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# What Might Have Been: 25 Years of Robert Bork on the United States Supreme Court

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# WHAT MIGHT HAVE BEEN: 25 YEARS OF ROBERT BORK ON THE UNITED STATES SUPREME COURT

BENJAMIN POMERANCE\*

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\* Excelsior Service Fellow, New York State Division of Veterans’ Affairs. J.D., Albany Law School (2013); B.A., SUNY Plattsburgh (2010). Views expressed here are the opinions of the author and do not necessarily represent the views of the Excelsior Fellow program. Many thanks are owed to Professor Vincent M. Bonventre, whose Judicial Process seminar sparked the creation of this Article; to the dedicated staff of the Belmont Law Review for their meticulous editing; and to my parents, Ron and Doris Pomerance, who instilled in me a love of law and history at an early age.

*“No man in America, and few in our history, have been as qualified to sit on the Supreme Court as Robert Bork.”*

– President Ronald Reagan, 1987<sup>1</sup>

*“Robert Bork’s America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.”*

– Senator Edward Kennedy, 1987<sup>2</sup>

## INTRODUCTION

On July 1, 1987, President Ronald Reagan nominated Judge Robert Heron Bork to replace retiring Justice Lewis Powell on the United States Supreme Court.<sup>3</sup> For the next three months, the nation watched as a battle royale over this nominee played out in the nation’s media,<sup>4</sup> within the nation’s law journals,<sup>5</sup> and—most prominently—on the floor of the United

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1. Merrill Hartson, *Reagan Predicts Bork Would Be a Great Supreme Court Justice*, ASSOCIATED PRESS (July 29, 1987), <http://www.apnewsarchive.com/1987/Reagan-Predicts-Bork-Would-Be-A-Great-Supreme-Court-Justice/id-a6f33bfb15db4e2e83b813b135235d5f>.

2. 133 CONG. REC. 18519 (1987) (statement of Sen. Edward Kennedy).

3. Gerald M. Boyd, *Bork Picked for High Court; Reagan Cites His ‘Restraint’; Confirmation Fight Looms*, N.Y. TIMES, July 2, 1987, at A1, available at <http://www.nytimes.com/1987/07/02/us/bork-picked-for-high-court-reagan-cites-his-restraint-confirmation-fight-looms.html>; see also Associated Press, *Reagan Urges Fast Senate Action on Bork*, L.A. TIMES (July 29, 1987), [http://articles.latimes.com/1987-07-29/news/mn-4458\\_1\\_robert-bork](http://articles.latimes.com/1987-07-29/news/mn-4458_1_robert-bork).

4. See, e.g., E.J. Dionne, Jr., *Abortion, Bork and the ‘88 Campaign*, N.Y. TIMES, July 8, 1987, at A20; Ted Gest, *A New Majority Moves to the Right*, U.S. NEWS & WORLD REPORT, July 13, 1987, at 28–29; Richard Lacayo, *The Battle Begins*, TIME, July 13, 1987, at 10–12; Aric Press & Ann McDaniel, *Trying to Leave a Conservative Legacy*, NEWSWEEK, July 13, 1987, at 22–23; Richard Vigilante, *Who’s Afraid of Robert Bork?*, NAT’L REVIEW, Aug. 1987, at 25–30. Actually, the fight began years earlier when Reagan and his advisors first began rumblings about possibly appointing Bork to the Court. See, e.g., Jamie Kalven, *Robert Bork and the Constitution*, NATION, Oct. 1, 1983, at 262–68 (acknowledging that Bork was a likely Supreme Court nominee and expressing horror at the notion that he might be confirmed).

5. In particular, the law review at the Benjamin Cardozo School of Law led the way in publishing the nation’s scholarly coverage of the Bork nomination. See generally Stephen Gillers, *The Compelling Case Against Robert H. Bork*, 9 CARDOZO L. REV. 33 (1987); Gary B. Born, *Robert H. Bork’s Civil Rights Record*, 9 CARDOZO L. REV. 75 (1987); Public

States Senate.<sup>6</sup> Wave after wave of legal scholars rushed forth to assail or applaud the controversial jurist from Pittsburgh.<sup>7</sup> Politicians revealed a level of emotion and investment typically found in a general election rather than a confirmation hearing.<sup>8</sup> Even Hollywood got involved, with Gregory Peck narrating an advertisement aimed at blocking the sixty-year-old Bork's appointment to the Court.<sup>9</sup> At one particularly low point in the process, participants hauled Bork's video rental history into the limelight, with observers hoping for some particularly salacious records disappointed that the judge had rented only bland films like *A Day at the Races* and *The Man Who Knew Too Much*.<sup>10</sup> And so the process dragged on for weeks, as the nation—and particularly the Senate Judiciary Committee and the White

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Citizen Litigation Group, *The Judicial Record of Judge Robert H. Bork* (1987), reprinted in 9 CARDOZO L. REV. 297 (1987); U.S. Dep't of Justice—Office of Public Affairs, *A Response to the Critics of Judge Robert H. Bork*, 9 CARDOZO L. REV. 373 (1987).

6. Senator Kennedy's remarks about back-alley abortions and segregated lunch counters, delivered a mere forty-five minutes after President Reagan announced Bork's nomination to the Court, were just the beginning of the struggle in the Senate. An excellent account of the Senate debates and the personalities involved in those debates can be found in a book written by Boston Globe journalist Ethan Bronner that tracks Bork's nomination battle from start to finish. ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989). See also Linda Greenhouse, *The Bork Nomination; In No Time at All, Both Proponents and Opponents Are Ready for Battle: Foes on the Left Strive for Unity*, N.Y. TIMES, July 9, 1987, at A24 ("By the time President Reagan went before the television cameras last week to announce his choice for the Supreme Court, the campaign to persuade the Senate not to confirm Robert H. Bork was already well under way."); Associated Press, *Bork Gives Reasons for Continuing Fight*, N.Y. TIMES, Oct. 10, 1987, at 13 (noting that Bork, even in the face of almost certain defeat from the Senate, insisted on fighting to the bitter end and making the Senate quite literally vote him down).

7. The "Who's Who" list of legal academics testifying about Bork's nomination included Owen Fiss, Edward Levi, George Priest, David A.J. Richards, John Simon, Cass Sunstein, Kathleen Sullivan, and Laurence Tribe. The noted economist Thomas Sowell also testified at the hearings. See David A.J. Richards, *Book Review: Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1374 n.4 (1990); Linda Greenhouse, *Legal Establishment Divided over Bork Nomination*, N.Y. TIMES, Sept. 26, 1987, at 33.

8. See Ayo Ogundele & Linda Camp Keith, *Reexamining the Impact of the Bork Nomination to the Supreme Court*, 52 POL. RES. Q. 403, 404 (June 1999) (stating that the Bork confirmation hearings "significantly raised the visibility of the confirmation process"); BRONNER, *supra* note 6, at 95 ("The idea of such a fight in the Senate was a new one. In the preceding half century a tradition had built up that the president had the power to nominate judges and the Senate's job was to confirm them unless there were signs of gross incompetence or corruption.")

9. The ad can still be viewed today. PFAWdotorg, *1987 Robert Bork TV Ad, Narrated by Gregory Peck*, YOUTUBE (July 16, 2008), <http://www.youtube.com/watch?v=NpFe10lkF3Y>.

10. This shocked enough people to spark the creation of a new law, the Video Privacy Protection Act, which forbade the general release of such information. See ENCYC. OF AM. CIVIL LIBERTIES at 1713 (Paul Finkelman ed., 2006).

House—engaged in a tug-of-war over one of the most outspoken Court nominees in history.<sup>11</sup>

When the bloodletting was finally over, the Senate had resoundingly rejected Bork's nomination to the Court by a vote of 58–42.<sup>12</sup> It still stands as the largest margin of defeat for a Supreme Court nominee in the history of the United States.<sup>13</sup> The whole emotionally, politically, and ideologically charged experience<sup>14</sup> gave rise to a new verb in the English lexicon: “To bork,” essentially meaning “to attack a person's reputation and views unfairly.”<sup>15</sup> Bork resigned from his seat on the United States Court of Appeals for the D.C. Circuit just one year after his nomination to the Supreme Court was rejected, and remained indignant for the rest of his life about the process which he believed wrongfully denied him membership in America's loftiest judicial club.<sup>16</sup>

Angered by the Senate's refusal of his nominee—an outrage likely augmented by surprise, given that his earlier Supreme Court nominations of Sandra Day O'Connor<sup>17</sup> and Antonin Scalia<sup>18</sup> had passed the Senate vetting process with apparent ease—Reagan vowed to strike back by appointing a carbon copy of Bork. “My next nominee for the Court will share Judge Bork's belief in judicial restraint—that a judge is bound by the Constitution to interpret laws, not make them,” he announced on the day after the

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11. See Curtis J. Sitomer, *Bork Presents Two Profiles: Sharp-Penned Scholar Emphasizes Judicial Restraint in Hearings*, CHRISTIAN SCI. MONITOR (Sept. 21, 1987), <http://www.csmonitor.com/1987/0921/acurt.html>.

12. Linda Greenhouse, *Bork's Nomination Is Rejected, 58–42; Reagan 'Saddened': Both Foes and Allies Ask Less Antagonism as President Picks a New Nominee*, N.Y. TIMES, Oct. 24, 1987, at 1.

13. *Id.*

14. For a good understanding of what precisely was at stake in this confirmation battle, at least from an ideological perspective, see Ronald Dworkin, *The Bork Nomination*, THE N.Y. REV. BOOKS, Aug. 13, 1987, reprinted in 9 CARDOZO L. REV. 101, 102 (1987) (“The Bork nomination is the climactic stage of a very different presidential ambition: to freeze [the Supreme Court], for as long as possible, into an orthodoxy of the President's own design.”).

15. See David Brock, *CNN Wheels Out Bork, Unchallenged, to Discuss “Borking,”* MEDIAMATTERS FOR AM. (July 3, 2005), <http://mediamatters.org/research/2005/07/03/cnn-wheels-out-bork-unchallenged-to-discuss-bor/133443>. In addition to Bork's own definition, the Oxford English Dictionary added the verb “to bork” to their lexicon in March of 2002. *Bork Definition*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/bork> (last visited Jan. 3, 2014).

16. See, e.g., ROBERT BORK, THE TEMPTING OF AMERICA 271–350 (1990) [hereinafter THE TEMPTING OF AMERICA]; Robert Bork, Remarks at the National Press Club Luncheon (Sept. 6, 2005), <http://press.org/news-multimedia/videos/cspan/188727-1>.

17. O'Connor was confirmed unanimously, 99–0, in 1981. *1981 Year in Review*, UNITED PRESS INT'L, <http://www.upi.com/Archives/Audio/Events-of-1981/Reagan-Foreign-Policy-Speech/OConnor-Appointed-to-Supreme-Court/> (last visited Feb. 22, 2014).

18. Scalia was also confirmed unanimously, 98–0, in 1986. Kathy Kiely, *Past Confirmation Votes*, USA TODAY, [http://usatoday30.usatoday.com/news/washington/judicial/past-confirmation-votes.htm?csp=YahooModule\\_News](http://usatoday30.usatoday.com/news/washington/judicial/past-confirmation-votes.htm?csp=YahooModule_News) (last updated Aug. 6, 2010, 1:47 PM).

Senate's vote.<sup>19</sup> Five days later, his nomination of Douglas Ginsburg—another conservative judge on the D.C. Circuit, although a jurist who at the time appeared to be much more reserved than Bork on many issues<sup>20</sup>—seemed to follow through on that promise.<sup>21</sup>

Yet just ten days after that, Ginsburg was gone too, withdrawing his name after the public discovered that he had smoked marijuana with his students at Harvard.<sup>22</sup> After losing out on two nominees in a three-week span, the President appeared to temper his expectations of appointing a die-hard “originalist” to the Court. On November 12, noting that “[t]he experience of the last several months has made all of us a bit wiser,”<sup>23</sup> Reagan nominated Ninth Circuit Court of Appeals Judge Anthony M. Kennedy to take over Powell's seat.<sup>24</sup> In a none-too-subtle gesture across the aisle, Reagan announced to the press that Kennedy “seems to be popular with many senators of varying political persuasions.”<sup>25</sup> Evidently, truer words were never spoken. On February 3, 1988, the Senate confirmed Kennedy's appointment to the Court by a unanimous vote.<sup>26</sup> The battle to replace Powell was finally over.

Twenty-five years later, though, questions still linger about what might have been, particularly in the wake of Bork's recent death. Today, Kennedy is recognized as the “swing vote” on the Court,<sup>27</sup> the least politicized member of an institution divided sharply along ideological lines.<sup>28</sup> Presumably, Bork would not have echoed this record of

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19. Greenhouse, *supra* note 12.

20. See Ginsburg: *Reagan Tries Again*, CHRISTIAN SCI. MONITOR (Nov. 2, 1987), <http://www.csmonitor.com/1987/1102/egins.html>.

21. Reagan even alluded to that vow in his speech introducing Ginsburg to the general public. See Remarks Announcing the Nomination of Douglas H. Ginsburg to Be an Associate Justice of the United States Supreme Court, II PUB. PAPERS 1252 (Oct. 29, 1987).

22. Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES, Nov. 8, 1987, at A1; John M. Broder, *Collapse of the Ginsburg Nomination: At the End, Ginsburg Stood Alone—And Still a Puzzle*, L.A. TIMES (Nov. 8, 1987), [http://articles.latimes.com/1987-11-08/news/mn-21569\\_1\\_doug-ginsburg](http://articles.latimes.com/1987-11-08/news/mn-21569_1_doug-ginsburg).

23. Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES, Nov. 12, 1987, at A1.

24. *Id.*

25. *Id.* When asked by reporters whether he was upset to be Reagan's third choice for the seat, Kennedy apparently wryly responded that he was “delighted with this nomination.” *Id.*

26. The total vote for Kennedy was 97–0. *Past Confirmation Votes*, *supra* note 18.

27. See Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME, June 18, 2012, at 1; Dahlia Lithwick, *Why Justice Kennedy Is Just Like America*, SLATE (June 13, 2012), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/06/justice\\_anthony\\_kennedy\\_holds\\_the\\_deciding\\_vote\\_on\\_many\\_of\\_the\\_supreme\\_court\\_s\\_most\\_significant\\_cases\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/justice_anthony_kennedy_holds_the_deciding_vote_on_many_of_the_supreme_court_s_most_significant_cases_.html); Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST (May 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586.html>.

28. See, e.g., Calabresi & Von Drehle, *supra* note 27 (“[Kennedy] is the decisive figure on a court that is otherwise divided between liberals and conservatives.”).

moderation—relatively speaking, anyway<sup>29</sup>—if he were on the bench. Yet the nation still does not truly know what would have happened if Bork, not Kennedy, were chosen to occupy this seat on the Court. With the Court deciding major cases on issues ranging from freedom of speech to abortion to affirmative action, the questions of what might have transpired if Bork actually were confirmed back in 1987 loom larger than ever.

This Article tries to briefly attempt an answer. Part I examines the backgrounds of Judge Bork and Justice Kennedy, and then studies some of the major cases decided by the Court in four key areas—abortion, freedom of speech, the right to bear arms, and civil rights—during the last twenty-five years. Part II then evaluates the voting record of Justice Kennedy in these cases, as well as the views held by Judge Bork—based on Bork’s own writings, on opinions that he rendered at the D.C. Circuit, and on commentaries written about him by other scholars—on these controversial topics. Part II also includes a discussion based on these records about how Judge Bork would likely have voted in these major cases, and analyzes how these cases would have turned out if Bork, not Kennedy, were sitting on the Supreme Court bench. While this Article is too short to examine every major case to come before the Court in the last quarter-century, it provides at least a bird’s-eye view of many of the leading disputes to come before the Court in this time and looks at how Bork might have influenced the outcome—and, by extension, the country’s entire direction on these matters.

