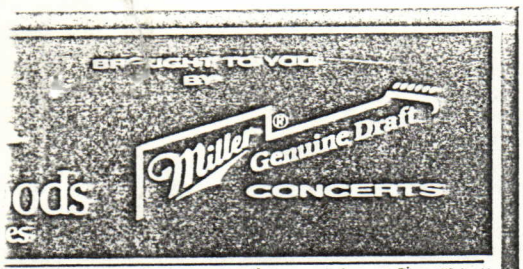

Origin of specious

The most self-serving of intentions

by Harvey Silverglate


AP/WIDE WORLD

So what if he's smart?

Robert H. Bork is to judicial scholarship and philosophy what Albert Speer was to architecture — a brilliant mind perverted to an ignoble cause. The fundamental accuracy of this analogy, however, has been somewhat lost in the debate over Bork's nomination to fill the US Supreme Court seat recently vacated by retired justice Lewis F. Powell Jr.

The Reagan-Meese gang has thrown up a lot of dust on the subject of the proper role of judges and courts in our political system, as well as on the proper role of the Senate in the confirmation process for judicial nominees. The selection of the next justice is probably one of the most momentous decisions the Senate will have made in the three decades since Dwight Eisenhower nominated Earl Warren for the Supreme Court. It is not an overstatement to compare it with the unfortunate — indeed disastrous — nomination, in the 19th century, of Roger B. Taney, who was rejected by the Senate for political reasons the first time around but who two years later was confirmed as chief justice when his name was resubmitted by President Andrew Jackson. (One result of that lack of backbone on the part of the Senate was Taney's authorship of the infamous Dred Scott decision, in 1857, which declared negroes to be chattel by ruling that slaves who fled into free states remained legally the property of their owners and had to be returned. The Civil War followed shortly thereafter.)

This being the case, the utmost clarity is required in what even White House Chief of Staff Howard Baker admits is "going to be a controversial, tumultuous, even pyrotechnic debate" over the Bork nomination. In order for this debate to focus on the critical issues and to result in a Supreme Court that will not tear at the nation's social fabric as the Taney Court did, the Senate has to dispel three powerful myths created by the Reagan-Meese team.

Myth number one. Robert Bork is a proponent of a perfectly respectable "conservative" judicial philosophy that is not based on the likes and dislikes of individual judges but rather begins and ends by following closely the text of the Constitution (a practice known as "strict constructionism") and, where the text is not absolutely clear, by looking to the "original intent" of those who drafted the Constitution (the Founding Fathers, or "the framers").

Myth number two. Bork is a member of that also perfectly respectable school of conservative judicial thought that decries "judicial activism" and enshrines "judicial restraint," a necessarily modest position for the one branch of government that is not elected (instead, its members are appointed for life). Such an elite branch, the advocates of judicial restraint insist, must defer to the "democratic process" and must not thwart the "political" (that is, executive and legislative) branches, which act in the name of and at the sufferance of the people.

Myth number three. The president is entitled to have his Supreme Court nominee confirmed unless the candidate is intellectually or morally unfit for the position. Mere "political," "philosophical," or "ideological" differences between the nominee and the majority of senators are not appropriate grounds for rejection of the president's choice.

The first myth is the easiest to dispose of, so we'll handle that now and leave the second and third myths for another day.

Attorney General Edwin Meese wrote last year that "the meaning of the Constitution can be known." Notwithstanding that some of the more brilliant minds throughout our history have toiled to understand the sometimes enigmatic text of that document, our attorney general says that he knows the meaning, and that it is easy. The secret, Meese wrote in the winter issue of the journal *Policy Review*, is to look at the intention

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of the framers. He admitted that there had been no unanimity among the drafters, or even among the legislatures that ratified the Constitution, but still, he said, the document's meaning is clear. What is to be avoided at all costs, purred the attorney general, is a jurisprudence that seeks to obtain a certain preordained political result, regardless of the holy and revealed text of 1789 and the intentions of the drafters. The jurisprudence of original intention, he said, "in our day seeks to depoliticize the law." That judges who claim to follow the jurisprudence of original intention happen frequently to advance the Reagan political agenda is, presumably, simply a coincidence.

Moreover, in his article Meese goes on to claim that his view of original intention has become intellectually respectable. "In recent weeks," he wrote, "there have been important new contributions to this debate from some of the most distinguished scholars and jurists in the land." Perhaps the most noteworthy of those scholars and jurists, in the mind of the attorney general, would be Robert Bork.

