. He wants them to do so openly, not furtively. And if they base decisions on consequences, he wants them to consider real consequences, not simply those cooked up in the judge's chambers.

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review of Bork's latest book in the New York Times.

2. For a more thorough discussion of their position, see Eskridge (1994, 41–47, 224–236) and the articles cited therein.

3. Posner's position is far too subtle and complex to be summarized here; readers who want more than a caricature should read his books for themselves.

Thus it appears that, as a matter of fact, Bostan is wrong to say that originalism is the only interpretative strategy acceptable to conservatives. Plenty of respectable libertarians disagree with Bork, and therefore with Bostan.

Is Interpretation Just an Obsession of Effete European Intellectuals?

Over and over throughout his article, Bostan, following Bork, claims that Posner is wrong, that it is really easy to interpret the law. To interpret is, he tells us, "to attempt to discern the intent of the author." This definition, he says, is clear to "everyone else in the world, save the academics influenced by…deconstructionsists." Thus, he concludes, by treating interpretation as a difficult process, Judge Posner has (perhaps inadvertently) joined forces with those who claim that since texts offer no guide, judges are free to read their own preferences into the law. And whatever it means to have rule of law, it cannot mean "rule at the whim of judges."

This argument sounds sensible, but is it correct? Are trendy followers of the latest fads in recondite European literary theory really the only people who find interpretation difficult? Does worrying about interpretation force one to accept the radical skepticism of the deconstructionists? Well, actually, no. A quick look at history reveals that concern over interpretation is neither new nor alien. Since before the founding, Americans have discussed interpretation. Moreover, their discussions reveal lots of reasons to reject the commonsense view of interpretation touted by Bork and Bostan.

One of the first Americans to worry publicly about legal interpretation was James Madison: in The Federalist no. 37, he defended the Constitution against charges that it was vague and incomplete. He argued that because the world is complex and we are relatively ignorant, those who draft and ratify legal documents simply cannot foresee and anticipate all of the contingencies to which the text must apply. Even if they could, their reliance on language, which is necessarily imprecise, would prevent them from always being clear. As a result, Madison reasons, "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications" (Madison, Hamilton, and Jay [1788] 1987, 245).

Madison may have been the first American to worry about these things, but he was hardly the last. In 1880, Francis Lieber, a noted defender of limited government, wrote Legal and Political Hermeneutics: or Principles of interpretation and construction in law and politics." In it, he noted that when writing laws, we must always "leave a considerable part of our meaning

to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey" (Lieber 1880, 20).

More recently, many students of American politics have questioned the Bork/Bostan equation of interpretation and intent. They ask whether it makes sense to talk of a collective—say, the people who drafted and ratified the Constitution—as intending anything. These skeptics argue that only an individual, such as the author of a book, can have an intention. In their view, to speak of the "intention" of a group or of the "author" of the Constitution is to misuse the words intention and author. Their logic is simple: what happens in groups is politics; that is, a group of people with diverse goals and beliefs search for a compromise that will satisfy the procedural requirements of their group. The result is likely to be contingent (they could have reached some other decision) and a real compromise (they could agree on some outcome that no single one of them actually wanted.) To complicate matters, the members of the winning coalition may even disagree among themselves over what exactly they agreed to.

Rejecting the analogy between collective choice and that of individuals does not imply that political decisions are incomprehensible or meaningless and, consequently, that judges are free to read statutes as saying whatever they want them to say. Rather, it suggests that to understand the choices of politicians we must delve deeply into their strategic environment. Only after doing so can we understand what they wanted and what they had to do to get others to go along (however grudgingly) with them.

The basic argument—that collectivities can't have intentions in the same sense as individuals—has been made in many ways by many people, as diverse and distinguished as Learned Hand (1952), Kenneth Arrow (1963), James Buchanan (1954), and William Riker (1982). Granted, Arrow calls himself a socialist. But Buchanan is, and Riker was, a libertarian. And they were making this argument long before Jacques Derrida became prominent.

So What Did the Founders Intend?

Suppose we decide to follow Bork and take original intent as our guide to the Constitution. Will we necessarily find the same intentions as Bork? As the skeptics point out, if the original intentions of the founders can be found anywhere, they can be found only in the politics of the founding. To understand the "intentions" of the founders, we need to ask what goals they had and then how those various goals influenced their decisions. To answer these questions, we need to dig deep into the history of the period, which neither Bork nor Bostan has done. Indeed, in chapter 7, "The Original Understanding," Bork's only source for the founders' intentions besides The

Federalist is the snippets of the debates at the Constitutional Convention excerpted in a constitutional law text.[4] These hardly constitute what most of us would consider authoritative evidence of original intent.