The decision of whether Bork’s likely impact on the Court would be as positive as President Reagan posited or as negative as Senator Kennedy asserted will be left in the hands of the readers. Instead, this Article is more empirical in nature. By looking at Bork’s own words, as well as comments made about him by knowledgeable observers, it will give the reader a sense of what might have been. Even more importantly, this study vividly illustrates the weight carried by each appointment and confirmation to the United States Supreme Court. As shown here, the presence or absence of just one individual on the Court has the ability to transform large swaths of America’s judicial landscape. With key vacancies on the Court potentially looming on the horizon, this is a lesson that all Americans should remember well.

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29. Notably, though, Kennedy still is twice as likely to vote the way that a conservative politician would vote. See Vincent M. Bonventre, *Focus on Justice Kennedy (Supreme Court: How Partisan? Ideological? Activist?—with Graphs!)*, N.Y. COURT WATCHER (May 3, 2012), <http://www.newyorkcourtwatcher.com/2012/05/part-2-focus-on-kennedy-supreme-court.html>.

## I. THE MAKING OF TWO JUDGES: A BRIEF BACKGROUND OF JUSTICE KENNEDY & JUDGE BORK

Before moving to a discussion of Bork's possible impact on the Court, a brief pause is necessary to examine the heritage from which he came. Additionally, by way of comparison, it is likewise worthwhile to look at Justice Kennedy, the man who ultimately was confirmed for that Supreme Court seat. Given that a judge's background can strongly influence his or her jurisprudence, this section provides an overview of both of these judges, their influences, and their journey to judicial prominence.

### A. Judge Bork

Born into a middle-class family in suburban Pittsburgh,<sup>30</sup> Robert Heron Bork showed no early inclinations of ever becoming a darling of ardent conservatives. As an adolescent, he proclaimed himself a Socialist.<sup>31</sup> This may have been nothing more than a teenager's rebellious nature taking hold in a dominantly conservative region, but Bork has since stated that his early views were strongly influenced by British Marxist scholar John Strachey's book *The Coming Struggle for Power*.<sup>32</sup> Thus, by the time he graduated high school, Robert Bork apparently—and ironically—stuck out as a far left-wing radical.<sup>33</sup>

According to Bork in later interviews, his political leanings began to shift during his short stint in the Marine Corps, which came at the very end of World War II.<sup>34</sup> Yet the sea change occurred while Bork was attending the University of Chicago immediately after the war.<sup>35</sup> At that time, the University of Chicago was beginning to carve out a niche as the leading proponent of “law and economics” judicial philosophy—the neoclassical notion that economic principles and methods should be used to properly assess the merits and effects of laws.<sup>36</sup> Working closely with

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30. See Terence P. Jeffrey, *Q & A with Judge Robert Bork: Moral Life of Nation Could Be Decided by One Judge*, CNS NEWS (Jan. 19, 2009), <http://cnsnews.com/news/article/qa-judge-robert-bork-moral-life-nation-could-be-decided-one-judge>.

31. *Legends in the Law: A Conversation with Robert H. Bork*, BAR REPORT (Dec.–Jan. 1998), [http://web.archive.org/web/20130401131335/http://www.dcbar.org/for\\_lawyers/resources/legends\\_in\\_the\\_law/bork.cfm](http://web.archive.org/web/20130401131335/http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/bork.cfm). In this interview, Bork speaks of his earliest political debates, which took place late at night with his mother. He describes these discussions with his mother as “our own debating society.” *Id.*

32. *See id.*

33. *See id.*; see also Remarks at the National Press Club Luncheon, *supra* note 16.

34. *See Legends in the Law: A Conversation with Robert H. Bork*, *supra* note 31.

35. *Id.*; Remarks at the National Press Club Luncheon, *supra* note 16.

36. *See generally* Robin I. Mordfin & Marsha Ferziger Nagorsky, *Chicago and Law and Economics: A History*, THE RECORD (Fall 2011), <http://www.law.uchicago.edu/alumni/magazine/fall11/lawandecon-history> (discussing, in the law school's alumni magazine, how the law and economics movement in Chicago can actually be traced back to the school's earliest years of existence).



professors who vigorously promoted a *laissez-faire* approach to governance, specifically a commercial marketplace free of government constraints, Bork's ideology swung dramatically away from his early Socialist views.<sup>37</sup>

In particular, Bork was impacted by the teachings of Aaron Director, the conservative economist who ardently argued that laws aimed at breaking up monopolies tended to hurt consumers rather than help them.<sup>38</sup> Under the guidance of Director and other similarly inclined professors, Bork gave up his goal of becoming a labor union lawyer and decided to devote his attention to fighting antitrust legislation.<sup>39</sup>

Bork worked briefly for a New York City law firm, and then returned to Chicago to work on antitrust cases for Kirkland & Ellis LLP.<sup>40</sup> From there, he accepted a professorship teaching antitrust law at Yale Law School.<sup>41</sup> By his own estimation, he was the token conservative on the faculty.<sup>42</sup> There, he developed a close friendship with the liberal professor Alexander Bikel, who became a frequent intellectual sparring partner.<sup>43</sup> In the 1960s, however, Bork tired quickly of the "rebellions" taking place among the students on campus. "The classroom became a very tense place. You'd get almost no differences of opinion among the students," he later told an interviewer. "They were more rigid in their attitudes, less willing to think, than any other group I've ever known."<sup>44</sup>

In 1972, President Richard Nixon appointed Bork as the Solicitor General in his administration.<sup>45</sup> By this point, Bork had already made his mark working on Senator Barry Goldwater's presidential campaign in 1964, as well as working for Nixon in the 1968 and 1972 presidential elections.<sup>46</sup> When Bork accepted the Solicitor General's post, however, he immediately

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37. See BRONNER, *supra* note 6, at 47 ("He switched, in effect, from true believer to true believer, attacking the 'soft' liberal center of American political theory, but from the opposite end of the spectrum.").

38. *Id.* at 46-47.

39. *Legends in the Law: A Conversation with Robert H. Bork*, *supra* note 31.

40. *Id.*

41. In doing so, he gave up his \$40,000-per-year job in Chicago for a \$15,000-per-year professorship. See David Beckwith, *A Long and Winding Odyssey*, TIME (Sept. 21, 1987), <http://www.time.com/time/magazine/article/0,9171,965540,00.html>. According to sources interviewed by Beckwith, Bork feared that continuing with Kirkland & Ellis would leave him with a bland, unfulfilling life, whereas academia could allow him to engage in the fierce scholarly debates that he loved. *Id.*

42. *Legends in the Law: A Conversation with Robert H. Bork*, *supra* note 31.

43. *Id.* Bork co-taught a Constitutional Law seminar with Bikel, during which the two professors "often shouted at each other for several hours, each exhibiting wilting wit." BRONNER, *supra* note 6, at 56.

44. *Legends in the Law: A Conversation with Robert H. Bork*, *supra* note 31.

45. BRONNER, *supra* note 6, at 65. When Bork accepted the post, a group of his Yale students gave him a hard hat for a going-away present, symbolic of Bork's tough, hard-line stances on legal principles. See Richard Lacayo, *The Law According to Bork*, TIME (Sept. 21, 1987), <http://www.time.com/time/magazine/article/0,9171,965560,00.html>.

46. BRONNER, *supra* note 6, at 52, 65.

became embroiled in the infamous Watergate scandal.<sup>47</sup> It was he who ultimately carried out President Nixon's controversial order to fire Special Prosecutor Archibald Cox when Cox demanded that Nixon produce certain tapes of conversations carried out in the Oval Office<sup>48</sup>—a duty which fell to Bork only after Nixon's Attorney General and Deputy Attorney General both resigned rather than carry out the President's order.<sup>49</sup> Later, in the Senate confirmation hearings, Bork's willingness to fire Cox resurfaced, with several commentators declaring that engaging in such an act revealed Bork's unfitness to hold judicial office.<sup>50</sup>

By the late 1970s, Bork was back at Yale,<sup>51</sup> writing legal commentaries that were more outspoken than ever. His book *The Antitrust Paradox: A Policy at War with Itself*, published in 1978, is still regarded as a groundbreaking work, arguing that intervention by the courts actually harmed consumers by shielding inefficient businesses, consequently causing market prices to rise.<sup>52</sup> His other writings took similarly controversial stances, particularly with his opposition to civil rights measures such as affirmative action and anti-discrimination policies.<sup>53</sup>

Still, Bork's controversial writings did not prevent him from being confirmed to the D.C. Circuit bench in 1981.<sup>54</sup> There, he joined a court that would ultimately include another University of Chicago disciple: Antonin Scalia, the longest-serving justice on today's U.S. Supreme Court.<sup>55</sup> Also on the D.C. Circuit at that time were two of the most famous liberal judges

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47. *Id.* at 65.

48. *Id.*

49. *Id.*

50. *See, e.g.*, Anthony Lewis, *Abroad at Home; Bork and Watergate*, N.Y. TIMES, Aug. 23, 1987, at E23; Aaron Epstein, *2 Challenge Bork on Watergate*, PHILA. INQUIRER (Sept. 30, 1987), [http://articles.philly.com/1987-09-30/news/26208441\\_1\\_cox-dismissal-judge-bork-challenge-bork](http://articles.philly.com/1987-09-30/news/26208441_1_cox-dismissal-judge-bork-challenge-bork); *Bork Hearings Return to Role in Watergate*, KNIGHT RIDDER, Sept. 30, 1987, in THE SPOKESMAN-REVIEW (Spokane, Wash.), at A3. In 1973, well before Bork was facing the Senate, his act of removing Cox from office was even deemed to be an obstruction of justice by the D.C. Circuit—the very court on which Bork would eventually sit. *See Nader v. Bork*, 366 F. Supp. 104 (1973).

51. BRONNER, *supra* note 6, at 68–69. However, the second stint at Yale was evidently not as pleasant as the first. Many students and certain faculty members viewed him as “Nixon’s henchman” due to his role in firing Cox. Worse still, the death of Alexander Bickel evidently affected Bork deeply, and deprived him of his closest friend on the faculty. *Id.* at 69. And worst of all, Bork’s wife, Claire, suffered from cancer during this period, dying in 1980. *Id.* at 71, 73.

52. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

53. *See* BRONNER, *supra* note 6, at 71–72 (stating that at this time, Bork’s writing began to reflect his evolving view that “egalitarianism went hand in hand with permissiveness.”).

54. *See* Remarks at the National Press Club Luncheon, *supra* note 16.

55. Scalia was appointed to the D.C. Circuit in 1982. RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 34–35 (1997). By this point, though, Bork and Scalia already knew each other from discussions at the American Enterprise Institute for Public Policy Research. *Id.* at 23.

of that era: Ruth Bader Ginsburg, today one of the leaders of the Supreme Court's liberal wing,<sup>56</sup> and Patricia Wald, who would later go on to serve as the D.C. Circuit's Chief Judge.<sup>57</sup> Surprisingly, though, an analysis of Judge Bork's voting record prepared by the Department of Justice in 1987 showed that he voted with the position taken by Ginsburg on 91% of cases and with the position taken by Wald on 76% of cases.<sup>58</sup>

Bork served on the D.C. Circuit bench for just six years.<sup>59</sup> The year after the Senate rejected him as Justice Powell's Supreme Court replacement, he stepped down from the Circuit Court and returned to a largely academic life. His widely purchased writings from that point onward took on a largely moralistic tone, including his 1989 book *The Tempting of America*<sup>60</sup> and two books in the 1990s, *War in the Culture* (1994)<sup>61</sup> and *Slouching Toward Gomorrah* (1996).<sup>62</sup> One of his last books, *A Country I Do Not Recognize: The Legal Assault on American Values*, continued with this theme of a corrupt judiciary injecting American society with shameful principles.<sup>63</sup> In 2003, at the age of seventy-six, he converted to Catholicism.<sup>64</sup> Until the final years of his life he served as a leader in the conservative Federalist Society,<sup>65</sup> as well as a Distinguished Fellow with the Hudson Institute.<sup>66</sup> He also served as co-chairman of Mitt Romney's "Justice Advisory Committee" during Romney's unsuccessful bid for

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56. Ginsburg was appointed to the D.C. Circuit in 1980. See *Ruth Bader Ginsburg*, ACAD. OF ACHIEVEMENT, <http://www.achievement.org/autodoc/page/gin0bio-1> (last revised Nov. 11, 2013 8:13 PM).

57. Wald was appointed to the D.C. Circuit in 1979. See *Legends in the Law: A Conversation with Patricia M. Wald*, BAR REPORT (Apr.–May 1995), available at [http://web.archive.org/web/20130401134318/http://www.dcbar.org/for\\_lawyers/resources/legends\\_in\\_the\\_law/wald.cfm](http://web.archive.org/web/20130401134318/http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/wald.cfm).

58. *Response to the Critics*, *supra* note 5, at 376.

59. See *Robert H. Bork: Biographical Highlights*, HUDSON INST., <http://www.hudson.org/experts/42-robert-h-bork> (last visited Jan. 3, 2014).

60. See *THE TEMPTING OF AMERICA*, *supra* note 16.

61. ROBERT H. BORK, *WAR IN THE CULTURE* (1994).

62. ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996) [hereinafter *SLOUCHING TOWARD GOMORRAH*]. The use of the name "Gomorrah" is a Biblical allusion, referring to a city that was destroyed by God for its wickedness.

63. *A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES* (Robert H. Bork ed., Hoover Inst. Press 2005).

64. Tim Drake, *Judge Bork Converts to the Catholic Faith*, NAT'L CATH. REG. (July 20, 2003), [http://catholiceducation.org/articles/catholic\\_stories/cs0048.html](http://catholiceducation.org/articles/catholic_stories/cs0048.html).

65. See *A Conversation with Judge Robert H. Bork*, The Federalist Society (June 26, 2007), [http://www.fed-soc.org/publications/pubID.332/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.332/pub_detail.asp) (containing a discussion that includes significant attention to Bork's contributions to The Federalist Society). For a time, Bork served as the co-chair of the organization's board of trustees. See Remarks at the National Press Club Luncheon, *supra* note 16.

66. See *Robert H. Bork: Biographical Highlights*, *supra* note 59.

President in 2012. It was Bork's last turn in the public limelight before his death on December 19, 2012, at the age of eighty-five.<sup>67</sup>

## B. Justice Kennedy

Compared to Robert Bork's multiple moves and high-profile job changes, the life of Anthony McLeod Kennedy at first seems relatively bland. Until his confirmation to the Supreme Court, Kennedy spent most of his days in Sacramento, California, and exhibited little desire to ever leave.<sup>68</sup> As a child, he was a self-described "nerd" who adopted the most mundane of lifestyles, apparently devoid of athletics, dating, and party-going.<sup>69</sup> Seemingly from the start, he fully adopted his family's devout Catholicism,<sup>70</sup> and enjoyed a very close relationship with his parents.<sup>71</sup> In fact, his first job after attending school at Stanford, Harvard Law School, and the London School of Economics<sup>72</sup> was as a lobbyist for his father's Sacramento law firm.<sup>73</sup>

In 1965, he began teaching at the McGeorge School of Law at the University of the Pacific, a post that he held until his U.S. Supreme Court appointment in 1988.<sup>74</sup> There, he became friends with the Dean of McGeorge School, Gordon Schaber,<sup>75</sup> who at the time was the youngest law school dean in America.<sup>76</sup> Later, when Kennedy realized that Schaber was

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67. See Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES, Dec. 19, 2012, at A1; Al Kamen & Matt Schudel, *Robert H. Bork, Conservative Judicial Icon, Dies at 85*, WASH. POST (Dec. 19, 2012), [http://articles.washingtonpost.com/2012-12-19/local/35929283\\_1\\_judicial-restraint-conservative-jurist-judge-bork](http://articles.washingtonpost.com/2012-12-19/local/35929283_1_judicial-restraint-conservative-jurist-judge-bork); Lloyd Grove, *Robert Bork's Romney Connection*, NEWSWEEK (Oct. 17, 2011), <http://www.thedailybeast.com/newsweek/2011/10/16/robert-bork-on-romney-obama-and-biden.html>.

