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Bork, Robert H. *Neutral Principles and Some  
First Amendment Problems*, 47 Ind. L. J. 1  
(1971)

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To the extent that Judge Robert Bork lives on in the American consciousness, it is too often as a caricature. Many on the right lionize Bork as an ideological visionary, a cultural warrior, an archetypical Reagan Republican, the grand poohbah of judicial conservatism, and as the preeminent martyr in the partisan battle for control of the judiciary, which was fully joined in 1987 when Senate Democrats rejected – borked<sup>1</sup> – his nomination to the Supreme Court of the United States.<sup>2</sup> Many on the left, on the other hand, remember Bork as just another Beltway political figure – a Federalist Society ideologue (anti-civil rights, pro-business) whose court opinions were just a different species of judicial activism from the ones he lambasted.

These are both imperfect characterizations, but the latter is more consequential, because it diminishes the serious contributions that Bork, who died in 2012 at age 84, made to legal theory. Even though he was the central figure in a sensational political drama and had a more public presence than most

judges, Bork deserved to be taken seriously, particularly by non-conservatives, and that is still true today. Indeed, young First Amendment scholars would do well to start their academic journeys by grappling with Bork, because he presents, as well as anyone, two fundamental and enduring challenges that must be met: to articulate (or explicitly embrace) a theory to guide one's interpretation of the Constitution, and, relatedly, to identify the central values that animate and serve to define the scope of the First Amendment.

His most comprehensive presentation of the first challenge came in his book *The Tempting of America: The Political Seduction of the Law*,<sup>3</sup> which was his originalist opus, designed to call out the non-interpretivist,<sup>4</sup> living-Constitution judges and scholars who had ascended in the middle-to-late-twentieth century. He accused them of rewriting the Constitution by infusing it with ideas that were neither apparent from the text nor intended by the framers. And he railed against the “sham”<sup>5</sup> of substantive due process, which allowed judges, “wholly without limits,” to simply make up rights and other restraints on government power.<sup>6</sup> Nearly two decades before *Tempting*, Bork laid out many of the same arguments in “Neutral Principles and Some First Amendment Problems,”<sup>7</sup> which was Bork's first response to Herbert Wechsler's call<sup>8</sup> for more objectivity in constitutional interpretation and a chance for Bork to expound upon what his mentor Alexander Bickel called the “counter-majoritarian difficulty” of judicial review.<sup>9</sup>

Bork's prescription was for judges to simply “discern how the framers' values, defined in the context of the world they knew, apply to the world we know.”<sup>10</sup> This is easier said than done, of course, and naturally Bork (specifically) and originalists (generally) have been the targets of countless critiques and rebuttals. It is not necessary to review those here. What is important is that constitutional and First Amendment scholars take up the gauntlet that Bork threw down, because he was certainly right that judicial decisions and scholarly arguments about the meaning of the Constitution are unpersuasive or illegitimate if they are not rooted in a theory and method of constitutional interpretation. Too many judges and scholars neglect this, or are not candid about it, which presents the practical problem of inconsistency and invites the more serious accusation that they are simply arguing backward from their favored outcomes.

This risk is acute for media law scholars, because we tend to be First Amendment enthusiasts who are predisposed to favor expansive interpretations of the Speech and Press Clauses. Our desire to broaden the domain of individual expression, embolden the citizen-critic or empower the journalistic surveillance of powerful interests can sometimes lead to strained rationales that push the limits of both text and history or that are simply ad hoc. Those who advocate for recognition of First Amendment-based rights of access to government records and proceedings, for example, or who propose an affirmative government obligation to enable free speech by providing universal internet access, or by putting limits on media ownership, will find no clear pathway around the negative-rights construction of the First Amendment or its focus on state action – at least not without potentially, as Bork might warn, turning the First Amendment into a boundless charter for judicially administered media policy.