Resorting to one or another highfalutin catch phrase is the hallmark of those who do not like the trend evidenced by the Supreme Court at any given time. This has been characteristic of Court critics from either end of the political spectrum at different times in our history, of course, and is not a proprietary tool of the radical right. However, the Senate has a duty to see through the fog when it engages in the solemn process of giving advice and consent on a presidential nomination, particularly where the Court seat may be a pivotal position of historic dimensions.

The doctrine of original intention is fraught with a number of problems. The last few years, legal historians have been having a ball with it, each school of thought delving into the sources and, predictably, finding evidence supporting its preconceived position. When so many different views can so readily be supported by the same historical record, one grows suspicious that that record is hopelessly muddied.

To begin with, the only reasonably detailed account of the Constitutional Convention — the notes taken by James Madison, widely regarded as the most influential author of the Constitution — was not published until 1840. That is to say, this primary record of the framers' "original intention" was not available to the Supreme Court during the first 50 years of its existence. If the Court during its formative years did not pay any attention to original intention, why should the Court today twist itself out of shape to conform its opinions to what the 55 white males who participated in the convention intended?

Further, since those 55 framers disagreed violently on some matters and arrived at rather vaguely worded compromises on many of them, how are we to select which guiding lights to be guided by? Indeed, one can read different essays in *The Federalist Papers* and come away with very different views as to what the framers meant. For that matter, one can read different essays by the same author and come away with confusion.

Proponents of the doctrine of original intention have yet another problem. It is not clear whether the intention to be divined should be that of the framers or that of the state legislatures that ratified the document. And if it is to the legislatures that we turn, what records are determinative, and which members' views are to be given more weight?

In short, it is a hopeless task to figure out what the original intention was. To base the Supreme Court's interpretation of the nation's fundamental document on the quicksand of original intention is both impossible and foolish. This is not to say, of course, that the general principles enunciated by the framers are not important and do not give guidance. They are, and they do. But the mere fact that some states had capital punishment in 1789, and that some states punished abortion, and that some states promoted religion does not mean that the framers had the original intention of ratifying such practices and freezing them forever in the Constitution.

Indeed, two things seem reasonably clear. First, various framers had very different views on many of these controversial subjects. (Contrary to what Reagan, Meese, and some justices claim, for example, there is substantial historical evidence that a number of the important minds at the convention and in the ratifying legislatures viewed the First Amendment as indeed creating a wall separating church and state. What does this do to the Reagan-Meese effort to put prayer in the public schools? And if Meese is correct in saying that, when the text is clear, one does not even have to divine the framers' intention, then how can he explain his failure to support the First Amendment's facially absolute admonition that "Congress shall make no law . . . abridging the freedom of speech, or of the press"? Weren't the recommendations of his porno commission therefore unconstitutional?)

Second, it is even more apparent that, though some provisions of the Constitution are entirely clear, such as the age at which a citizen qualifies to be president, others are extremely broad and even vague, such as a number of provisions of the Bill of Rights. It would seem, for example, that the framers specifically refrained from either endorsing or prohibiting the death penalty. Instead,

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they outlawed "cruel and unusual punishments." It was left up to each generation to deal anew with the task of determining what punishments the sensibilities of that age might deem to be beyond toleration.

The same may be said for the Fourth Amendment's prohibition against "unreasonable searches and seizures." Surely the framers had no view on whether wiretapping or electronic eavesdropping without a search warrant constituted an unreasonable invasion of the citizen's privacy or the sanctity of the home. Such matters of interpretation necessarily had to be left to future generations. If the framers can be said to have had any single original intention, surely it was the intention to leave certain parts of the Constitution vague and hence somewhat flexible, in order to meet the exigencies and challenges that posterity would present.

So let's get rid of the notion that Reagan and Meese have selected Robert Bork for the Supreme Court because he believes in, preaches, follows, or gives a scholarly patina to the doctrine of original intention. The doctrine itself is utter nonsense. Senators should not worry whether a nominee does not spout or support the doctrine; to the contrary, they should be skeptical if a nominee claims to ground his or her entire judicial philosophy upon so specious a basis. The original-intention catch phrase is just another one of the administration's verbal cover-ups of its true, underlying motives and designs, in the same way that Peacemaker is the Reagan moniker for the MX missile and that the contras are Nicaraguan freedom fighters.