68. See Jeffrey Toobin, *Swing Shift*, THE NEW YORKER (Sept. 12, 2005), [http://www.newyorker.com/archive/2005/09/12/050912fa\\_fact](http://www.newyorker.com/archive/2005/09/12/050912fa_fact); Calabresi & Von Drehle, *supra* note 27; Lithwick, *supra* note 27; Barnes, *supra* note 27.

69. Jeffrey Rosen, *Supreme Leader: The Arrogance of Anthony Kennedy*, THE NEW REPUBLIC (June 16, 2007), <http://www.tnr.com/article/politics/supreme-leader-the-arrogance-anthony-kennedy>.

70. See Calabresi & Von Drehle, *supra* note 27. In the words of one of Kennedy's childhood acquaintances: "He and I were altar boys together, and I can't count how many times I would say something, or I was going to do something, and he would say, 'That's a sin.'" *Id.*

71. See *id.*

72. See *id.*; see also Toobin, *supra* note 68.

73. Toobin, *supra* note 68 (stating that when Kennedy's father passed away, Kennedy immediately took over his father's practice).

74. Calabresi & Von Drehle, *supra* note 27.

75. *Id.*

76. See Gordon Schaber, *Dean of School of Law*, L.A. TIMES (Nov. 8, 1997), <http://articles.latimes.com/1997/nov/08/news/mn-51544>.

gay, their friendship survived, despite the tremendous social taboo placed on homosexuality in that time period.<sup>77</sup>

During the early 1970s, Kennedy worked for Reagan—who was at that time the Governor of California—on a variety of issues, including drafting tax cut legislation for the state.<sup>78</sup> Then, in 1975, Reagan appointed Kennedy to the Ninth Circuit Court of Appeals.<sup>79</sup> During his time as a Ninth Circuit judge, Kennedy displayed the philosophical flexibility for which he is presently known on the Supreme Court. One of his clerks stated that Kennedy would “try on” opinions as if they were hats, never entirely satisfied with a particular look.<sup>80</sup>

Since the Ninth Circuit held court in California, Kennedy was able to continue living in the same suburban home where he had spent his childhood years.<sup>81</sup> So it came as no great surprise that when Reagan wanted a less controversial nominee after the debacles with Bork and Douglas Ginsburg, he called upon his fellow Californian with the quiet, steady, boy-next-door image for the job.<sup>82</sup> As one author later wrote, “Kennedy was depicted in the national media at that time as a man who virtually stepped out of a Norman Rockwell painting, a conservative federal judge and devout Catholic with a schoolteacher wife from a mid-size provincial town in Northern California.”<sup>83</sup>

Still, Kennedy is anything but provincial. In addition to his education in London, he once possessed a license to practice law in Mexico, served in the 1970s as the supervisor of courts in America’s South Pacific territories, and advised the Chinese government on improvements to their court system.<sup>84</sup> Today, he is a frequent speaker at international judicial conferences and teaches an annual seminar in Salzburg.<sup>85</sup> Perhaps due to this global exposure, he frequently cites treaties, foreign court decisions,

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77. Calabresi & Von Drehle, *supra* note 27. People have speculated that Kennedy’s longstanding friendship with Schaber could be at the core of Kennedy’s propensity to rule in favor of homosexuals in civil rights cases. *Id.*

78. *Id.*

79. *Id.* At age thirty-eight, Kennedy was the youngest Court of Appeals judge in America at that time. *Id.*

80. *Id.* This statement was made by Alex Kozinski, Kennedy’s first clerk on the Ninth Circuit and, as of the date of this publication, the Chief Judge of the Ninth Circuit.

81. Toobin, *supra* note 68.

82. See *supra* notes 23–26 & accompanying text.

83. Melinda Welsh, *Sacramento’s Supreme: Will Anthony Kennedy halt or advance the rightward swing of the U.S. Supreme Court?*, NEWSREVIEW.COM (Oct. 4, 2007), <http://www.newsreview.com/sacramento/sacramentos-supreme/content?oid=574071>.

84. Toobin, *supra* note 68.

85. Calabresi & Von Drehle, *supra* note 27; Toobin, *supra* note 68.

and other non-U.S. sources in his Supreme Court opinions<sup>86</sup>—a practice for which he has been both praised and pilloried.<sup>87</sup>

Overall, Justice Kennedy appears to be an enigmatic individual, both on and off the bench. In direct contrast to Bork, he rarely articulates concrete theories about the law or about any particularly controversial legal issues. Nor has he ever written a book about “good judging” or any other topic specifically pertaining to his judicial career. Yet because of his mercurial nature, and because of his propensity to cross “party lines” in his judicial opinions, he has become the Court’s most unpredictable justice.<sup>88</sup> As *Time Magazine* put it in an extensive cover story about him, “The fate of America’s biggest issues rests with Justice Kennedy and his take on the Constitution.”<sup>89</sup>

On the whole, Bork and Kennedy traveled markedly distinct paths to reach their judicial careers. The issue to which this Article now turns, though, is whether their decisions from the Supreme Court’s bench would have been as divergent as their often-contrasting heritages and lifestyles seem to suggest.

## II. ISSUES & LIKELY OUTCOMES: HOW THE COURT PROBABLY WOULD HAVE CHANGED WITH “JUSTICE BORK” INSTEAD OF JUSTICE KENNEDY

Without question, Bork and Kennedy evolved from noticeably different backgrounds. The question facing this Article, though, is whether Justice Kennedy’s take on the Constitution is diametrically opposed to the conclusions that Robert Bork would have reached. This discussion now moves to an examination of whether their judicial decision-making on matters before the Supreme Court would have intersected more than it diverged.

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86. See Toobin, *supra* note 68 (discussing Kennedy’s substantial use of foreign legislation, international instruments such as the United Nations’ Convention on the Rights of the Child, and decisions by international tribunals like the European Court of Human Rights in deciding some of America’s most controversial cases).

87. See, e.g., David G. Savage, *A Justice’s International View*, L.A. TIMES (June 14, 2008), <http://articles.latimes.com/2008/jun/14/nation/na-scotus14> (noting praise by noted law professor Michael Dorf for Kennedy’s use of international opinions in his decisions, but also describing criticism from a member of the Ethics & Public Policy Center about Kennedy’s belief that “the Constitution needs to be redefined in accord with international norms”); Calabresi & Von Drehle, *supra* note 27 (describing how Kennedy’s decisions involving international law “drew fire from his conservative colleagues”); Toobin, *supra* note 68 (“Kennedy’s reliance on foreign sources has prompted a vigorous backlash, both on and off the Court”); Rosen, *supra* note 69 (“He has infuriated conservatives by citing evidence of purported international consensus in his opinions, provoking some Republicans to call for his impeachment.”).

88. See *supra* notes 27 & 87.

89. Calabresi & Von Drehle, *supra* note 27.

### A. Abortion

During the confirmation hearings for both Bork and Kennedy, abortion was arguably the hottest of all hot-button topics.<sup>90</sup> Paramount in the minds of the Senators, as well as most outside observers of the hearings, was whether the new appointee to the Court would be inclined to overrule *Roe v. Wade*, the 1973 decision recognizing that a woman had a constitutionally protected privacy right to have an abortion.<sup>91</sup>

Over the course of the past twenty-five years, the Court has granted *certiorari* to several cases in which overruling *Roe v. Wade* was a distinct possibility. However, it has never done so. Instead, the Court has issued decisions refining and defining the scope of *Roe*, and arguably limiting its reach. Yet the extremely divisive decision still stands.<sup>92</sup>

Between 1987 and the present, some (but certainly not all<sup>93</sup>) of the major abortion decisions rendered by the Supreme Court include:

- *Webster v. Reproductive Health Services*, upholding a Missouri state law forbidding the use of public facilities for abortions, unless the abortion was necessary to save the woman's life.<sup>94</sup>
- *Hodgson v. Minnesota*, upholding a state law requiring minors to notify both parents before obtaining an abortion.<sup>95</sup>
- *Rust v. Sullivan*, finding that the federal government could constitutionally prevent recipients of funds designated for

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90. For examples of the extremely polarizing affect this debate had on the confirmation hearings, see *supra* notes 3–6.

91. 410 U.S. 113 (1973). Officially, *Roe v. Wade* established a balancing test for determining whether a law forbidding an abortion was constitutional. *Id.* Blanket bans on abortions were deemed unconstitutional as a due process violation of a woman's right to privacy. *See id.* at 164. However, the Court also held that narrowly tailored laws prohibiting abortions later in the woman's pregnancy *could* be upheld, provided that they reinforced the State's compelling interest in protecting the health of the mother and/or protecting the unborn but developed fetus. *Id.* at 164–65. The specific point when a state can step in and prohibit an abortion without unconstitutionally violating the woman's right to privacy remains a source of much controversy today.

92. The core of *Roe v. Wade* was controversially upheld as constitutional in the 1992 case of *Planned Parenthood v. Casey*, described in some detail below. 505 U.S. 833 (1992).

93. In this section, and in all the sections of this Article, I recognize the impossibility of scrutinizing every important case in a specific area of the law, particularly such fertile areas as are discussed here. With this in mind, I have tried in each section to pick "highlight" cases that were decided by a divided Court and that focus on some major facet of the area of law at issue. Where possible, I have also tried to select cases where Justice Kennedy played an especially significant role in the outcome.

94. 492 U.S. 490 (1989).

95. 497 U.S. 417 (1990).

“family planning services” from using those funds for abortion counseling.<sup>96</sup>

- *Planned Parenthood v. Casey*, determining that the Court would not overrule *Roe v. Wade*, but upholding the portion of a Pennsylvania statute requiring a twenty-four hour waiting period before receiving an abortion as consistent with due process.<sup>97</sup>
- *Gonzales v. Carhart*, establishing that a federal law banning partial-birth abortions was constitutional, even though this law lacked a provision allowing the procedure when the health of the mother was at risk.<sup>98</sup>

### 1. Where Kennedy Stands

In several of these cases, Justice Kennedy took an extremely active role. For instance, in the divisive *Planned Parenthood* matter, Kennedy joined with Justices O’Connor and Souter to form the controlling three-vote plurality in the case.<sup>99</sup> It was their decision that preserved *Roe v. Wade* over the vehement objections of Chief Justice Rehnquist, Justice Scalia, Justice Thomas, and Justice White.<sup>100</sup> And it was also the Kennedy–O’Connor–Souter holding that carved out a new test for the constitutionality of abortion laws: the “undue burden” standard.<sup>101</sup> Under this analysis, the Court’s key question in abortion cases became whether the law in question imposed an “undue burden”<sup>102</sup> upon the woman’s constitutionally protected privacy interest.<sup>103</sup> This was a departure from the standard in *Roe*, yet still affirmed the *Roe* decision as good law.<sup>104</sup> Under this standard, the

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96. 500 U.S. 173 (1991).

97. 505 U.S. 833 (1992).

98. 550 U.S. 124 (2007). This case overruled the 2000 decision of *Stenberg v. Carhart*, in which the Court held that the government could not ban doctors from performing partial-birth abortions. 530 U.S. 914 (2000). The likely cause of this discrepancy between 2000 and 2007: the replacement of Justice Sandra Day O’Connor, who voted with the majority to strike down the partial-birth abortion ban in *Stenberg*, with Justice Samuel Alito, who voted to uphold the ban in 2007.

99. *See* 505 U.S. at 843–901.

100. In short, these dissenters argued that because the Constitution was silent on a woman’s right to an abortion, and because “longstanding traditions” of American society have permitted abortions to be outlawed, there was no such thing as a constitutionally protected liberty interest in an abortion. *See id.* at 944–78 (Rehnquist, C.J., dissenting); 979–1002 (Scalia, J., dissenting).

101. *Id.* at 874–79.

102. This could be an undue burden intended by the state law, or an unintentional undue burden resulting from the overall effect of the law at issue. *See id.*

103. *See id.* at 878.

104. *Id.* at 879 (“Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding.”).



Kennedy–O’Connor–Souter plurality found that the Pennsylvania requirement that a woman notify her husband prior to seeking an abortion was an undue burden on the woman’s privacy right to an abortion.<sup>105</sup> The state’s demand for a twenty-four hour waiting period before the abortion procedure could be performed, however, was not deemed to be an undue burden on the woman’s right to an abortion, and thus was upheld.<sup>106</sup>

In *Gonzales*, Kennedy authored the opinion of the Court.<sup>107</sup> Observers who had read *Stenberg v. Carhart*, the case in which the Court had previously struck down a partial-birth abortion ban,<sup>108</sup> probably were not surprised at the tone of Kennedy’s commentary on this issue. Kennedy, joined by Rehnquist,<sup>109</sup> had written a rather lengthy dissent in *Stenberg*, arguing that the interests of the unborn child outweighed the privacy right to an abortion in partial-birth abortion cases.<sup>110</sup> He went on to explain that the partial-birth abortion ban proscribed a specific type of abortion, but “deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman.”<sup>111</sup> Predictably, his opinion for the Court’s majority in *Gonzales* upheld the partial-birth abortion ban along much the same lines.<sup>112</sup> Again, though, he emphasized that he was not following the direction of the concurring opinion authored by Thomas and joined by Scalia, which held that a woman simply had no constitutional right to an abortion and thus the issue was easily resolved.<sup>113</sup>

With regard to the other cases, Kennedy joined Rehnquist’s majority opinion in *Webster*, affirming the Missouri statute but rejecting the chance to re-visit *Roe v. Wade*.<sup>114</sup> He concurred with the majority in *Hodgson*, affirming the state law requiring minors to notify both parents before having an abortion.<sup>115</sup> And he joined the majority opinion written by Rehnquist in *Rust*, allowing the federal funding for “family planning” to be limited so that it was not used for abortion counseling.<sup>116</sup>

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105. *Planned Parenthood*, 505 U.S. at 887–98.

106. *See id.* at 885–87. This three-justice plurality also concluded that a parental consent requirement under the Pennsylvania law for “unemancipated” women under the age of eighteen also was constitutional, as it did not impose an undue burden on these women in seeking an abortion. *See id.* at 899–900.

107. 550 U.S. 124, 132–68 (2007).

108. 530 U.S. 914 (2000).

109. *Id.* at 957–79 (Kennedy, J., dissenting). As a side note, it appears that Kennedy and Rehnquist frequently voted the same way during their time on the Court. While this Article certainly is not an exhaustive study of the overlap in their voting patterns, even a cursory glance at the cases discussed here reveals Kennedy and Rehnquist voting the same way and even joining each other’s opinions at what appears to be an exceptionally high rate.

110. In particular, *see id.* at 970–75.

111. *Id.* at 965.

112. *See Gonzales*, 550 U.S. at 167–68.

113. *See id.* at 167–69. For the short but pointed concurring opinion by Thomas, *see id.* at 168–69.

114. 492 U.S. 490, 520–22 (1989).

115. 497 U.S. 417, 480–501 (1990) (Kennedy, J., concurring).

116. 500 U.S. 173, 201–03 (1991).

## 2. Where Bork Stood

One can sum up the essence of Robert Bork's views on abortion by reading a single passage from his book *Slouching Toward Gomorrah*:

It was argued that abortion on demand would guarantee that every child was a wanted child, would keep children from being born into poverty, reduce illegitimacy rates, and end child abuse. Child poverty rates, illegitimacy rates, and child abuse have soared. But it is clear, in any event, that *the vast majority of all abortions are for convenience.*<sup>117</sup>

In an effort not to belabor the point, suffice it to say that Robert Bork was not a proponent of finding any sort of a constitutional right to an abortion. Since seemingly the day after *Roe v. Wade* was decided, his writings and speeches attacked the case and its progeny,<sup>118</sup> as well as the very practice of abortion.<sup>119</sup> The more fundamental question, though, is this: Would Bork, despite his obvious distaste toward abortion, nevertheless have voted to uphold *Roe v. Wade* out of deference to *stare decisis*, the doctrine requiring that precedent must be upheld unless there is a blatant reason to overrule it?<sup>120</sup>

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117. SLOUCHING TOWARD GOMORRAH, *supra* note 62, at 180 (emphasis added).

