

How Robert Bork Changed American Politics

Damon W. Root | Oct. 18, 2012

This month marks the 25th anniversary of President Ronald Reagan's failed attempt to confirm former federal appellate judge Robert Bork to the U.S. Supreme Court, an event that largely set the template for every bitterly contested judicial confirmation battle that has followed. In a [superb new essay](#) in *Commentary*, Adam J. White tells the story of the Bork nomination and reflects on how it ultimately reshaped American politics. As White writes:

The changed course of future Supreme Court nominations was the Bork nomination's most obvious legacy, but that was not its only legacy. Indeed, the Bork nomination's most significant impact may be not the manner in which Supreme Court justices are selected, but rather the content of constitutional law itself. For while Bork himself was pilloried for embracing an originalist approach to constitutional law, his nomination's failure laid the basis for originalism's eventual success. The Bork hearings galvanized conservatives and challenged them to refine originalism to achieve greater political effectiveness....

Even more fundamentally, the Bork hearings forced originalists to reconsider, or at least further develop, first principles. Where Bork had defended originalism primarily as an inquiry into the Founding Fathers' "intentions"—a seemingly subjective inquiry, irrevocably tied to the Framers' politics and prejudices—conservatives eventually shifted their focus away from "intentions" and toward the more objective "original public meaning" of the constitutional text.

The title of White's essay is "Bork Won," and as the excerpted paragraphs above indicate, he makes a very compelling case to support this counterintuitive claim. As a founding father of originalism, Bork may indeed take a certain amount of satisfaction in the theory's growing influence, which is visible both on the Supreme Court and in popular political movements such as the Tea Party. In fact, as White notes in the piece, nowadays even liberal legal scholars [want to get in](#) on the originalism game, with recent books such as Yale law professor Jack Balkin's *Living Originalism* attempting to reconcile progressive political outcomes with the Constitution's text.

Bork also played an important role in the rise and development of a distinctly libertarian legal movement, though his contributions in that realm occurred in more of a negative capacity. As libertarian legal scholars began honing their own theories about the meaning of the Constitution over the past several decades, they frequently pointed to Bork's work as an example of the sort of thing they were arguing *against*.

For instance, in 1986 the libertarian Cato Institute published Stephen Macedo's influential book *The New Right vs. The Constitution*, which took direct aim at Bork's heavy emphasis on judicial restraint and majority rule, and his correspondingly narrow view of individual rights. "When conservatives like Bork treat rights as islands surrounded by a sea of government powers," Macedo wrote, "they precisely reverse the view of the Founders as enshrined in the Constitution, wherein government powers are limited and specified and rendered as islands surrounded by a sea of individual rights."

Similarly, in his groundbreaking 2004 book *Restoring the Lost Constitution*, libertarian Georgetown law professor Randy Barnett extensively critiqued Bork's cramped interpretation of the Ninth Amendment, which explicitly guarantees the protection of unenumerated rights, despite Bork's famous dismissal of the amendment as being analogous to an "ink blot."

In more recent years, this legal debate between libertarians and Borkian conservatives [has played out](#) over issues ranging from gun rights to economic liberty, while also revealing important divisions among the Supreme Court's right-leaning justices.

So whether you're a fan or foe of Robert Bork, there's no question he has had a tremendous influence on American politics.