Bork offers similar admonitions in the back half of his “Neutral Principles” article, laying out a second, more specific challenge for those interpreting the First Amendment. For decisions about free speech to be more than manifestations of personal preferences, Bork argues, they must flow from a theory

based on principles that can be “neutrally derived, defined and applied.”<sup>11</sup> Bork argues that some protection for free expression can be inferred as a precondition of a democratic society,<sup>12</sup> but because the text of the First Amendment offers little guidance about its meaning, and because the framers had “no coherent theory of free speech,”<sup>13</sup> only speech that is “explicitly political”<sup>14</sup> should be constitutionally protected. Speech that is scientific, educational, commercial or literary might have social value but there is no foundation in the text or historical record to put it within the ambit of the First Amendment.<sup>15</sup>

What is remarkable about Bork’s argument is not so much its strict focus on political speech, which Alexander Meiklejohn<sup>16</sup> had proposed decades earlier, but rather his wholesale rejection of the legitimacy of any other free speech-supporting values. With some audacity, he picks Justice Louis Brandeis as his foil, arguing that Brandeis’s concurrence in *Whitney v. California*,<sup>17</sup> perhaps the most eloquent and celebrated elucidation of the spirit of the First Amendment, is theoretically flimsy despite its rhetorical potency. Bork concurs with Brandeis that the First Amendment was designed to protect “the discovery and spread of political truth,”<sup>18</sup> but the other values Brandeis cites in *Whitney* – translated by Bork as “the development of the faculties of the individual,” “the happiness derived from engaging in [expressive] activity,” and “the provision of a safety valve for society”<sup>19</sup> – are not, by themselves, justifications for free speech protection. The latter involves issues of “expediency and prudence”<sup>20</sup> that are in the domain of the political branches, and the others, like the “self-fulfillment” rationale emphasized by some theorists,<sup>21</sup> do not offer a basis for distinguishing expressive acts from any other form of human endeavor that someone might find edifying or gratifying.

Bork’s focus on political speech and his derogation of other free speech values are certainly vulnerable to attack. His view of “political” is crabbed, he conflates speech that is constitutive of the self with other activities that are merely satisfying, and despite his professed concern for democratic government, his approach would impair democratic progress by countenancing censorship of every form of creative expression – an odd circumstance for a country founded on Enlightenment principles.

But whatever the merits of Bork’s peculiar prescriptions, his “Neutral Principles” article remains a vital work in this field because it serves as an antidote to the tendency among First Amendment scholars to treat the values undergirding the First Amendment as self-evident, and to view every expansion of the boundaries of free expression as a per se good that must therefore have some claim to constitutional protection. Credible scholars will avoid those temptations in developing and articulating their own speech theories. Bork’s work continues to provide a useful crucible for starting, or renewing, those efforts, particularly for those of us who find many of Bork’s arguments and prescriptions to be unpersuasive.

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## Notes

- 1 Bork, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/bork> (last visited Jan. 7, 2020) (“to attack or defeat (a nominee or candidate for public office) unfairly through an organized campaign of harsh public criticism or vilification.”).

- 2 President Ronald Reagan nominated Bork to replace retiring Associate Justice Lewis F. Powell. The Senate rejected the nomination by a vote of 58-42. See Linda Greenhouse, *Borks [sic] Nomination Is Rejected*, 58-42; *Reagan Saddened*, N.Y. Times, Oct. 24, 1987, available at <https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html>.
- 3 Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).
- 4 See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 1 (1980) (distinguishing interpretivist approaches – those in which judges “confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution” – from non-interpretivist approaches that rely on sources outside “the four corners of the document.”).
- 5 Bork, *supra* note 3, at 31.
- 6 *Id.* at 49.
- 7 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L. J.* 1 (1971).
- 8 Herbert Wechsler, *Principles, Politics and Fundamental Law* (1961).
- 9 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986).
- 10 Bork, *supra* note 3, at 1.
- 11 Bork, *supra* note 7, at 23.
- 12 *Id.*
- 13 *Id.* at 22.
- 14 *Id.*
- 15 *Id.* at 28. Bork adds that no protection should be afforded speech that is “obscene or pornographic” or that advocates lawlessness or violent overthrow of the government. *Id.* at 20.
- 16 Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).
- 17 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).
- 18 Bork, *supra* note 7, at 25.
- 19 *Id.*
- 20 *Id.*
- 21 See, e.g., Eric Barendt, *Freedom of Speech* 14 (1985).