Looking at history reveals that the founders had much more complex goals than those attributed to them by Bork.[5] As he suggests, those who supported the Constitution agreed that the United States needed a new national government, one that had more power than the government created by the Articles of Confederation. At the same time, they disagreed among themselves about how that government ought to be structured. Most of their disagreements sprang from their recognition that such a government was a mixed blessing—in addition to making them all better off, the government might also become a tool by which some could make themselves even better off at the expense of others. Naturally, their views about whose fears were justified and whose unjustified reflected the diversity of circumstances across the nation. Those from small states worried about exploitation by those from large states. Those from commercial areas worried about exploitation by those from agricultural areas. And those from slave states worried about exploitation by those from free states.

Given these worries, the delegates at the convention had to make a series of compromises in order find a Constitution that reassured everyone. As a result, the Constitution reflected not a coherent vision of an ideal government but a series of contingent decisions. The need to compromise explains such seeming inconsistencies as the Constitution's guarantee of slave owners' right to pursue runaway slaves and the simultaneous prohibition of slavery in the Northwest Territories. This juxtaposition makes sense once we realize that the Constitution was not the work of a single person but of a collectivity in which everyone gave up something in return for something else. The extent of the compromises also explains why, in September 1787, Madison told Thomas Jefferson that the Constitution created by the convention was a failure because it could "neither effectually answer its national object nor prevent the local mischiefs which everywhere excite disgusts against state governments" (quoted in Rakove 1996, 197).

Tracing out the intentions of the founders is even more difficult once we consider the politics after the convention.[6] How are we to tease out what exactly those who voted for the Constitution intended? The voluminous propaganda on both sides does not help, because it displayed a multitude of

4. The sources for that chapter are cited in Bork (1990, 387–89).

5. The literature on the founding is vast. For a recent account that stresses the role of politics in shaping the founders' rhetoric and decisions, see Rakove (1996).

6. In addition to referring to Rakove (1996) readers should consult Riker (1996), which analyzes all of the surviving literature from the ratification campaign.

intentions. Which of these did the voters find convincing? We may never know. And what are we to make of the fact that, after violently opposing the Anti-federalist proposal for a Bill of Rights during the first part of the ratification campaign, the Federalists switched their views and proposed a Bill of Rights at the end of the campaign? This switch means that those who voted at the end were considering a different document than those who voted in the beginning. How did this change affect intentions?

To further complicate matters, after the ratification the Federalists themselves split up, forming the first two political parties. In his book, Bork makes it clear that his sympathies lie with the Hamilton wing of the Federalists against the party of Jefferson and Madison. Yet it is not clear why, except that he agrees with them on matters of policy.

These difficulties in parsing the original intentions of the founders are not due to the pernicious influence of French literary theorists. Quite the contrary: they are simply a consequence of politics. Politics is necessary only when people disagree over their joint ventures and therefore need some method of reconciling differences if they are to work together. Under these conditions, should we expect them to adopt the views of any single individual?

The centrality of politics to the founding does more than complicate our search for intentions. It also raises some serious moral questions. How are we to deal with the influence of considerations that we see as illegitimate, such as the desire to placate slave owners? Clearly because of the log-rolling and vote trading, slavery was implicated in much of the Constitution. Why should we respect intentions that included protecting slavery? And if we want to purge intentions of slavery, how exactly do we do so?

What Was the Original Intention of Due Process?

Bostan tells a story in which we have been led off the path of constitutional government by judges who see themselves as unconstrained by the Constitution. As authority, Bostan cites Bork, who devotes several chapters to an explication of the low points of American constitutional history. Much of this history focuses on the interpretation of the due process clauses. Bork starts his tour in 1847 with Dred Scott, in which he says the Supreme Court invented the substantive interpretation of due process. From there, Bork moves on to Lochner, a 1905 decision in which the Court usurped legislative power by striking down a New York statute regulating the bakers' work week. He ends in the present, with Roe v. Wade and its progeny, which set the courts up as arbiters of abortion policy.

In telling this story, Bork relies on the textbook treatment of Lochner. That treatment errs on several counts. First of all, it misreads what the

Court actually did in Lochner. The Lochner majority did not, as Bostan suggests, treat the Constitution as "a living document" that they were free to interpret as they pleased. Rather, they thought that they were applying hallowed ideas about what it meant to give someone due process. Like Bork and Bostan, they believed in constitutional government and did not think that judges should simply read their views into the Constitution. But unlike Bostan and Bork, they believed that due process meant more than proper procedure. In particular, they believed that a statute was not law simply because it was passed by a majority of both houses of the legislature and signed by the executive. They thought that a statute had to meet a variety of other criteria—it had to be prospective, it had to be of general application, and it had to serve a public purpose. A statute such as the one at issue in Lochner, which benefited a small group—people working in bakeries—didn't fulfill the public-interest requirement.