118. For a thorough review of Bork's commentaries about abortion up to the time of his Senate confirmation hearings, see Gillers, *supra* note 5, at 43–47. For other, more recent statements by Bork about abortion, see, for example, Robert Bork, *Keeping a Republic: Overcoming the Corrupted Judiciary*, THE INSIDER, Spring 2010 (adapted from a speech delivered at the Joseph Story Lecture for The Heritage Foundation), Oct. 15, 2008, available at <http://www.hudson.org/research/7063-keeping-a-republic-overcoming-the-corrupted-judiciary> (referring to abortion as a “wholly fictitious” right created by activist judges on the Supreme Court); Robert Bork, *Barak's Rule*, AZURE, Winter 2007, available at [http://web.archive.org/web/20130415205455/http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=4389](http://web.archive.org/web/20130415205455/http://www.hudson.org/index.cfm?fuseaction=publication_details&id=4389) (accusing the Court of inventing “a general, undefined right of privacy” and thereby illicitly re-writing the Constitution); THE TEMPTING OF AMERICA, *supra* note 16, at 8 (stating that the Court “found a right to abortion in the Constitution without ever explaining even once how that right could be derived from any constitutional materials”); Jeffrey, *supra* note 30 (quoting Bork as stating that “The legislatures were not about to rule for abortion on demand, which is what the court did.”).

119. See Robert H. Bork, *Inconvenient Lives*, FIRST THINGS, December 1996, at 9–13. In this essay, Bork remarked that “Americans do not view human life as sacrosanct,” and blamed this on “radical individualism,” then stated that “there are severe moral problems” regarding the act of abortion. *Id.* at 9, 11. Abortion, he wrote, is a matter of “killing unborn children for convenience.” *Id.* at 13. Bork also hypothesized that abortion is the first step toward a society that allows killing of elderly individuals when they become socially expendable. *Id.* “If it is permissible to kill the unborn human for convenience,” he stated, “it is surely permissible to kill those thought to be soon to die for the same reason. And it is inevitable that many who are not in danger of imminent death will be killed to relieve their families of burdens.” *Id.*

120. In other words, Bork could conceivably decide that even though he dislikes the practice of abortion and the case that constitutionalized it, he owes a duty of “judicial

It appears to be quite clear that Bork would never have deferred to precedent regarding *Roe v. Wade*. Testifying before Congress in 1981, he proclaimed that *Roe* was “a serious and wholly unjustifiable usurpation of state legislative authority.”<sup>121</sup> He castigated the decision in most of his books and articles, typically using it as his primary exhibit of how “activist judges” create constitutional rights that never actually appeared in the Constitution.<sup>122</sup> In one speech in 2010, he announced that *Roe* had “invented a wholly fictitious right to abortion.”<sup>123</sup> “Though they have tried desperately,” he continued, “nobody, not the most ingenious academic lawyers nor judges, in the thirty-six years since it was decided has ever managed to construct a plausible legal rationale for *Roe*, and it is safe to say nobody ever will.”<sup>124</sup>

There is, however, one unexpected wrinkle in Bork’s views on abortion. In 1981, despite denouncing *Roe v. Wade* in his testimony before Congress, Bork went on to oppose the notion of a “Human Life Bill.”<sup>125</sup> Among other things, the Bill defined “life” as beginning from the moment of conception.<sup>126</sup> Had the Bill passed into law, this definition alone would have dramatically called into question the holding in *Roe*.<sup>127</sup> To the surprise of his supporters, though, Bork spoke out against the Bill.<sup>128</sup> In essence, he argued that it would be wrong for Congress to pass a law abridging a freedom that the Supreme Court had held to be a constitutionally protected right.<sup>129</sup> Ultimately, the Bill was never passed.

However, it still appears unlikely that Bork’s refusal to support the Human Life Bill would signal his reluctant acquiescence to the precedent

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restraint”—a philosophy that Bork has praised—to follow the Court’s prior ruling in this matter and not remove a right that the Court has previously recognized.

121. See William F. Buckley, Jr., *Understanding Bork*, UNIVERSAL PRESS (June 10, 1981), <http://news.google.com/newspapers?nid=1696&dat=19810610&id=1uEeAAAAIBAJ&sjid=NUcEAAAAIBAJ&pg=5583,2123702>; see also Joe Nocera, Op-Ed, *The Ugliness All Started with Bork*, N.Y. TIMES (Oct. 21, 2011), <http://www.nytimes.com/2011/10/22/opinion/nocera-the-ugliness-all-started-with-bork.html>.

122. See *supra* note 118.

123. *Keeping a Republic*, *supra* note 118.

124. *Id.*

125. See LEONARD GROSS & NORMAN VIEIRA, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 69 (1998); LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 187 (Thomas R. Kearns & Austin Sarat, eds., 1997); Buckley, *supra* note 121.

126. See Buckley, *supra* note 121.

127. See, e.g., GROSS & VIEIRA, *supra* note 125, at 69.

128. See *supra* note 125.

129. *The Human Life Bill: Hearing on S.158 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. 309–11 (1981) (statement of Prof. Robert Bork, Yale Law School, New Haven, Conn.). Notably, and perhaps humorously, Bork objected to this bill in a manner that also critiqued the Supreme Court. See *id.* He testified that the Human Life Bill would be an act of overreaching by Congress that would change “the constitutional function of the courts as we have known it since *Marbury v. Madison*.” *Id.* at 311. He then went on to add that such overreaching actually would be “no more drastic than what the judiciary has accomplished over the past 25 years.” *Id.* at 310.

set by *Roe*. While Bork protested the notion of Congress overturning the Court's determination of constitutionality, it appears that he would have had no qualms about the Judicial Branch reversing this decision. Tellingly, in a 2003 interview, Bork stated that "if the Court makes a bad mistake about the Constitution, nobody can cure it except the Court."<sup>130</sup> Clearly, Bork views *Roe v. Wade* as precisely that: "a bad mistake about the Constitution."<sup>131</sup> There seems to be little doubt that if he were on the Court, he would wield his judicial authority to "cure it."

### 3. The Bork Effect

Given this look at Bork's views on abortion, it appears that he would almost certainly have differed from Kennedy's reluctance to re-visit *Roe v. Wade*.<sup>132</sup> Thus, in *Webster*, Bork would have voted not only to uphold the Missouri statute, but to explicitly declare that there is no recognizable constitutional right for a woman to have an abortion.<sup>133</sup> This would be a far broader decision than the Court's majority authored by Rehnquist and joined by Kennedy, among others, in this case.<sup>134</sup> He would have joined Scalia's partial concurrence, arguing as Scalia did that the Court should use this case to overrule *Roe* "more explicitly" than what the majority was willing to do.<sup>135</sup>

Likewise, Bork would have agreed with the results in *Hodgson*, *Rust*, and *Gonzales*, but would have likely called for all three to be cases in which the constitutionalized right to an abortion was eliminated once and

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130. Peter Robinson, *Robert's Rules of Order: A Conversation with Robert Bork*, UNCOMMON KNOWLEDGE (July 16, 2003), <http://www.hoover.org/multimedia/uncommon-knowledge/27065>.

131. For convincing evidence of this viewpoint, see *supra* notes 118 & 121. Interestingly, Bork also defended the right of a state to ban contraception. See THE TEMPTING OF AMERICA, *supra* note 16, at 95. He referred to *Griswold v. Connecticut*, the Supreme Court decision that overturned a Connecticut law that prohibited contraceptive use by married couples, as being "utterly specious" and a "constitutional time bomb." *Id.* Conversely, Anthony Kennedy defended *Griswold* and the recognition of a constitutional right to privacy in his Senate confirmation hearing. See Linda Greenhouse, *Echo of '87 Bork Uproar Rings Softly in Abortion Debate*, N.Y. TIMES (Apr. 28, 1989), <http://www.nytimes.com/1989/04/28/us/the-law-echo-of-87-bork-uproar-rings-softly-in-abortion-debate.html>. "It was [Kennedy's] eloquent statement in support of the constitutional right to privacy at his confirmation hearing that, as much as any factor, made him acceptable to the Senators who had found Judge Bork unacceptable," Greenhouse wrote. *Id.*

132. As noted earlier, Kennedy's reluctance to re-visit *Roe* was on clearest display in *Planned Parenthood v. Casey*, but also was particularly evident when he joined Rehnquist's decision in *Webster*. See *supra* notes 99–104, 114.

133. This would clearly follow Bork's expressed views on abortion laws. See *supra* notes 118 & 121.

134. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520–22 (1989). Rehnquist's opinion was also fully joined by Justice Byron White.

135. *Id.* at 532 (Scalia, J., concurring in part).

for all.<sup>136</sup> This viewpoint would have the greatest impact on the fragmented Court in *Planned Parenthood v. Casey*. Rather than venturing down the road of the “undue burden test” articulated by Kennedy, O’ Connor, and Souter,<sup>137</sup> Bork would have once again demanded that *Roe* be destroyed completely rather than being dismantled “doorjamb by doorjamb.”<sup>138</sup>

This time, though, Bork’s trumpet blast would have sent the walls tumbling down. Without Kennedy on the Court, the opinion held by O’Connor and Souter would have lacked the third vote needed to make it a controlling plurality. Instead, Bork’s vote to strike down *Roe* would have given five votes to the opinion written by Scalia and joined by Rehnquist, White, and Thomas—an opinion holding that a woman’s decision to abort her unborn child is not a constitutionally protected interest.<sup>139</sup> Bork’s vote would have turned Scalia’s most stinging line—“We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining”<sup>140</sup>—from an angry dissent into a majority opinion. In short, with Bork on the Court rather than Kennedy, *Planned Parenthood v. Casey* would be remembered by posterity as the case that overruled *Roe v. Wade* and eliminated the constitutional right to an abortion from American jurisprudence.

## B. Freedom of Speech

During the last quarter of a century, and particularly during the years when John Roberts has served as Chief Justice, many of the Supreme Court’s most highly publicized decisions have been in the free speech arena.<sup>141</sup> Not surprisingly, Bork’s views about the Speech Clause of the First Amendment also took center stage for much of the debate surrounding

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136. Again, this is consistent with Bork’s views on *Roe v. Wade* and subsequent case law arising from this decision. See *supra* notes 118 & 121. It is also further than the majority was willing to go on these three cases. However, this viewpoint did receive support from Scalia in *Hodgson*, and from Thomas and Scalia in *Gonzales*. *Hodgson v. Minn.*, 497 U.S. 417, 480 (1990) (Scalia, J., concurring); *Gonzales v. Carhart*, 550 U.S. 124, 168–69 (Thomas, J., concurring).

137. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843–901 (1992).

138. *Webster*, 492 U.S. at 537 (Scalia, J., dissenting).

139. *Planned Parenthood*, 505 U.S. at 1002 (Scalia, J., concurring in part and dissenting in part). With Bork on the Court instead of Kennedy, the final vote would be five Justices in favor of not recognizing any constitutional right to an abortion (Bork, Scalia, Rehnquist, White, and Thomas) and four Justices favoring, in various forms, recognition of such a constitutional right (O’Connor, Souter, Stevens, and Blackmun).

140. *Id.*

141. See, e.g., Adam Liptak, *Study Challenges Supreme Court’s Image as Defender of Free Speech*, N.Y. TIMES (Jan. 7, 2012), <http://www.nytimes.com/2012/01/08/us/study-challenges-supreme-courts-image-as-defender-of-free-speech.html>; Robert Corn-Revere & Ronald K.L. Collins, *The Roberts Court and the Fight for First Amendment Freedoms*, A.B.A. SEC. LITIG. FIRST AMEND. & MEDIA LITIG. (Mar. 17, 2011), <http://apps.americanbar.org/litigation/committees/firstamendment/news.html>; Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 F. COMM. L.J. 579 (2011).

his nomination.<sup>142</sup> While Bork's views about the First Amendment's protection of free speech are not as well defined as his stance on abortion, sufficient evidence exists to formulate an educated hypothesis about how Bork might have ruled on some of the most contentious cases in this area.

Between 1987 and the present day, some of the most notable free speech cases<sup>143</sup> decided by the Court include:

- *Texas v. Johnson*, holding that burning the American flag is a form of expression protected by the First Amendment.<sup>144</sup>
- *United States v. Playboy Entertainment Group*, striking down as unconstitutional a law blocking channels dedicated to “sexually oriented content” during certain hours.<sup>145</sup>
- *Virginia v. Black*, holding that a blanket ban on cross-burning violates the First Amendment protections of free expression and that cross-burning could be criminalized only if the intent of the act was to inspire fear of imminent bodily harm.<sup>146</sup>
- *Garcetti v. Ceballos*, determining that a government employee's speech in the workplace and about workplace policies is not protected by the First Amendment.<sup>147</sup>
- *Morse v. Frederick*, deciding that school officials did not violate the First Amendment by preventing a student from holding up a “pro-drug” banner at a school-sponsored event.<sup>148</sup>
- *Holder v. Humanitarian Law Project*, holding that the federal government can ban the distribution of any

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142. See, e.g., Public Citizen Litigation Group, *supra* note 5, at 338–45; *Response to the Critics*, *supra* note 5, at 409–29; Gillers, *supra* note 5, at 47–52.

143. Again, this does not claim to be a comprehensive review of all leading free speech cases of the past twenty-five years. As with the abortion cases, I tried to select decisions that were close cases (preferably 5–4 or 6–3 decisions) and decisions in which Justice Kennedy played a particularly important role (i.e., a key vote to tilt the Court in one direction or another).

144. 491 U.S. 397 (1989).

145. 529 U.S. 803 (2000).

146. 538 U.S. 343 (2003). The case placed the burden on the state to prove that burning the cross was more than just an expression of views, but was instead actually intended to inspire fear of bodily harm in a particular person or group. *Id.*

147. 547 U.S. 410 (2006).

148. 551 U.S. 393 (2007).

“material support” to organizations deemed to be a threat to the United States without violating the First Amendment.<sup>149</sup>

- *Citizens United v. Federal Election Commission*, overturning a law restricting independent political campaign expenditures by corporations (and, by extension, unions).<sup>150</sup>
- *United States v. Alvarez*, holding that a law criminalizing lying about receiving military honors violates the First Amendment protections of free speech.<sup>151</sup>

### 1. Where Kennedy Stands

Justice Kennedy is recognized as one of the most vigorous defenders of free speech rights on the Court today.<sup>152</sup> However, in this limited sample of cases, it also becomes evident that Kennedy is not an absolutist with regard to freedom of speech. Instead, his “swing vote” legacy appears to be in full effect when it comes to free speech decisions. His record in these cases reveals a judge who recognizes the importance of this constitutional right but who is also willing to rule that it can be outweighed by other competing interests.

One of Kennedy’s signature moments announcing his presence on the Court was his concurring opinion in *Texas v. Johnson*, authored just one year after his confirmation by the Senate.<sup>153</sup> In holding that burning the flag as a protest was protected by the First Amendment, Kennedy delivered a short yet resounding—and seemingly expansive—defense of First Amendment protection of distasteful speech and expressive activities.<sup>154</sup> In part, he noted:

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149. 561 U.S. 1 (2010).

150. 558 U.S. 310 (2010).

151. 132 S. Ct. 2537 (2012).

152. See, e.g., Ronald K.L. Collins, *Foreword: Exceptional Freedom—The Roberts Court, The First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 438, 452 (2013) (stating that Justice Kennedy is “likely to lean towards a kind of near-absolutism” in free speech cases and describing Kennedy as “a force in this area of law”); Ashutosh Avinash Bhagwat & Matthew Struhar, *Justice Kennedy’s Free Speech Jurisprudence: A Quantitative and Qualitative Analysis*, 44 MCGEORGE L. REV. 167 (2013) (evaluating Kennedy’s decisions as generally expanding, rather than contracting, the First Amendment right to freedom of speech); Eugene Volokh, *The Justices and Free Speech*, N.Y. TIMES, Oct. 30, 2000, at A27, available at <http://www2.law.ucla.edu/volokh/justices.htm> (stating that “[t]he Justice who takes the broadest view of free speech rights is actually moderate conservative Justice Kennedy” and noting that at that point in his career, Kennedy voted for free speech claimants in 74% of cases that he had heard).