Original intention is for the Reaganites as much a red herring as the similar doctrine of "strict constructionism" was for Richard Nixon, when he used it as his philosophical underpinning for trying to saddle the high court with the likes of Harold Carswell. The real intention of the Reagan administration in nominating Robert Bork to the Supreme Court is more readily learned by examining the other two myths — that the judicial branch is supposed to be "restrained" and butt out of the business of the more political branches of government and that the Senate should allow the president to appoint justices of whatever philosophy the president chooses.

There is no serious debate as to Bork's intelligence, or his integrity (though a number of senators are concerned over why he obeyed Nixon's order to fire Watergate special prosecutor Archibald Cox when the latter started going after the White House tapes). But there is serious concern that Robert Bork has a view of the role of the judiciary in American life which, if adopted by a majority of the Supreme Court's members, would be dangerous in the extreme to the health of the Republic. Bork is a powerful intellect, but in the service of what goal?

More on that goal, and the way justices should be selected and how we should interpret the Constitution, next week. □

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to restrain the paper from publishing the *Pentagon Papers*. And boy was his boss, the never-honorable felon and former attorney general John Mitchell, proud.

Like Mitchell, and his ideological heir, Ed Meese, even today Rehnquist wouldn't recognize a constitutional right if it walked right up to him at the polls and gave him a literacy test. Back then, he was the only justice to abstain from voting for the ruling that required Nixon to turn over the White House tapes. Today, with Bork headed for a place at his side, he is a black-robed Klansman out of America's ugly past, leading Reagan's assault on our constitutional rights.

It's hard to imagine the Supreme Court ruling in Nixon's favor back in 1973, but it tried. According to inside sources, the unanimous decision was actually far from unanimous when the first vote was taken. In the initial tally, according to an informed source, the Court was closely divided, but against Nixon. Only when Nixon appointee, then chief justice Burger, realized there were not enough votes to rule for Nixon did he decide to join with the majority. As senior justice on the majority side, in keeping with Supreme Court tradition, he could then write the opinion and keep Justice Brennan from writing what was certain to have been a broader opinion, one more damning to Nixon.

Even before Bork's confirmation, it's hard to imagine *this* Court — with it's Nixon/Reagan-appointed majority — ruling against Nixon. And it's even harder to imagine it ruling against the Reagan administration on the constitutionality of the Boland Amendment. And that's not the worst of it.

Say goodbye to the First Amendment, folks. Expect major reverses in libel laws and in the whole area of press protection and prior restraint. Say goodbye to free speech, kids, and hello to injunctions against the publishing of "sensitive" material in the press. (Rehnquist supported prior restraint in the *Pentagon Papers* case, though he didn't vote on it when it came before the Court as it was one of the cases he'd initiated at the Department of Justice.)

The Fourth Amendment is going to go down the tubes. Bye-bye privacy. Hello electronic surveillance. Say yes to wiretaps, because the next Court certainly will. In the search-and-seizure area, the Court has already ruled for the state and against the citizens. Remember as you pee into the bottle at that roadblock while the state troopers search your trunk that unreasonable search and seizure was a principal grievance against King George back before the Revolution. Because the Court will be saying yes to mandatory urinalysis, road blocks, warrantless searches, and AIDS testing, as the Court affirms the right of the police to run roughshod over the citizenry while reversing recent decisions on police brutality, preventive detention, and the rights of the accused.

People will tell you not to worry. They'll spin out tails of justices who switch-hit from liberal to conservative while the presidents who'd appointed them gnashed their teeth in consternation. They'll say it's wrong for the Senate to give Bork a litmus test on civil rights or abortion — if he's competent and not a crook, just let him pass. Wake up, folks. Worry. For seven years the president's been filling lower-court posts with conservative judges just waiting to punt some juicy cases up to the big boys. And do you really think Reagan didn't get a *Roe v. Wade* reversal on the table, guaranteed, before sending Bork down to the Senate floor? When you're faced with an ideological appointment from the top, a *second* litmus test is only fair.

Listen up. In 1973 the Supreme Court decided *Roe v. Wade* by seven to two. Just last year, while Burger was still serving on the Court, the ruling was five to four. If and when the next Court with Reagan's new appointee (Justice Antonin Scalia hasn't had a chance to vote on abortion

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