In interpreting due process this way, the Lochner justices were not, as the textbooks suggest, acting without precedent. The textbooks tell us that the expansive reading of due process was invented sometime in the mid to late nineteenth century by activist judges who needed to justify reading their policy preferences into the Constitution. More recent constitutional histories of due process show that this history is itself an invention, created by Progressive commentators who disapproved of the Court's use of due process to strike down regulatory legislation. To bolster their case, the Progressives charged the Court with ignoring history in order to read its values into the Constitution. In adopting this line, Bork and Bostan ignore the findings of those historians who have recently gone back over the constitutional history of the early Republic.[7]

These historians show that when the Lochner justices attributed their reading of due process to their ancestors, they were obviously not deluded. To support their position, they could point to many precedents. Contrary to Bork, this interpretation of due process was not invented in Dred Scott; rather, Dred Scott was simply the first time the doctrine was used by a federal court. The true lineage of Lochner runs not through federal courts but through state courts. It includes Wynehamer v. New York (13 N.Y. 378 [1856]), in which the New York State Court of Appeals struck down an 1854 law prohibiting the sale of liquor on the ground that banning the sale of liquor already on hand was a retrospective act; Hoke v. Henderson (15 N.C. 1 [1833]), in which the North Carolina Supreme Court held in 1833 that the legislature could not appoint Henderson to a life term as clerk of a county court and later open the job to election; and North Carolina v. Foy (5 N.C. 58), in which the North Carolina Court held (in 1805!) that the

7. For examples, see Ely (1992), Gilman (1993), or Mendelson (1956).

legislature could not change the charter of the University of North Carolina. In these and many other cases, state court judges interpreted the due process clauses of their (state) constitutions as requiring more than proper procedure; indeed, they all rejected the view that procedure was enough to turn any legislative order into a law. In doing so, they established the interpretation of due process drawn on by the Lochner justices (an interpretation, I might add, that Bork's anachronistic exclusive focus on the federal courts leads him to miss completely).

Ironically, Bork and Bostan could also invoke this line of cases to support their critique of Lochner. To do so, they could point out that the interpretation of due process was never unanimously accepted. Due process was, in the language of postmodernism, "always contested."[8] For every attorney arguing that a particular regulation violated due process, there was an attorney arguing the other side, and many judges who agreed. For example, the dissenters in Wynehamer, like Bork, argued that the majority relied on "strained and unwarrantable construction" of due process in striking down New York's liquor law (Johnson, in Wynehamer, p. 466). They believed that this interpretation forced the court to make decisions about the wisdom or expediency of statutes, decisions that the state's constitution left to the legislature. From their perspective, the majority's reading of the due process clause forced the courts to violate the separation of powers by usurping the powers of the legislature.

Thus, a look at history reveals several truths. If Bork's stories are meant to illustrate how to ascertain original intent, they fail. His approach to finding intent leads him into two separate errors. First, by reading his nationalistic constitution—that of Hamilton and Marshall—back to the founding, he misses the real federalism of the early Republic, a federalism in which much of the constitutional action was in the states. As a result, he misses the complexity of the truth about due process. Second, perusing the state courts, no matter how close we get to the founding, we find people arguing both sides. If by original intent we mean what really happened, then no amount of historical research will allow us to recover the "original intent" of due process. There simply was no such thing. Not because, as the deconstructionists would have it, there are no intentions, but because, as the skeptics warn us, people often differ in their intentions.

At this point, an originalist might be tempted to ask, "So what?" All that's been proven so far is that Bork isn't a good historian. Well, an originalist might argue, Bork's a busy man, who can't be expected to keep up with the latest findings of historians. Besides, his examples are meant as

8. The dissension was so deep that the New York Court of Appeals' opinion in Wynehamer was more than 100 pages long and included contributions from seven of the court's eight justices.

illustrations, not as gospel truth. What matters is that judges adopt his approach and use it to guide their constitutional decisions, not whether they reach the same results that he did.

It is time to call the originalists to the stand, to hear what they have to say for themselves.

How Originalist Is Originalism Anyway?