153. 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring).

154. See *id.*

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.<sup>155</sup>

Since *Texas v. Johnson*, Kennedy has frequently cast the deciding vote in tense cases where controversial speech and expression are at issue. In the *Playboy Entertainment Group* case, for instance, Kennedy wrote the majority opinion, striking down the law blocking channels dedicated to “sexually oriented” content.<sup>156</sup> With *Virginia v. Black*, he joined Justice Souter’s concurring opinion arguing that the law against cross-burning should be overturned, but also that no vestige of the statute—including the provision allowing criminalization of cross-burning with the intent to intimidate—should be preserved.<sup>157</sup> Much more recently, in *Citizens United*, Kennedy wrote the Court’s opinion in the 5–4 decision that extended free speech rights to corporations and unions, and held that monetary campaign contributions by these entities qualified as protected speech under the First Amendment.<sup>158</sup> And in 2012, Kennedy wrote the controlling plurality opinion in *United States v. Alvarez*, applying First Amendment protections to the right to lie and profit from those lies.<sup>159</sup>

However, Kennedy has also voted against free speech interests in a number of landmark cases, including scenarios where he found content-based restrictions on speech and expression to be perfectly valid. For example, Kennedy authored the majority opinion in *Garcetti v. Ceballos*, finding that the free speech rights of a government employee were diminished when speaking as an employee and talking about the policies of

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155. *Id.*

156. 529 U.S. 803, 806–27 (2000).

157. 538 U.S. 343, 380–87 (2000) (Souter, J., concurring). The keystone of this concurring opinion, which was also joined by Justice Ruth Bader Ginsburg, is that the content-based nature of this statute invalidated it, even in circumstances where the defendants might have intended to intimidate a particular person or group by the act of cross-burning. *See id.*

158. 558 U.S. 310, 318–72 (2010).

159. 132 S. Ct. 2537 (2012).



his workplace.<sup>160</sup> The employee's First Amendment interests, Kennedy wrote, were outweighed by the public interest of a well-functioning government, which demanded cooperation in government workplaces.<sup>161</sup> In the Court's 5–4 *Morse v. Frederick* decision, he joined a concurring opinion by Justice Samuel Alito, agreeing with the decision to uphold a school's right to punish "pro-drug" speech but limiting the holding to restrictions on speech "that a reasonable observer would interpret as advocating illegal drug use."<sup>162</sup> Under this opinion, therefore, *Morse* could not be used to stand for any other forms of restrictions on schoolhouse speech.<sup>163</sup> In the view of Alito and Kennedy, it particularly provided "no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."<sup>164</sup>

Perhaps most surprisingly of all, Kennedy joined the Court's majority in *Holder v. Humanitarian Law Project*, upholding the government's right to restrict any form of "material support" to a group deemed to be a national security threat.<sup>165</sup> Even though the "material support" in question was clearly non-violent in nature and was actually aimed at encouraging organizations *not* to engage in terrorist activities, Kennedy—and the majority of Court—determined that the potential security risk outweighed the rights of free speech and free association under these circumstances.<sup>166</sup>

In a way, these three cases in which Kennedy ruled against free speech protections—*Garcetti*, *Morse*, and *Holder*—might be the most revealing set of information regarding the hard-to-pinpoint First Amendment views of Justice Kennedy: a defender of First Amendment freedoms in many instances, but willing to yield those freedoms to competing government interests such as national security, workplace morale, and the "war on drugs." At the very least, it provides a useful starting point for comparing Kennedy's free speech views with those of Robert Bork.

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160. 547 U.S. 410, 413–26 (2006).

161. *See id.*

162. 551 U.S. 393, 422–25 (Alito, J., concurring).

163. *See id.* at 422.

164. *Id.* at 422, 425. This rationale seemed consistent with Kennedy's earlier decision in *Rosenberger v. University of Virginia*, where Kennedy, writing for the 5–4 majority, held that the University had improperly denied funding to a campus group wanting to publish a Christian magazine, as withholding such funding stifled the spread of various social and religious viewpoints on campus. *See* 515 U.S. 819 (1995). Whether Kennedy was also influenced, if not persuaded, to rule this way because of his own strong religious convictions is a subject for another article.

165. 130 S. Ct. 2705, 2712–31 (2010).

166. *See id.*

## 2. Where Bork Stood

Robert Bork first came to the always-lively free speech debates with a bang in 1971. That was the year when the *Indiana Law Journal* published Bork's article *Neutral Principles and Some First Amendment Problems*,<sup>167</sup> a provocative piece containing statements that later followed him to his Senate confirmation hearing battles.<sup>168</sup> Overall, Bork's article expressed the view that the First Amendment should protect solely "political speech,"<sup>169</sup> which he went on to define as "speech concerned with government behavior, policy or personnel."<sup>170</sup>

Such a constrained perspective of the First Amendment's scope succeeded in shocking plenty of readers.<sup>171</sup> Under the viewpoint that Bork advocated in this article, the First Amendment would offer no protection to works of literature and art, scientific theories, commercial advertisements, or educational debates about non-political themes.<sup>172</sup> Only speech pertaining to the government—but not advocating any sort of overthrow of the government<sup>173</sup>—could receive First Amendment protection from criminalization.<sup>174</sup> "The line drawn must, therefore, lie between the explicitly political and all else," Bork wrote. "Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the First Amendment that does not accord absolute protection for all verbal expression . . . will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary."<sup>175</sup>

In later years, however, Bork pulled back from the hard-and-fast stance that he promoted in this article. For instance, in a 1984 letter to the American Bar Association, he portrayed a more "open" Speech Clause than

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167. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) [hereinafter *Neutral Principles*].

168. See Michael W. McConnell, *The First Amendment Jurisprudence of Judge Robert Bork*, 9 CARDOZO L. REV. 63 (1987) (defending Bork's free speech decisions and writings); Anthony Lewis, *Bork on Free Speech*, N.Y. TIMES (Sept. 3, 1987), <http://www.nytimes.com/1987/09/03/opinion/abroad-at-home-bork-on-free-speech.html> (calling Bork a "committed radical" regarding his views on the Speech Clause); Doug Cassel, *The Law: People v. Robert Bork*, CHI. READER (Aug. 13, 1987), <http://www.chicagoreader.com/chicago/the-law-people-v-robert-bork/Content?oid=870977>; Public Citizen Litigation Group, *supra* note 5, at 338–45; *Response to the Critics*, *supra* note 5, at 409–29; Gillers, *supra* note 5, at 47–52.

169. *Neutral Principles*, *supra* note 167, at 26.

170. *Id.* at 27.

171. See, e.g., *supra* note 168.

172. *Neutral Principles*, *supra* note 167, at 28 ("It does not cover scientific, educational, commercial, or literary expressions as such."); see also *id.* at 27 ("I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity.")

173. See *id.* at 31 ("Speech advocating violent overthrow is thus not 'political speech' as that term must be defined by a Madisonian system of government.")

174. See *id.* at 26–27.

175. *Id.* at 28.

what he had originally described.<sup>176</sup> “I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection,” he wrote, “and continue to think that obscenity and pornography do not fit this rationale.”<sup>177</sup> Later, at the Senate confirmation hearings, he defended this viewpoint in a dialogue with Senator Joseph Biden.<sup>178</sup> “Protection is going to spread out from [political speech] . . . into moral speech and the scientific speech into fiction, and so forth,” Bork stated. “That statement explicitly contemplates protection for fiction and so forth, whatever that is.”<sup>179</sup> Then, later, he continued: “I think when you get to speech or print, which is purely for sexual gratification, pornography, or obscenity, I fail to see its connection to anything.”<sup>180</sup>

From this, one can glean a few absolutes about Bork’s thoughts on freedom of speech. Clearly, vulgarity and sexually oriented speech received no protection. And even under the more inclusive viewpoint that he expressed in 1984, it seems evident that Bork’s interpretation of freedom of speech provided significantly more limits than the Supreme Court’s modern jurisprudence in this area. For instance, the Court recently held that selling violent video games to minors was protected under the Speech Clause,<sup>181</sup> as was engaging in vulgar protests at military funerals<sup>182</sup> and selling videos depicting acts of extreme animal cruelty.<sup>183</sup> In each case, the Court decisively ruled that the act in question constituted protected “speech.”<sup>184</sup> Yet each of these decisions would be anathema to Bork’s views of freedom of speech. He would almost certainly have held that each of these forms of expression were unprotected, as they involved obscene acts that were not tied to the process of democratic governance.<sup>185</sup>

Bork also held a somewhat limited view toward freedom of the press, stating that the media should not receive any form of heightened

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176. See *The Bork Hearings: Judge Bork at Senate Hearing: In Defense of Past Statements and Opinions*, N.Y. TIMES (Sept. 18, 1987), <http://www.nytimes.com/1987/09/18/us/bork-hearings-judge-bork-senate-hearing-defense-past-statements-opinions.html>.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011).

182. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

183. *United States v. Stevens*, 559 U.S. 460 (2010).

184. See *Brown*, 131 S. Ct. at 2742; *Snyder*, 131 S. Ct. at 1220–21; *Stevens*, 559 U.S. at 460.

185. Bork specifically stated that the First Amendment should allow censorship to promote a more moral culture. SLOUCHING TOWARD GOMORRAH, *supra* note 62, at 140. “Sooner or later censorship is going to have to be considered, as popular culture keeps plunging to ever more sickening lows.” *Id.* “The alternative to censorship, legal and moral, will be a brutalized and chaotic culture, with all that entails for our society, economy, politics, and physical safety.” *Id.* He concluded the book by stating that the lone hope for American values is “perhaps in administering censorship to the vilest aspects of our popular culture.” *Id.* at 342.

protection of expression,<sup>186</sup> although he was often sympathetic toward newspapers in libel suits.<sup>187</sup> And he noted his strong dislike for virtually any form of free speech and expression among students in schools. “Once more the lunacies of America’s rights-crazed culture are on display in our highest court—disguised, of course, as a serious civil-liberties issue,” he wrote after the Court agreed to hear arguments in *Morse v. Frederick*.<sup>188</sup> He went on to argue that schools need the authority to suspend unruly students for inappropriate speech without judicial intervention.<sup>189</sup> “It is unfortunate in the extreme that the law is being forced into every institution and social relationship,” he stated. “When the law attacks authorities within institutions, it weakens those institutions, deprives them of their integrity, and makes them less effective.”<sup>190</sup>

Still, it appears that the basis of Bork’s views on the Speech Clause stemmed primarily from political speech. Speech about moral and scientific matters was protected only because of their relation to democratic governance. Speech by schoolchildren was not protected if it was about drugs instead of about the democratic process.<sup>191</sup> His free speech jurisprudence from the D.C. Circuit bears witness to this. In *Ollman v. Evans*, for example, Bork’s concurring opinion held that a newspaper column criticizing a university professor was protected because the plaintiff “placed himself *in the political arena* and became the subject of heated *political debate*.”<sup>192</sup> In *Reuber v. United States*, he emphatically made the point that a government physician would have no First Amendment case if his speech was solely about “his employer’s business judgment and integrity” but would have a viable claim if the speech in question criticized government policies.<sup>193</sup> Writing for the court in *Lebron v. Washington*

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186. Robert H. Bork, *The First Amendment Does Not Give Greater Freedom to the Press Than to Speech*, CENTER MAG., Mar.–Apr. 1979, at 28–34.

187. See Public Citizen Litigation Group, *supra* note 5, at 343–44. Whether these decisions are truly stimulated by Bork’s belief in the First Amendment rights of newspapers or by Bork’s concern for protecting the business interests of newspapers from financial harm is a matter of debate and speculation. *Id.*

188. Robert H. Bork, *Thanks a Lot*, NAT’L REVIEW, Apr. 16, 2007, available at [http://web.archive.org/web/20130410132839/http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=5088](http://web.archive.org/web/20130410132839/http://www.hudson.org/index.cfm?fuseaction=publication_details&id=5088) [hereinafter *Thanks a Lot*].

189. *Id.*

190. *Id.*

191. However, even this is called into doubt when it comes to the schools. In 2007, Bork wrote in praise of Justice Hugo Black for dissenting in *Tinker v. Des Moines Independent Community School District*, the 1969 case where the Court held that students had a First Amendment right to wear black armbands to school in protest of the Vietnam War. *Thanks a Lot*, *supra* note 188. Bork argued that Black was correct when he dissented and wrote that “the Court had taken from educational officials ‘the power to control pupils’” by allowing the conduct at issue in that case. *Id.* Teachers and students, Bork indicated, automatically have a lessened free speech expectation once they enter the schoolhouse, even when the speech in question is political. *See id.*

192. 750 F.2d 970, 1002 (D.C. Cir. 1984) (Bork, J., concurring) (emphasis added).

193. *Reuber v. U.S.*, 750 F.2d 1039, 1065 (D.C. Cir. 1984) (Bork, J., concurring).

*Metropolitan Area Transit Authority*, he determined that the city subway system's refusal to lease space to a man wanting to display a "deceptive" anti-Reagan poster was an unconstitutional prior restraint.<sup>194</sup> The reason: "[C]ourts ought not to restrain speech where the message sought to be communicated is political and is sufficiently ambiguous to allow a discerning viewer [or reader] to recognize it as something other than a reproduction of an actual event."<sup>195</sup> According to a study by Public Citizens Advocacy Group, most of Bork's decisions in free speech cases continue in this same vein.<sup>196</sup>

Thus, it seems that Bork's judgment in matters where freedom of speech is at issue centers primarily on whether that speech can be tied to the political process. While his views on the issue may be a bit more open than they were in 1971, his notion of the right to free speech is still quite limited.

### 3. The Bork Effect

Again, we proceed on the assumption that Bork would have required some tie to "political speech" in order to deem a particular form of speech protected by the First Amendment. From his writings, it is also clear that he would have been extremely hesitant to find such a link in situations involving obscenity, pornography, or in matters where institutional authority (particularly in schools) was placed at risk.

Thus, Bork likely would have voted the same way that Kennedy did in *Morse v. Frederick*, arguing that the student's speech about drugs was unprotected.<sup>197</sup> Yet he would probably not have joined Alito's concurrence protecting the right of students to engage in other forms of controversial speech while in school. Instead, he would have promoted the power of schools to greatly limit student speech without any potential First Amendment consequences. He also would have likely ruled the same way that Kennedy did in *Garcetti v. Ceballos*, finding that the employee's speech was not protected. Indeed, this case has many crossovers with *Reuber*, in which Bork specifically stated that the government employee's speech would not be protected if it criticized the judgment of his

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194. *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 899 (D.C. Cir. 1984).

195. *Id.* at 898 (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). *But see* *Finzer v. Barry*, 798 F.2d 1450, 1454 (D.C. Cir. 1986) (holding that a law prohibiting protests within 500 feet of a Washington, D.C., embassy was constitutional, even though it prohibited protests of a political nature in this zone). Bork determined that on balance, a government interest of protecting diplomats entering and leaving these embassies from potential danger outweighed the value of the political speech from protestors in this situation. *Id.* at 1454.

196. Public Citizen Litigation Group, *supra* note 5, at 338–45; *see also* Gillers, *supra* note 5, at 47–52. *But see* U.S. Dep't of Justice, *supra* note 5, at 409–29; McConnell, *supra* note 168, at 63–74 (arguing that Bork's free speech views are "moderate" and respect the limits originally intended by the Framers but are not unduly restrictive).

