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## **Epstein Reviews Bork**

Posted on: July 15, 2009 9:02 AM, by [Ed Brayton](#)

Richard Epstein reviews Robert Bork's new book in a Cato Institute [publication \(PDF\)](#) and nails Bork for his

irrational social conservatism.

The nub of the difficulty lies in Bork's worldview, which is as weak and fearful on social issues as it is strong and confident on antitrust matters. Anyone who reads through these pages is struck by his deep sense of social alienation that has turned a former libertarian into a strident social conservative who rails incessantly against modern popular culture. Bork's near irrational leitmotif is that the absence of common values will lead our culture into a terrible moral quagmire from which it will never escape. He urgently postulates that all cultures need some common moral glue to hold themselves together. He sees the Supreme Court as a mortal threat to our traditional religious values when it champions a philosophy of excessive individualism, which is only a thin veneer for personal self-indulgence.

He also correctly identifies the contradiction at the core of most conservative judicial philosophies, between originalism and the concept of judicial restraint. On the one hand, Bork is an outspoken proponent of conservative originalism; on the other hand, he constantly preaches the need for greater deference to the elected branches of government. What to do, then, when the elected branches of government go against the clear results of an originalist inquiry? In Bork's case, the answer seems to be to accept anything that gives government more authority - but only over our private lives and moral choices, not over economic choices.

Epstein notes:

Quite simply, any commitment to originalism must give broad readings to broad constitutional protections. A categorical insistence on judicial restraint is inconsistent with a faithful originalism that reads constitutional text against the background of the political theory that animated their adoption. Ironically, Bork's insistence on the dominance of democratic processes finds, at most, lukewarm support in the Constitution, which at every turn -- the electoral college, the early appointment of senators by state legislators, the presidential veto -- shows a deep ambivalence toward the democratic processes that he selectively champions....

The same dilemma applies to the scope of federal powers that were clearly and strictly enumerated in Article I under the heading "all legislative powers herein granted." Yet everyone knows that the great transformation wrought by the New Deal judges allowed, in *Wickard v. Filburn* (1942), the federal government to regulate a farmer that fed his own grain to his own cows under the commerce clause that provides that "The Congress shall have power...to regulate commerce, with foreign nations, among the several states and with the Indian tribes." No originalist examination of text, structure, or history could defend that tortured interpretation.

In the end, he really nails Bork's incoherence:

But what is so striking about Bork's collection of *ipse dixit*s is that they never rest on the close and careful reading of text that the originalist method mandates. Thus, the real indictment of Bork lies not in the views that got him into such hot water in his 1987 confirmation hearings... What really makes Bork a disappointing constitutional scholar is that his moral self-indulgence has led to an utter lack of intellectual discipline.


And his is written by a guy who supported Bork's nomination in 1987.

Ilya Somin [joins in at the VC](#) and writes:

One can advocate broad judicial deference to the legislature or one can be a consistent originalist. But it is getting harder and harder to support both simultaneously. Unfortunately, Judge Bork and many other legal conservatives continue to do exactly that. As Epstein notes, Bork is no fool but a man of "evident intellectual and stylistic talents" who made a major contribution to scholarship. The contradictions in his thought are not just personal idiosyncracies, but deeper shortcomings of a larger

body of conservative thinking.

I could not agree more.

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## Comments

1

I have always found it odd that Bork champions the free market when it comes to economics, but not when it comes to social relationships. Strange.

Posted by: kehrsam | [July 15, 2009 9:26 AM](#)

2

kehrsam,

Agreed. But it's the consequence of a particular type of moralism. While that moralism may find the greed of the market disdainful, the moralist may believe that competition disciplines the greed to promote the social good (i.e., the Adam Smith view). But what disciplines the social exchanges of personal relationships to keep the immoral aspects in check? Instead of competing against each other, and creating discipline, immoral people collaborate with and feed off each other to create ever more immoral relationships.

Of course that type of moralism relies on very fuzzy and hard to support claims that certain types of voluntary behavior are inherently immoral. If we simply rely on the harm principle, we avoid most of the incoherencies of moralism.

Posted by: [James Hanley](#) | [July 15, 2009 9:37 AM](#)

3

Yes, we do indeed need a set of strong common values to hold us together as social creatures. But like so many other fear-driven moralists, Bork is completely oblivious to the fact that we ALREADY HAVE a set of common values, evident in the civil rights, women's rights, gay rights, New Deal, and other recent social movements that have made our country a better place to live. The problem for people like Bork is that the common values that currently hold us together are not HIS values, therefore he is simply incapable of acknowledging their existence.

And it is people like Bork who are actively destroying our society by rejecting, attacking, and undermining the common values that the rest of us uphold for our collective benefit.

Posted by: Raging Bee | [July 15, 2009 9:38 AM](#)

4

I've found conservatives rationalize their ideological desire for originalism and their support for judicial activism by creating a mental image of the constitution they would like to have, not the one the founders wrote. Ignorance of the text of the constitution, its history and context, allows them to twist their understanding of original meanings so far that true judicial activism can be excused.

Beyond that, I agree with Bork (And Washington, et. al.) that a country needs a shared set of values to keep cohesion. Where I disagree is the source of these values. While the founders thought a common religion would meld the country together, and Bork similarly, if I read the subtext of your post correctly, in "conservative"