The implicit promise of originalism is the offer of a principled and objective approach to interpretation. By sticking to a clear and limited set of authoritative sources, originalist judges avoid imposing their preferences on their decisions. Yet a closer examination of the works of two of the most prominent originalists, Justice Scalia and Judge Bork himself, shows that, at crucial moments, they shrink from consistent application of their own principles. Instead, they opt for the very methods they condemn in others.

Perhaps the most striking example of this inconsistency comes in Bork's own discussion of the reapportionment case Baker v. Carr. In deciding Baker, the Court found that the equal protection clause of the Fourteenth Amendment required that states apportion legislative districts so as to give one man one vote. In Tempting, Bork argues that an originalist would have decided Baker under Article 4, sec. 4, which guarantees each state "a republican form of government." According to Bork, the guarantee clause was the way to go "precisely because a situation in which the majority is systematically prevented from governing is not what the Founders meant by a republican form of government" (Bork 1990, 86). Bork offers no evidence for this claim. Yet it is hard to square with what we know of the founders' decisions. For instance, the sole purpose of the Senate is to ensure that voters are not equally represented in the national government; those from small states are systematically over-represented in the Senate. Moreover, many states had extremely restricted franchises and unbalanced representation. Thus it seems that Bork's reasoning, though perhaps sound, is not originalist.

Bostan's uncompromising originalism has also been implicitly criticized by Justice Scalia, who is among the most prominent of those calling for a return to original intent. But instead of celebrating intentionalism, Scalia calls it "The Lesser Evil," one that he finds "a bitter pill" "that seems too strong to swallow" (Scalia 1989, 861). Moreover, he does not think that judges should restrict themselves to implementing only original intentions. Instead, he would have them start with those intentions and deviate from them only for good reasons. To illustrate his approach, Scalia considers the case of flogging and branding. Suppose, he asks, that historians could show that these were not regarded as cruel and unusual punishments when the Constitution was ratified. He asserts that even so, no "federal judge—even

among the many who consider themselves originalists—would sustain" such laws today (861). But instead of denouncing these judges for abandoning constitutional government, Scalia applauds them. He further argues that such deviations from originalism are a practice that "any espousal of originalism as a practical theory must somehow come to terms with" (861). So, when push comes to shove, Scalia calls for a "faint hearted" originalism, a position that Posner might call "pragmatic" originalism (862).

Scalia is not alone in urging us to moderate our originalism when it is sensible to do so. In 1978, well before Derrida had corrupted the American legal academy, Bork himself raised many of the themes I have mentioned, in his book The Antitrust Paradox. There, he advocated a radical reinterpretation of the antitrust laws: he claimed that those laws had a single goal, the maximization of consumer welfare. He argued that because such maximization was the intention of the law, judges ought to put it into effect in their decisions. He adduced a variety of evidence, including legislative history, to support his claim.

Bork's most radical factual claim—that Congress intended the antitrust laws to maximize consumer welfare—has not fared well. A variety of scholars, many of them as enamored of free markets as Bork, have reviewed his analysis of the political economy of antitrust. Few, if any of them, support his claim. For example, Gary Libecap (1992) argues that the laws were the work of a coalition made up of populists who simply hated big business and various small, local producers who were hurt by the rise of big businesses serving national markets. Others, such as Christopher Grandy (1993), argue that Congress considered and then rejected Sherman's proconsumer approach. In its place, Congress adopted an approach that focused on the behavior of producers.

It is not clear how these factual critiques affect Bork's argument, because Bork states throughout the book that the "intention" he affirms may have little to do with what actually happened in Congress. At one point, he declares that "the problems and artificialities of attributing an intent to a sizable body of men are well known" (1978, 56). In the next sentence, he asserts that courts should ignore these problems when reading statutes. Why? In his words, although "the concept of legislative intent may be artificial…it is also indispensable" (57) And why, if it is artificial, is it indispensable? Because, it turns out, "even in statutory fields of law, courts have obligations other than the mechanical translation of legislative will" (72). Among these are a "responsibility…for the integrity and virtue of law" (72). As he expresses it, they must use the fiction of intent to make sure that law has "coherence" (57).

So much for the original intentions.

Who's in Charge Here?

Bostan and Bork worry about how judges read the Constitution because they think that it affects the real world. Like many conservatives, they believe that autonomous judges have taken over our government and forced it to do many things that it wouldn't otherwise do. Is this belief true? Can judges frustrate the will of the majority for a long time? Or is their power over policy limited by their position in the political system?