197. *Morse v. Frederick*, 551 U.S. 393, 422–25 (Alito, J., concurring).

supervisor.<sup>198</sup> And he would have almost certainly ruled the same way Kennedy did in *Holder*, finding that the government could ban “material support” to certain groups in the name of national security.<sup>199</sup> Given Bork’s desire for courts to stop “interfering” in matters of war and America’s safety, the government’s stated interests would outweigh any political speech value held in the materials shared with the organization in question.<sup>200</sup>

However, Bork likely would have differed from Kennedy in *Texas v. Johnson*. While burning the flag could be seen as political speech, it seems that Bork would have been more likely to find it an act of wanton obscenity. Notably, he argued that speech advocating government overthrow was not political speech.<sup>201</sup> Flag-burning—which Bork specifically deemed to be “not speech”<sup>202</sup>—would seem to fall into this category. Thus, with Bork on the Court instead of Kennedy, the case would have ended 5–4 in the opposite direction, holding that flag-burning was *not* an act protected by the First Amendment, and therefore was conduct that could be criminalized.<sup>203</sup>

Bork would probably also have voted differently than Kennedy in the *Playboy Entertainment Group* case. Given his statements that speech for “sexual gratification” was not protected by the First Amendment and that censorship could be allowed for morally reprehensible speech in popular culture,<sup>204</sup> Bork likely would have upheld the law banning “sexually oriented” programming during particular times of day. This, too,

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198. See *Reuber*, 750 F.2d at 1065 (Bork, J., concurring).

199. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712–31 (2010).

200. Comments about Bork’s opinions on the need for courts to step back when national security interests are at issue could fill an entire paper. For one characteristic example of how Bork views this issue, though, see Robert H. Bork & David B. Rivkin, Jr., *A War the Courts Shouldn’t Manage*, WASH. POST, Jan. 21, 2005, [http://web.archive.org/web/20130410132802/http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=3595](http://web.archive.org/web/20130410132802/http://www.hudson.org/index.cfm?fuseaction=publication_details&id=3595). In this article, Bork argues that the primary concern in deciding whom to nominate to the federal courts is “avoiding judicial mismanagement of America’s war against radical Islamic terrorists.” *Id.* “Already there are disturbing signs of judicial overreaching that is constitutionally illegitimate and, in practical terms, potentially debilitating,” he wrote. *Id.* He went on to argue that judges need to be more sensitive to unique wartime needs and freedoms, criticizing a Supreme Court decision that held that the right of *habeas corpus* applied to Guantanamo Bay detainees. *Id.* “Too much is riding on the outcome of this war—ultimately, perhaps, the survival of Western societies—to choose judges who are unaware of what is at stake,” he concluded. *Id.*

201. *Neutral Principles*, *supra* note 167, at 31.

202. SLOUCHING TOWARD GOMORRAH, *supra* note 62, at 100.

203. The outcome would be five Justices against granting constitutional protection to flag burning (Bork, Stevens, Rehnquist, O’Connor, and White), and four Justices in favor of granting First Amendment protection to flag burning (Brennan, Marshall, Blackmun, and Scalia).

204. *Supra* notes 177 & 185.

would have changed the overall outcome of the case, allowing the statute to stand by a 5–4 margin.<sup>205</sup>

Similarly, Bork probably would have voted the opposite way that Kennedy did in *Alvarez*. Most likely, Bork would have stated that there is no connection between lying about receiving military honors and the political process. Consequently, Bork would have held that the First Amendment does not shield this speech. The fact that the reputation of the military is at issue also could have enhanced Bork's propensity of permitting criminalization of this type of lying, given Bork's obvious concerns about the judiciary refraining from undermining the military's mission.<sup>206</sup> His vote in this case would not have changed the ultimate outcome, but would have turned the 6–3 decision into a much closer 5–4 result.<sup>207</sup>

The tougher calls for Bork would have occurred with *Virginia v. Black* and with *Citizens United*. Both are cases where he easily could have found the existence of political speech, the typical keystone of Bork's free speech analysis. However, both involved conduct that strays from the commonly understood definitions of "speech"—burning crosses in *Black* and making corporate donations to political candidates in *Citizens United*. This could have given Bork an easy out if he wished to find that either of these forms of expression was not protected speech. For instance, he could have argued that cross-burning did not pass the test of being "explicitly political," and could have even conceivably denounced it as a form of unprotected obscenity.

Yet it seems more likely that Bork would have found a political link in both of these cases, and voted to strike down both the cross-burning statute in *Black* and the campaign finance law in *Citizens United*. Undoubtedly, *Citizens United* would have been the easier of the two for Bork, who could have found that since the money was used to further political campaigns, it was directly tied to the democratic process, and thus received First Amendment protection. This would lead Bork to vote the same way that Kennedy voted, leaving the outcome of this case unchanged.<sup>208</sup> *Virginia v. Black* would have been a harder sell, but Bork

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205. With Bork instead of Kennedy on the Court, the outcome would likely be as follows: Five Justices upholding the statute forbidding channels dedicated to "sexually oriented programming" to broadcast during certain times of the day (Bork, Scalia, Breyer, Rehnquist, and O'Connor), and four Justices voting to strike down the statute as a violation of the First Amendment's Speech Clause (Stevens, Souter, Thomas, and Ginsburg).

206. See Bork & Rivkin, *supra* note 200.

207. Voting that lying about receiving military honors was speech protected by the First Amendment would be Roberts, Ginsburg, Sotomayor, Breyer, and Kagan. Voting to uphold the Defense of Valor Act, which made such speech a criminal offense, would be Bork, Alito, Scalia, and Thomas.

208. Bork would simply replace Kennedy in the majority holding that the McCain-Feingold Act limitation on independent corporate expenditures violated the First Amendment.

could have found that burning crosses was a way for citizens to express their feelings about certain types of laws (i.e., civil rights laws) to the government and make a “political process” link in that manner. He then could have voted, as Kennedy did, to overturn the cross-burning ban as an unconstitutional infringement on free speech.

### C. The Right to Bear Arms

Until relatively recently, the Supreme Court stayed away from the Second Amendment.<sup>209</sup> Although gun ownership issues are commonly in the forefront of public debate, decades passed without the Court handing down any sort of decision interpreting the constitutional extent of the people’s “right to bear arms.”<sup>210</sup> Then, in 2008, the Court finally spoke on the limits of the Second Amendment in the case of *District of Columbia v. Heller*.<sup>211</sup> In a 5–4 decision written by Justice Scalia, the Court ruled that the Second Amendment recognized an individual’s right to keep and bear arms even when their ownership of guns had no relation to serving in a militia.<sup>212</sup> Furthermore, the Court held that inherent in this individual right was the ability to use firearms for “traditionally lawful purposes,” such as defending one’s home and family.<sup>213</sup>

Two years later, in *McDonald v. City of Chicago*, the Court held that the constitutional right of individuals to own firearms and use them for “traditionally lawful purposes” applied to the states.<sup>214</sup> Any state law that infringed upon this right would be a violation of due process of law.<sup>215</sup> Put another way, the Court deemed that the Second Amendment was “incorporated” to all of the states through the Due Process Clause of the Fourteenth Amendment.<sup>216</sup>

These cases are the only two major Second Amendment decisions by the Court in the last twenty-five years. Together, though, they established a principle that formally expanded the scope of the Second Amendment, thereby increasing the protections for gun owners against both the federal government and the governments of the states.

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209. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639–42 (1989) (discussing the surprising scarcity of major cases, law review articles, or discussions of any substantive sort about the Second Amendment).

210. See *id.*; see also Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (noting that the Second Amendment was “almost completely ignored” for two centuries).

211. 554 U.S. 570 (2008).

212. *Id.* at 636.

213. *Id.* at 577; see also *id.* at 636 (stating that the Second Amendment will not permit an “absolute prohibition of handguns held and used for self-defense in the home”).

214. 130 S. Ct. 3020, 3050 (2010).

215. *Id.*

216. See *id.*



## 1. Where Kennedy Stands

Justice Kennedy has not proven to be particularly outspoken on Second Amendment issues. Yet within the two Second Amendment cases that have come before him during his time on the Court, Kennedy has also clearly shown where he stands on this debate. In *Heller*, he joined the majority opinion written by Scalia, finding that the Second Amendment included an individual right to own firearms and to use them for traditionally lawful purposes.<sup>217</sup> And in *McDonald*, he joined the controlling plurality opinion written by Alito, applying the Second Amendment right of individuals to bear and use firearms to all of the states through the Fourteenth Amendment.<sup>218</sup>

Both of these cases were 5–4 decisions. Thus, Kennedy’s vote was regarded as the tiebreaker between four Justices who seemed guaranteed to vote for a more expansive view of the Second Amendment and four Justices who seemed guaranteed to vote for a more restrictive view of the right to bear arms.<sup>219</sup> Therefore, with a different justice on the Court, the outcome of these controversial cases could have been very different.

## 2. Where Bork Stood

Bork’s position on the Second Amendment was never outwardly apparent. During his tenure on the D.C. Circuit, he never decided a case that hinged on a Second Amendment issue. However, he did speak and write about gun control on a number of occasions, although his viewpoints in these remarks and articles were not always consistent. From these examples, though, one can gain some understanding of how Bork might have voted in a Second Amendment case if he were on the Supreme Court.

In a 1989 interview, Bork specifically stated that the Second Amendment guarantees “the right of states to form militias, not for individuals to bear arms.”<sup>220</sup> He repeated this view two years later in a

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217. See *Heller*, 554 U.S. at 636.

218. *McDonald*, 130 S. Ct. at 3020–50.

219. Of course, the Justices could have certainly broken from their standard ideological lines in their voting. Yet given the strong ideological lines on which the Roberts Court is drawn, it would be extremely unlikely that Alito, Scalia, Thomas, or Roberts would have voted against an individual right to bear and use firearms. It would have been just as unlikely for Ginsburg, Breyer, Stevens, or Souter (or Sotomayor, who had replaced Souter on the Court by the time *McDonald* was decided) to vote in favor of interpreting the Second Amendment to allow an individual right to bear and use arms. For an excellent look at the partisan nature of judging on the Supreme Court today, see Vincent M. Bonventre, *A Court of Shameless Partisans. (Supreme Court: How Partisan? Ideological? Activist?—with Graphs!)*, N.Y. CT. WATCHER (June 24, 2012), <http://www.newyorkcourtwatcher.com/2012/06/part-11-court-of-shameless-partisans.html>.

220. Claudia Luther, *Lectures at UCI with Rose Bird: Bork Says State Gun Laws Constitutional*, L.A. TIMES, Mar. 15, 1989, at B5, available at [http://articles.latimes.com/1989-03-15/local/me-587\\_1\\_state-gun-laws-constitutional](http://articles.latimes.com/1989-03-15/local/me-587_1_state-gun-laws-constitutional).

point-counterpoint with Laurence Tribe.<sup>221</sup> This directly contradicts the holding in *Heller* and, by extension, *McDonald*. Bork was roundly criticized by the pro-gun lobby for taking this position,<sup>222</sup> but never appeared to retract it.

Later, though, in his book *Slouching Toward Gomorrah*, Bork proclaimed that “gun control shifts the equation in favor of the criminal.”<sup>223</sup> He went on to criticize gun control laws as examples of activist judges being too soft on lawbreakers, opening windows for offenders to commit more frequent and more dangerous crimes.<sup>224</sup> With this point of view, it would seem that Bork may have shifted his opinions in favor of an individual right to bear firearms and use them for traditionally lawful purposes, as this could give law-abiding citizens a means of defense against delinquents trying to harm them.

Perhaps the most revealing piece of Bork’s later-in-life Second Amendment views, however, is the fact that he joined an *amicus curiae* brief in *Heller* urging the Court to find a broad constitutionally protected individual right to own and use firearms.<sup>225</sup> Interestingly, the brief also urged the Court to limit its conception of this individual right to the types of weapons reasonably foreseen by the drafters of the Bill of Rights, such as common handguns.<sup>226</sup> Therefore, the individual right to own and use firearms would not, under this view, be extended to more modern devices such as automatic and semi-automatic weapons.<sup>227</sup>

The question, then, is which Bork existed by the time the Court decided its two major Second Amendment cases: the Bork who saw no individual right in the Second Amendment or the Bork who signed onto a brief advocating for the Court to find precisely that right in *Heller*? The best clue appears to be the fact that both the *Heller* brief and the negative remarks about gun control in *Slouching Toward Gomorrah* were much

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221. Miriam Bensimhorn, *Advocates: Point and Counterpoint, Laurence Tribe and Robert Bork Debate the Framers’ Spacious Terms*, LIFE, Fall 1991 (Special Issue), at 96, 98 (“[T]he National Rifle Association is always arguing that the Second Amendment determines the right to bear arms. But I think it really is people’s right to bear arms in a militia.”).

222. Indeed, the conservative National Rifle Association refused to lobby for Bork after he was nominated for the Supreme Court. See Nat’l Rifle Ass’n, GALE ENCYC. OF U.S. HIST., <http://www.answers.com/topic/national-rifle-association-of-america> (citing OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL (University of Iowa Press, 1998)).

223. SLOUCHING TOWARD GOMORRAH, *supra* note 62, at 167.

224. See *id.* (“Gun control proposals are nothing more than a modern liberal suggestion that government, which is unable to protect its citizens, make sure that citizens cannot defend themselves.”).

225. Brief of Amici Curiae Former Senior Officials of the Dep’t of Justice in Support of Respondent, D.C. v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 405551.

226. *Id.* at 30–31 (“As the court of appeals held—and amicus United States does not dispute—ordinary handguns fit that description both in 1789 and today. It seems equally apparent that machineguns do not.”).

227. *Id.*

more recent statements than the interview. Thus, it seems probable that Bork's thoughts about the Second Amendment shifted since 1989, leading him to ultimately recognize an individual right to keep and use firearms even without any militia connection.

Still, the analysis does not end here. Even if Bork recognized an individual constitutional right to bear arms, this does not inherently mean that he would have supported this law's application to the states through the Fourteenth Amendment. Plenty of judges have recognized individual rights but balked at a blanket application of those rights to the states. And on several occasions, beginning with his criticisms of *Roe v. Wade*<sup>228</sup> and of various civil rights cases,<sup>229</sup> Bork advised the Supreme Court to leave state laws alone unless a breach of the Constitution is obvious.<sup>230</sup>

However, in his hearings before the Senate, Bork declared his "full acceptance of the incorporation doctrine"<sup>231</sup>—the notion that the entire Bill of Rights should be applied to the states through "incorporation" into the Fourteenth Amendment.<sup>232</sup> This is a position that has never gained a majority of votes on the Court, although many decisions have allowed the "incorporation" of *certain* rights into the Fourteenth Amendment.<sup>233</sup> But if Bork truly had adopted this viewpoint and had been confirmed as a Supreme Court justice, then perhaps Bork's opinions may have turned out differently than one might be outwardly inclined to suspect.<sup>234</sup>

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228. See *supra* notes 118 & 121.

229. See *infra* notes 290–301.

230. See also Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS, November 1996, at 21–24 ("[W]hen the Court invented the theory that the Bill of Rights limited states as well as the federal government . . . the opportunities for judicial government exploded . . . The list of such incursions into the legitimate sphere of democratic control goes on and on.").

231. *The Bork Hearings; Final Remarks: Interpret Law, Not Make It*, N.Y. TIMES (Sept. 20, 1987), <http://www.nytimes.com/1987/09/20/us/the-bork-hearings-final-remarks-interpret-law-not-make-it.html>.

232. See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1950); see also Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

233. For a concise but illuminating discussion of the "incorporation" debate at the U.S. Supreme Court, see Richard C. Cortner, *The Nationalization of the Bill of Rights: An Overview*, AM. POL. SCI. ASS'N, & AM. HIST. ASS'N (Fall 1985), [http://www.apsanet.org/imgtest/Nationalization\\_Bill.pdf](http://www.apsanet.org/imgtest/Nationalization_Bill.pdf). Importantly, while a majority of the Court has never adopted total incorporation, the principle has gained some prominent supporters, most notably Justice Hugo Black. See *id.*

234. But see *Our Judicial Oligarchy*, *supra* note 230, at 21–24. Here, Bork presented a viewpoint that definitely does not appear friendly to the "incorporation" doctrine. Thus, it remains unclear whether Bork really would have followed this professed acceptance of "incorporation" if he were on the Court, particularly since the article cited here is a much more recent statement than his Senate confirmation hearing testimony.

### 3. The Bork Effect

It is difficult to discern how Bork would have affected the outcome in these two Second Amendment cases if he were on the Court instead of Kennedy. With *Heller*, however, all recent signs indicate that he would have joined Scalia's majority opinion, just as Kennedy did. While Bork's comments from 1989 give cause to wonder whether he might have ruled otherwise, his more recent remarks criticizing gun control laws tilt the scales in the opposite direction, and the fact that he joined an *amicus* brief supporting the ultimate outcome in *Heller* seals the deal. The decision under Bork thus would have been the same as it was under Kennedy, with a 5–4 majority upholding an individual right to bear arms and use them for traditional lawful purposes.

Bork's likely holding in *McDonald* is an even closer call. If he continued to espouse the doctrine of total incorporation, then he certainly would have voted to extend the Second Amendment to all of the states.<sup>235</sup> This would be the same holding that Kennedy reached in *McDonald*. Yet Bork's writings about the importance of respecting states' rights create doubt about whether Bork would have willingly interceded in so many areas. In the end, the decision probably would have come down to whether Bork, the judge praised by Reagan for his "judicial restraint," would have been willing to impose a previously unforeseen individual right on the states.

#### D. Civil Rights

After abortion, the issues that sparked the greatest amount of denigration when Bork was nominated for the Supreme Court dealt with civil rights. In particular, Bork's interpretations of the Equal Protection Clause of the Fourteenth Amendment came under heavy fire.<sup>236</sup> Senator Kennedy was far from the only acerbic critic of Bork's record on these matters.<sup>237</sup> In the end, it appeared that a fear that Bork would not protect the

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235. Again, though, Bork's ultimate position on this issue was hardly clear. See *supra* note 234.

236. See, e.g., Editorial, *Against Robert Bork; His Bill of Rights Is Different*, N.Y. TIMES (Oct. 5, 1987), <http://www.nytimes.com/1987/10/05/opinion/against-robert-bork-his-bill-of-rights-is-different.html>; BRONNER, *supra* note 6, at 60, 226; Gillers, *supra* note 5, at 36–47.

237. See, e.g., Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985,1990 (1988); United Press International, *NAACP Hears More Voices Against Bork*, CHI. TRIB. (July 7, 1987), [http://articles.chicagotribune.com/1987-07-07/news/8702190569\\_1\\_mr-bork-judge-robert-bork-supreme-court](http://articles.chicagotribune.com/1987-07-07/news/8702190569_1_mr-bork-judge-robert-bork-supreme-court); United Press International, *Newark March Notes Civil Rights Advances*, L.A. TIMES (Aug. 2, 1987), [http://articles.latimes.com/1987-08-02/news/mn-999\\_1\\_civil-rights](http://articles.latimes.com/1987-08-02/news/mn-999_1_civil-rights); Associated Press, *Group Opposes Bork as Threat to Women's Rights*, L.A. TIMES (Aug. 18, 1987), [http://articles.latimes.com/1987-08-18/news/mn-2291\\_1\\_legal-rights-women](http://articles.latimes.com/1987-08-18/news/mn-2291_1_legal-rights-women); Gillers, *supra* note 5, at 36–47. But see also Born, *supra* note 5, at 75–93 (arguing that Bork's civil rights record is much less draconian than what

rights of women and minorities<sup>238</sup> was a leading cause of the Senate's resounding rejection.<sup>239</sup>

"Civil rights" is an immense category, and judicial records in such cases truly deserve an article of their own. Yet by looking at some of the hallmark cases from the past twenty-five years, we can at least gain a sense of how Bork might have changed the Court's direction on some of these issues. For this section, we will look at the following "highlight" cases:

- *Automobile Workers v. Johnson Controls*, holding that a workplace policy barring potentially fertile and pregnant women from occupations that could be detrimental to their reproductive capacities was a form of gender discrimination that violated the Civil Rights Act of 1964.<sup>240</sup>
- *Romer v. Evans*, recognizing that homosexuals could be considered to be a constitutionally protected class and overturning a Colorado law excluding homosexuals from enjoying safeguards against discrimination.<sup>241</sup>
- *Bragdon v. Abbott*, deciding that a dentist who refused to fill a patient's cavity in his office because she was HIV-positive violated the Americans with Disabilities Act.<sup>242</sup>
- *Boy Scouts of America v. Dale*, determining that the Boy Scouts of America could exclude homosexuals from their membership under an implicit freedom of "expressive association."<sup>243</sup>
- *Grutter v. Bollinger*, holding that a school's "narrowly tailored" use of race as an admission criterion is permissible under the Equal Protection Clause of the

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was proposed by certain groups, and asserting that his positions on civil rights issues are more in the "mainstream" than most commentators have realized).

238. Not only racial minorities, but also minorities in terms of religious affiliation, sexual orientation, etc.

239. See, e.g., JOHN W. DEAN, *BROKEN GOVERNMENT: HOW REPUBLICAN RULE DESTROYED THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES* (2007) ("[Bork's] positions on civil rights were an anathema to all who cared about equality in America."); *Battle to Replace Justice Sandra Day O'Connor Begins* (CNN television broadcast July 1, 2005), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0507/01/pzn.01.html> (noting that 180 civil rights and civil liberties groups opposed Bork's nomination to the Court); Chemerinsky, *supra* note 237, at 1990.

240. 499 U.S. 187 (1991).

241. 517 U.S. 620, 620–21 (1996).

242. 524 U.S. 624, 624–25 (1998).

243. 530 U.S. 640, 641 (2000).

Fourteenth Amendment, as it furthers the compelling interest of achieving a diverse student body.<sup>244</sup>

- *Lawrence v. Texas*, striking down a Texas statute outlawing homosexual sodomy as violating the Due Process Clause of the Fourteenth Amendment.<sup>245</sup>
- *Ricci v. DeStefano*, determining that the City of New Haven violated the Civil Rights Act of 1964 by discarding exams for firefighter promotions solely on the grounds that the test results showed a disproportionate number of white candidates gaining promotion over minority candidates.<sup>246</sup>

### 1. Where Kennedy Stands

In the cases reviewed here, Justice Kennedy again reveals his “swing vote” propensities with a mixed record on these civil rights issues. As with his First Amendment freedom of speech jurisprudence,<sup>247</sup> he displays a strong interest toward protections of minority groups, but also shows a willingness to allow these civil rights concerns to be overcome on balance by other sufficiently competing interests.

Kennedy’s “pro-civil rights” stances seem particularly strong when it comes to the civil rights of homosexuals. He wrote the majority opinion in both *Romer v. Evans*<sup>248</sup> and *Lawrence v. Texas*,<sup>249</sup> standing up against staunch opposition from the conservative wing of the Court in both cases.<sup>250</sup> In *Lawrence*, he displayed particular vigor in criticizing the Texas anti-sodomy statute and its infringements upon personal liberties. At the time, the controlling precedent refused to recognize a right to homosexual conduct, even in the privacy of the home, because such a thing clearly would not have been considered by the drafters of the Fifth and Fourteenth Amendments.<sup>251</sup> In opposition to this rationale, Kennedy wrote:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold

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244. 539 U.S. 306, 307 (2003).

245. 539 U.S. 558 (2003).

246. 557 U.S. 557 (2009). The Court reached this holding largely on the basis that the fire department exhibited no intent to discriminate against minority candidates, and on the ground that no “less-discriminatory alternative” was available. *See id.*

247. *See supra* notes 152–66.

248. 517 U.S. 620, 623–36 (1996).

249. 539 U.S. at 562–79.

250. *See Romer*, 517 U.S. at 636–53 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 586–605 (Scalia, J. dissenting), 605–06 (Thomas, J., dissenting).

251. *Lawrence*, 539 U.S. at 566 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>252</sup>

In *Boy Scouts of America v. Dale*, however, Kennedy did not vote in favor of the homosexual scoutmaster who had been expelled from the organization on account of his sexual orientation. Instead, he joined Rehnquist's majority opinion, finding that a private organization has the right to exclude individuals for virtually any reason under an implicit First Amendment right of "expressive association."<sup>253</sup> Under the opinion, revoking the scoutmaster's membership did not violate his Due Process or Equal Protection rights, as the group's expressive association rights trumped these interests.<sup>254</sup> Forcing the Boy Scouts to accept a leader whose values ran contrary to the established morals of the organization violated these expressive association rights, as it would prevent the group from adhering to and advocating a particular viewpoint.<sup>255</sup>

With *Bragdon v. Abbott*, one of the leading Americans with Disabilities Act (ADA) cases of the last twenty-five years, Kennedy authored the majority opinion of the 5-4 Court.<sup>256</sup> In it, he wrote that the dentist's office qualified as a "public accommodation"<sup>257</sup> and that HIV qualified as a "disability," even in cases where the disease was asymptomatic.<sup>258</sup> Since the patient at issue likely did not pose a "direct threat to the health and safety of others,"<sup>259</sup> Kennedy wrote that the doctor therefore violated the ADA by refusing to treat her in his office.<sup>260</sup>

The *Automobile Workers* case resulted in a unanimous decision from the Court, with all nine Justices agreeing that the "fetal-protection policy" implemented by the company illegally discriminated against women.<sup>261</sup> However, Kennedy joined a concurring opinion authored by Justice Byron White that revealed a more limited view of the decision than several of his brethren had taken. In his concurrence, White wrote that the Court erred in holding that a "sex-specific fetal-protection policy" could

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252. *Id.* at 578-79.

253. 530 U.S. 641, 642 (2000).

254. *Id.* at 661.

255. *Id.*

256. 524 U.S. 624, 628-55 (1998).

257. *Id.* at 646.

258. *Id.* at 632-45.

259. *Id.* at 648-55.

260. *See id.* at 655. Ultimately, the Court remanded the case back to the circuit court for further proceedings on the "direct threat" issue. *Id.*

261. 499 U.S. 187, 211 (1991).

never be justified under the Civil Rights Act of 1964.<sup>262</sup> Instead, he stated that there could be circumstances that would qualify such a regulation under the “bona fide occupational qualification exception” of the Civil Rights Act.<sup>263</sup> Safety exceptions were not abandoned by Congress in passing the Civil Rights Act, White stated, and therefore gender-specific bans on certain types of work because the health of a fetus was potentially at issue could overcome any alleged gender bias in such a policy.<sup>264</sup> This would be particularly true in situations involving a woman who was pregnant.<sup>265</sup> Kennedy’s decision to join this concurrence seems to speak volumes about his views in this area, illustrating his willingness to uphold laws that disadvantaged a particular gender if there was a sufficiently compelling health-and-safety justification.

Kennedy dissented in *Grutter*, the affirmative action case dealing with race-based admission criteria.<sup>266</sup> He partially joined a dissent written by Rehnquist,<sup>267</sup> but also wrote his own separate dissent against the Court’s decision in this case.<sup>268</sup> Primarily, Kennedy objected to what he considered to be an abandonment of the “strict scrutiny” standard of review for race-based admission policies.<sup>269</sup> While clearly stating that he supported the use of race as an admission criterion in certain limited circumstances,<sup>270</sup> Kennedy argued that the Court had applied only a “perfunctory” review in this case, thus allowing racial minorities to have preferential treatment in a situation where such preferences were not necessary.<sup>271</sup>

Lastly, in the matter of *Ricci v. DeStefano*, Kennedy wrote the majority opinion for the 5–4 Court, holding that the City of New Haven had violated the Civil Rights Act of 1964.<sup>272</sup> Overall, his opinion focused on the city’s lack of a “strong basis in evidence” that the promotional exam discriminated against minorities.<sup>273</sup> Given that the exams were “job related” and consistent with the needs of the fire department in finding the best candidates for promotion, the allegations of discrimination were not strong enough for the city to cancel the results.<sup>274</sup> Furthermore, Kennedy wrote, no “less discriminatory alternative” to the test was available, again showing

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262. *Id.* at 211 (White, J., concurring).

263. *Id.*

264. *Id.* at 219.

265. *Id.*

266. 539 U.S. 306, 387–95 (Kennedy, J., dissenting).

267. Rehnquist’s dissent was also joined by Scalia and Thomas.

268. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

269. *See id.* at 388 (citing *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 291 (1978)).

270. *Id.* at 395.

271. *Id.* at 388, 395.

272. 557 U.S. 557, 561–93 (2009).

273. *See id.* at 587–92.

274. *See id.*



that the city did not have cause to void the results simply because whites tended to perform better than non-whites on the exam.<sup>275</sup>

## 2. Where Bork Stood

Unlike several other conservative judges, Bork publically stated that *Brown v. Board of Education* was correctly decided.<sup>276</sup> While other judges labeled *Brown* Exhibit A for “judicial activism” and overreaching by the Supreme Court, Bork ultimately praised *Brown* as being a “splendid vindication[] of human freedom.”<sup>277</sup> In another pro-*Brown* statement, he proclaimed that “as a matter of fact separate is never going to be equal in the area of race.”<sup>278</sup> Bork also spoke out in favor of *Loving v. Virginia*,<sup>279</sup> in which the Court overturned a statute forbidding interracial marriage,<sup>280</sup> and *NAACP v. Alabama*, where the Court determined that the state could not force the NAACP to disclose its membership lists because it could hamper the group’s ability to engage in political advocacy.<sup>281</sup> Such statements indicate that Bork could have been a pro-civil rights judge who truly believed that racial classifications are, in his own words, “invidious.”<sup>282</sup>

However, other evidence points to Bork being much less sympathetic toward civil rights causes. Situations where civil rights interests interfered with business decisions received particular ire from him.<sup>283</sup> He spoke out against legislation forbidding racial discrimination by owners of public accommodations, primarily on the grounds that forcing establishments to accept people of all races would injure the “personal liberty” of business owners.<sup>284</sup> Bork saw no need for courts to impose their

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275. *Id.* at 589–92.

276. *See* Born, *supra* note 5, at 76.

277. *Id.* Contrast this with Scalia, for example, who has said that he considers *Brown v. Board of Education* to be a negative example of judicial activism. *See* Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER (Mar. 28, 2005), [http://www.newamerica.net/publications/articles/2005/supreme\\_confidence](http://www.newamerica.net/publications/articles/2005/supreme_confidence); Adam Liptak, *From 19th-Century View, Desegregation Is a Test*, N.Y. TIMES (Nov. 9, 2009), <http://www.nytimes.com/2009/11/10/us/10bar.html>.

278. Born, *supra* note 5, at 76 (quoting League of Women Voters Education Fund, *The Constitution and the Courts: A Bicentennial Discussion Guide* (May 24, 1987)).

279. *Id.*

280. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

281. 357 U.S. 449, 466–67 (1958).

282. Born, *supra* note 5, at 76.

283. *See, e.g.*, David Broder, *Appraising the Judge, Not the Theorist*, CHI. TRIB. (Sept. 20, 1987), [http://articles.chicagotribune.com/1987-09-20/news/8703110251\\_1\\_judge-robert-h-bork-supreme-court-warren-court](http://articles.chicagotribune.com/1987-09-20/news/8703110251_1_judge-robert-h-bork-supreme-court-warren-court) (stating that in the midst of a bitter civil rights struggle, Bork was worried about limiting the property rights of white business proprietors); Gillers, *supra* note 5, at 36–37 (describing Bork’s tendency to favor business entities over individuals in civil rights disputes on the grounds that civil rights laws restrict the “freedom” of tradespeople); *His Bill of Rights Is Different*, *supra* note 236.