Certainly, the view that judges get to make policy contrary to the will of the political branches is popular, both in the academy and on the street. However, both recent scholarship and common sense suggest that we should not exaggerate the extent of judicial independence. Common sense tells us that over the long run, judges can not impose policies that are contrary to at least some politicians. In Bork's words, "The Court can do what it wants, and there is almost no way to stop it, provided that it has a significant political constituency" (Bork 1990, 77). Under these conditions, it seems curious to attribute policy solely to judges, as they can affect policy only with the approval, at least tacit, of some other branch. This observation doesn't mean that courts are powerless; they aren't. It just means that they aren't omnipotent.

Recent studies of courts point to the idea that politicians do not have to wait for the long run (when judges, like the rest of us, are all dead) to bring recalcitrant judges to heel. For instance, William Eskridge (1994) shows that politicians pay much more attention to judicial decisions interpreting statutes than folklore suggests. By examining committee hearings and reports, Eskridge was able to find evidence that Congress has not been asleep at the wheel. It is constantly monitoring judicial decisions. By examining subsequent decisions, Eskridge was able to find evidence that the judges pay attention to Congress, modifying decisions that displease Congress. Similar, if weaker, processes are probably at work for the Constitution.

That judges pay attention to politicians does not vitiate Bork's claim that the judicial decisions are out of sync with the views of a majority of Americans. After all, what politicians decide and what the majority of Americans want are not always (perhaps not often) the same. The institutions of governance—bicamerality, the committee system, presentment—all combine to distribute political power unevenly. These distributions allow minorities to get policies they prefer. (Of course, it may be that we are all in some minority that gets what it wants; allowing such giant logrolls may in fact be the point of these institutions.) If judges can find some powerful friends, politicians who are on their side and are powerful enough to protect them from other politicians, then their decisions will stand, regardless of their consistency with majority views.

This account of American politics suggests that majorities are frequently frustrated, that our institutions tend to favor some minority. So even if judges followed Borkean precepts, policy would still very often differ from what a majority wanted. Thus, it seems that Bork's promise that removing judges will empower majorities is a chimera. Reforming the judiciary would simply change the minority served.

This result should not surprise us. After all, the Constitution was drafted and ratified by people who believed, as Madison told George Washington before the Convention, that what America needed was a Constitution that would "curb the aggression of interested majorities on the rights of minorities and individuals" (quoted in Rakove 1996, 51). Perhaps a government that truly represented the will of majorities would be failing the founders' intentions.

What Is to Be Done?

In the end, it is hard not to see the Bork/Bostan defense of original intent as an exercise in unintended irony. Throughout his article, Bostan invokes Edmund Burke to justify his defense of originalism. He affirms that only someone who understands the Burkean argument about the superiority of tradition and evolution over design and legislation can understand why we should allow ourselves to be ruled by the dead. Yet it seems that those who appreciate Burke's argument will find a better friend in Posner than in Bork. After all, it is Posner, not Bork, who bases his prescriptions on descriptions. Over and over, Posner argues that pragmatism is the practice that judges have evolved to deal with the complicated interpretative decisions they face. Bork and Bostan, on the other hand, like Hayekian legislators, are always telling us what to do, arguing that their designs are better than evolution. Moreover, unlike good Burkeans, they get their history entirely second and thirdhand: Bostan relies on Bork, and Bork relies on what he's read in textbooks.

If the dispute between Bostan and Posner were simply a matter of academic bragging rights, these peccadilloes and inconsistencies would be amusing, but nothing more. However, as Bostan and Bork constantly remind us, much more is at stake. Judges and courts are important players in the modern political economy, so important that we cannot understand our world unless we understand them. But to understand their impact, we cannot simply study them in isolation, nor can we take their self-descriptions at face value. Instead, to understand what they are up to, and why it matters, we need to consider them in their legal, political, social, and economic environment because much of what they do depends crucially on their reaction to this environment.

Bork and Bostan offer us little insight into judges and their world. Their model of the political economy is abstract and arid, based on a simplistic view of the real world of politics and law. Readers who want to deepen their understanding of law's place in that world will have to look elsewhere. For my money, they would do well to turn to the recent books on courts by Posner and (despite its title) Eskridge.[9] Both authors deal with judges in their strategic environment, asking what the judges want and what constrains them in their quest. To answer these questions, both turn to the real world, using detailed discussions of actual events to support their theoretical claims. As a result, open-minded readers are likely to learn much from these books.

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9. And those who are interested in original intentions would be better served by the recent books by Rakove (1996) or Riker (1996) or (despite Bostan's canard in footnote 3) by any of the articles by Suzanna Sherry, such as Sherry (1987), than by Bork.

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