284. *See* Gillers, *supra* note 5, at 36.

view on the “preferences” of businesses in excluding certain racial groups—or any other class of people—from their midst.<sup>285</sup>

Bork also developed a particularly narrow view of the Equal Protection Clause. Not long before his death, he said that the Clause should not apply to women at all.<sup>286</sup> “They aren’t discriminated against anymore,” he stated in a 2012 interview.<sup>287</sup> For decades, he argued that the Equal Protection Clause is far too expansive for the nation’s own good.<sup>288</sup> To Bork, the open-ended language of the Clause became a blank check for improper judicial lawmaking, with judges affording special protection to certain groups “justified only by the sentimentalities or the morals of the class to which these judges and their defenders belong.”<sup>289</sup> Until his last day, he advocated for a much more restrictive use of this constitutional provision. “The poor and the minorities have had access to the political process and have done very well through it,” he wrote in one particularly outspoken article, noting that they were granted protection through “civil rights laws of all kinds.”<sup>290</sup>

Often, Bork argued that the government, including the judicial branch, tries to enforce a sense of morality in their laws and court decisions that favor minorities.<sup>291</sup> His distaste for such “moral” interpretations of the Constitution were at the core of his criticisms of cases such as *Oregon v. Mitchell*, which allowed Congress to forbid states to use literacy tests as a requirement to vote,<sup>292</sup> and *Shelley v. Kraemer*, which invalidated covenants that prevented members of a particular race from purchasing particular properties.<sup>293</sup> And it formed the backbone of his statements against the Civil Rights Act of 1964:

The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into

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285. *See id.*

286. Grove, *supra* note 67.

287. *Id.*

288. *See, e.g.*, Reginald Stuart, *Bork Denies Switcheroos*, PHILA. DAILY NEWS (Sept. 18, 1987), [http://articles.philly.com/1987-09-18/news/26212144\\_1\\_bork-nomination-judge-bork-robert-h-bork](http://articles.philly.com/1987-09-18/news/26212144_1_bork-nomination-judge-bork-robert-h-bork); GROSS & VIEIRA, *supra* note 125, at 81–86; DEAN, *supra* note 239, at 141 (quoting constitutional law scholar Herman Schwartz); *Neutral Principles*, *supra* note 167, at 11–16; *His Bill of Rights Is Different*, *supra* note 236.

289. Gillers, *supra* note 5, at 46.

290. Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L. Q. 695, 701 (1979).

291. *See, e.g.*, Robert H. Bork, *Civil Rights—A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 21; Gillers, *supra* note 5, at 37.

292. *See* Gillers, *supra* note 5, at 39.

293. *Id.*; *see also* *Neutral Principles*, *supra* note 167, at 15–17; Born, *supra* note 5, at 81–82 (defending Bork’s critique of *Shelley* on the grounds that the decision was “overbroad”).

more righteous paths. That is itself a principle of unsurpassed ugliness.<sup>294</sup>

Bork also opposed affirmative action policies in the workplace and in higher education. “The merit of the individual and the efficiency with which society accomplishes its work will be ideals submerged in a new ethos of group entitlement,”<sup>295</sup> Bork wrote in one of his critiques of *Regents of the University of California v. Bakke*, the first case to comprehensively discuss the legal merits of affirmative action policies in universities. “It is a thoroughly bad idea, and one wishes it had not been encouraged by *Bakke*.”<sup>296</sup>

In the last years of his life, though, perhaps no specific area of civil rights received greater condemnation from Bork than the so-called “gay rights” cases. “The Court’s ongoing campaign to normalize homosexuality—creating for homosexuals constitutional rights to special voting status and to engage in sodomy—leaves little doubt that the Court has set its course for a right to marry,” Bork wrote in 2004. “This is but one of a series of cultural debacles forced upon us by judges following no law but their own predilections. This one, however, will be nuclear.”<sup>297</sup> He went on to state that any future case permitting same-sex couples to marry would “rival *Roe v. Wade*” in the realm of “judicial incontinence.”<sup>298</sup> Such remarks were characteristic of Bork’s commentaries about the judiciary’s recognition of homosexuals as a potentially constitutionally protected class.<sup>299</sup>

On the D.C. Circuit, Bork’s opinion in the case of *Dronenburg v. Zech*<sup>300</sup> clearly articulated where Bork stood on the issue of “homosexual rights.” The case involved a sailor who had been discharged from the Navy solely on the basis of his homosexuality.<sup>301</sup> Writing for the court, Bork opined that the Navy had breached none of the sailor’s constitutional rights

294. *Civil Rights—A Challenge*, *supra* note 291, at 22.

295. See Philip Lentz, *Washington Rips Bork’s Affirmative Action Stand*, CHI. TRIB. (July 8, 1987), [http://articles.chicagotribune.com/1987-07-08/news/8702200002\\_1\\_affirmative-action-judge-robert-bork-supreme-court](http://articles.chicagotribune.com/1987-07-08/news/8702200002_1_affirmative-action-judge-robert-bork-supreme-court) (describing the protests against Bork’s stance on affirmative action during the Senate confirmation hearing).

296. Robert H. Bork, *A Murky Future*, AM. ENTERPRISE INST. J. ON GOV’T AND SOC’Y, Sept.–Oct. 1978, at 39, available at <http://www.cato.org/pubs/regulation/regv2n5/v2n5-5.pdf>.

297. Robert H. Bork, *Judges Following No Law*, FIRST THINGS, Aug. 1, 2004, available at [http://web.archive.org/web/20130415163852/http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=3427](http://web.archive.org/web/20130415163852/http://www.hudson.org/index.cfm?fuseaction=publication_details&id=3427).

298. *Id.*

299. For instance, in *The Tempting of America*, Bork stated that cases involving homosexuals should receive only the low-threshold rational basis review, and that “social treatment of homosexuals is based on moral concerns and it would be difficult to say that the various moral balances struck are unreasonable.” THE TEMPTING OF AMERICA, *supra* note 16, at 150.

300. 741 F.2d 1388 (D.C. Cir. 1984).

301. *Id.* at 1389.

by discharging him because of his sexual orientation.<sup>302</sup> “We conclude, therefore, that we can find no constitutional right to engage in homosexual conduct and that, as judges, we have no warrant to create one,” Bork wrote.<sup>303</sup> Given that the Navy’s policy was rationally related to the permissible end of enforcing moral standards in their branch of the military, the discharge was perfectly acceptable.<sup>304</sup>

During his six years on the D.C. Circuit, Bork decided a mixed bag of civil rights cases. A study of these decisions noted that Bork “voted for one or more civil rights claims in seven out of the nine decisions he has rendered involving substantive interpretations of civil rights law protecting minorities or women.”<sup>305</sup> However, *Dronenburg* was conspicuously absent from this analysis. Also missing from this discussion of Bork’s voting record were telling cases such as *Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co.*, where Bork held that a company could require women to be sterilized as a condition for working there, as the quantity of lead in the air could endanger the fetuses of pregnant women.<sup>306</sup> Thus, it appears that Bork’s overall stance on civil rights issues was not as tilted toward individual protections as this particular study indicates.

It would be unjust to denounce Bork as a total foe of civil rights interests. However, based on the discussion in this section, it is also clear that Bork took a very limited view of civil rights issues. The question remaining to be answered, though, is whether that viewpoint would have altered the stance taken by the Supreme Court on the civil rights cases discussed in this section.

### 3. The Bork Effect

This analysis begins with a look at the “gay rights” cases that Bork disparaged in his writings and speaking engagements. There is little doubt that Bork would have voted to uphold the Colorado statute in *Romer v. Evans* and to uphold the law against homosexual sodomy in *Lawrence v. Texas*—the exact opposite of how Kennedy voted in these cases.<sup>307</sup> Ultimately, both outcomes would have been unchanged if Bork were on the

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302. *Id.* at 1397–98.

303. *Id.* at 1397.

304. *Id.* at 1398.

305. Born, *supra* note 5, at 79.

306. 741 F.2d 444, 450 (D.C. Cir. 1984). Bork noted that the women in this factory were “put to a most unhappy choice,” but that the law in question left the court with no alternative decision. *Id.* at 450. Most likely, this case was not included in the analysis in Born’s article because the statute in question was the Occupational Safety and Health Act, not the Civil Rights Act. Still, this case certainly seems to show some insights into Bork’s civil rights views, including his deference to business interests.

307. *Romer v. Evans*, 517 U.S. 620, 623–36 (1996); *Lawrence v. Texas*, 539 U.S. 558, 562–79 (2003).

Court instead of Kennedy, but both would be much closer decisions than they were with Kennedy on the Court.<sup>308</sup>

On the other hand, Bork's decision in *Dronenburg* strongly indicates that he would have voted to permit the Boy Scouts to expel the homosexual scoutmaster based on their organization's moral principles.<sup>309</sup> This is the same way that Kennedy voted in the *Boy Scouts of America* case,<sup>310</sup> leaving this decision unbothered by Bork's presence.

In *Grutter v. Bollinger*, Bork's adamant dislike of affirmative action policies in general,<sup>311</sup> and of the *Bakke* case in particular, would have led him to vote against using race-based criteria in university admissions. His overall vote would have been the same as Kennedy's vote in this case,<sup>312</sup> leaving the decision unchanged. However, it is unlikely that Bork would have included Kennedy's qualification that race is a legitimate criterion in admissions under certain circumstances. Instead, a dissent written or joined by Bork probably would have specified that race had no place at all in the admissions decisions of universities.

The *Automobile Workers* case centered on the Civil Rights Act of 1964, a law against which Bork objected strenuously.<sup>313</sup> It also concerned a situation in which the judiciary could impinge on a workplace policy, something of which Bork had traditionally been quite wary.<sup>314</sup> Additionally, his decision in the *Oil, Chemical and Atomic Workers* case also shows that Bork was not shy about upholding strident workplace regulations for the purpose of protecting the health of a woman's fetus.<sup>315</sup> Thus, there is a good chance that Bork would have become the lone dissenter in this case, holding that the company's "fetal-protection plan" did not violate the Civil Rights Act and should be allowed to continue unimpeded by the courts. While it would not change the decisive outcome of the case, Bork's dissent would have undoubtedly shown that there were fault lines on the Court regarding the legitimacy of the Civil Rights Act.

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308. *Romer v. Evans* would move from a 6–3 decision to a 5–4 decision in favor of striking down the Colorado law. *Lawrence v. Texas* would become an even closer case, with a plurality of four Justices favoring the anti-sodomy law, four Justices looking to strike it down on Due Process grounds, and Justice O'Connor looking to strike down the law on Equal Protection grounds. Ultimately, though, the statute would still be overturned by this decision.

309. As with *Dronenburg*, Bork would likely base this finding on the notion that there is no constitutionally protected right to engage in homosexual conduct. Thus, the Boy Scouts would only need to show a rational relationship between their policy and a legitimate interest in order for Bork to uphold the policy, just as he did in *Dronenburg*.

310. 530 U.S. at 640, 644.

311. See *supra* note 296.

312. *Grutter v. Bollinger*, 539 U.S. 306, 387–95 (2003) (Kennedy, J., dissenting).

313. See, e.g., *supra* note 291.

314. Indeed, this was Bork's primary fear with civil rights laws preventing establishments from prohibiting clientele on the basis of race or other discriminatory factors. See *supra* note 283.

315. 741 F.2d 444, 450 (D.C. Cir. 1984).

With *Ricci v. DeStefano*, Bork again would have been confronted by the workings of the Civil Rights Act of 1964. This time, though, he would have had the opportunity to use the Civil Rights Act *against* a city employing tactics that Bork probably would have deemed to be a form of “reverse discrimination.” Most likely, he would have found—as Kennedy did—that there was no “strong basis in evidence” for throwing out the test results and that the city had discriminated against the non-minority firefighters as a result.<sup>316</sup> The decision would have therefore remained unchanged if Bork were on the Court rather than Kennedy.

Finally, there is the case of *Bragdon v. Abbott*, the matter involving the dentist who refused to fill the cavity of an HIV-positive patient.<sup>317</sup> Bork’s views regarding the ADA, the centerpiece of this decision, were unclear. However, Bork’s history shows that when the interests of a commercial enterprise are at issue, the business concerns tended to win out over individual civil rights concerns.<sup>318</sup> On balance, therefore, it seems likely that Bork would have ruled in favor of the dentist rather than the HIV-positive plaintiff. The potential health risk of HIV transmission to dentists identified by Rehnquist in his dissent<sup>319</sup> probably would have given Bork the opening that he needed to justify a ruling in the dentist’s favor. This would have caused a total upheaval of the decision. Without Kennedy’s vote, and with Bork voting against the plaintiff, Rehnquist would have gained the necessary five votes to control the Court.<sup>320</sup> The dentist would not have been found to be in violation of the ADA, and the case would likely have been remanded to a lower court for reconsideration.<sup>321</sup>

## CONCLUSION

The nomination of Robert Bork for a Supreme Court seat provoked perhaps the hardest-fought battle in American history over a judicial nominee. Twenty-five years after his rejection by the Senate, there is no doubt that Bork remained a magnet for controversy until—and even

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316. *Ricci v. DeStefano*, 557 U.S. 557, 561–93 (2009).

317. 524 U.S. 624, 624 (1998).

318. *See supra* note 283. For a discussion of the case’s potential impact on businesses, see Terri M. Solomon, *Supreme Court’s HIV Ruling May Have Broad Implications for Employers*, FINDLAW (Mar. 26, 1998), <http://corporate.findlaw.com/litigation-disputes/supreme-court-s-hiv-ruling-may-have-broad-implications-for.html>.

319. *See Bragdon*, 524 U.S. at 661–64 (Rehnquist, C.J., dissenting).

320. The five would be: Bork, Rehnquist, Thomas, Scalia, and O’Connor. Importantly, though, O’Connor and Rehnquist differ slightly on their rationale for finding that the dentist’s actions did not violate the ADA. *See id.* at 664–65 (O’Connor, J., dissenting).

321. This is the outcome called for by both the Rehnquist dissent and the O’Connor dissent. Both say that remand is necessary to determine whether the HIV-positive patient’s condition really constituted a “direct threat.” *Id.*, 524 U.S. at 663–64 (Rehnquist, C.J., dissenting); 664–65 (O’Connor, J., dissenting).

beyond—his death, never bashful about asserting his views about the law, the judiciary, and the present direction of the United States.

This review of Bork's scholarship and jurisprudence reveals that Bork would have left an undeniable impact on the Supreme Court if he, not Kennedy, had replaced Justice Powell. Connecting the dots, it seems evident that Bork would have repeatedly held that a woman has no constitutional right to an abortion, probably ultimately leading to the overturning of *Roe v. Wade*. He would have fought for a more limited right to freedom of speech than Kennedy's First Amendment jurisprudence recognizes, basing his decisions in this area largely on whether the speech in question was connected to the political process.

He probably would have found that the Second Amendment does indeed include an individual's right to bear firearms and use them for traditionally lawful purposes, and that this right extends to the states through the Fourteenth Amendment. And he likely would have authored many outspoken opinions—both in the majority and in dissent—calling for strict limitations on applications of the Equal Protection Clause, the Civil Rights Act of 1964, and other pieces of civil rights legislation. In particular, he would have demanded especially rigorous limits regarding the rights of women and homosexuals, the ability of universities and businesses to engage in affirmative action, and the power of the courts to interfere with policies set by private businesses—opinions that would have often differed from Kennedy's decisions.

Of course, this is all merely informed speculation. Yet it does provide a sense of what might have been if Robert Bork, rather than Anthony Kennedy, sat on the Supreme Court bench for the last quarter of a century. Whether these predicted results would have been as great as President Ronald Reagan believed, or as drastic as Senator Edward Kennedy feared, is solely up to you, the reader, to decide.

More importantly, though, this Article illustrates the tremendous power that the President of the United States wields when appointing a justice to the Supreme Court for life, as well as the tremendous impact of the Senate's ultimate vote to confirm or deny the nominee. The absence of this one man on the Supreme Court altered the course of history. America's legal portrait over the last quarter of a century likely would have been quite different in key areas simply because of this particular judge's vote. This underscores the ability of the Court to shape America's laws, and the ability of one person to shape the overall direction of the Court. Today, at a time when the President of the United States could soon have the opportunity to nominate a new candidate for the Supreme Court,<sup>322</sup> the magnitude of this decision is worth remembering.

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322. See Vincent M. Bonventre, *Court Elders: The Septuagenarian Justices (Part One)*, N.Y. COURT WATCHER (Nov. 21, 2012), <http://www.newyorkcourtwatcher.com/2012/11/court-elders-septuagenarian-justices.html>.