

WAS BORK RIGHT ABOUT JUDGES?

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The American public first met Robert Bork during the 1987 Senate Judiciary Committee hearing that considered his nomination to the Supreme Court. Compared with more recent judicial confirmations, the Bork hearing was highly dramatic. Most are aware of its outcome, which led to an addition to the English language: “bork”—meaning to “[d]efame or vilify (a person) . . . esp[ecially] with the aim of making it difficult for him or her to hold public office.”¹ Few are familiar, however, with Judge Bork’s distinguished career before that contentious and transformative hearing.

Robert Bork had been a tenured professor at Yale Law School, authored a watershed book that shifted the paradigm of antitrust law and helped make possible our comfortable standard of living,² served as Solicitor General of the United States, and worked as a federal appellate judge on the D.C. Circuit, the court on which I now sit. I am reminded of Judge Bork’s legacy every time I don my robe. My locker in the robing room is across a narrow aisle from his, which is marked by a brass plate that bears his name. Once robed, I enter a courtroom in which his portrait—a Rembrandt-like rendition of the Judge in which he appears broodingly omnipresent—hangs. He is watching, and that is fine by me.

I first became aware of Robert Bork during my first year of law school. I remember the moment when I pulled Volume 47 of the *Indiana Law Journal* from a shelf in the library at the University of Virginia and began reading his classic article, *Neutral*

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1. 1 SHORTER OXFORD ENGLISH DICTIONARY: ON HISTORICAL PRINCIPLES 271 (6th ed. 2007).

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

Principles and Some First Amendment Problems.³ I do not want to make too much of the moment. No heavenly choir or rushing wind accompanied my reading, but I found Judge Bork's approach to the Constitution, and more particularly to the role of judges in our democratic republic, immensely satisfying.

Consider a quick summary of Judge Bork's views, cobbled together from his writings with some editorial license on my part:

The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do . . . some areas of life in which the individual must be free of majority rule.⁴

In these latter areas, majorities cannot rule, "no matter how democratically [they] decide[] to do [so]. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny."⁵ The structure of the Constitution places the all-important "function of defining the otherwise irreconcilable principles of majority power and minority freedom in a nonpolitical institution, the federal judiciary."⁶ Placing this function with the courts creates "the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic."⁷ For that reason, "[i]t is as important to freedom to confine the judiciary's power to its proper scope as it is to confine that of the President, Congress, or state and local governments. Indeed, it is probably more important, for only courts may not be called to account by the public."⁸

In Judge Bork's view, courts will not confine themselves to their proper (nonpolitical) role as guardians of the delicate balance between majority rule and individual liberty unless they

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

4. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139 (1990) [hereinafter BORK, *THE TEMPTING*].

5. Bork, *Neutral Principles*, *supra* note 3, at 3.

6. BORK, *THE TEMPTING*, *supra* note 4, at 139.

7. Bork, *Neutral Principles*, *supra* note 3, at 2.

8. BORK, *THE TEMPTING*, *supra* note 4, at 141.

have a firm understanding of the proper scope of judicial power under the Constitution.⁹ Here, Judge Bork relies on the seminal article by Professor Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*,¹⁰ originally delivered as the 1959 Oliver Wendell Holmes Lecture at the Harvard Law School. According to Wechsler, “the deepest problem of our constitutionalism” is laid bare when courts function as a “naked power organ.”¹¹ This problem occurs when a judge, who is supposed to apply the law, “lets his judgment turn on the immediate result”¹²—that is, whether the outcome advances a cause he personally favors as a citizen. To avoid this problem, Wechsler insists that judges must resolve the cases before them according to “neutral principles—by standards that transcend the case at hand.”¹³

But what is wrong with a results-oriented approach? Why should I, having long embraced political conservatism and having been active as a Republican for much of my adult life before I was appointed to the court, not use my position as a federal judge to advance those outcomes I believe would best promote the common good? The reason, Bork tells us, is that doing so would undermine the very constitutional structure I have sworn by oath to uphold and defend.

[T]he Court’s power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.¹⁴

Rather than impose their own value determinations in every case, judges must derive, define, and apply generally applicable neutral principles gleaned from authoritative legal texts.¹⁵ In

9. See Bork, *Neutral Principles*, *supra* note 3, at 2.

10. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

11. *Id.* at 12.

12. *Id.*

13. *Id.* at 17.

14. Bork, *Neutral Principles*, *supra* note 3, at 3.

15. See *id.* at 7. In contrast to Judge Bork’s neutral-principles approach, some believe that ideological concerns predominate in judicial decisionmaking. A recent article in

short, according to Judge Bork, the structure of the Constitution, which places the lawmaking function with We the People, through elected representatives, demands that judges be neutral.

Judge Bork's approach is a fundamental tenet of mainstream conservative thought regarding the role of a judge, but it is also a view held by many who are not political conservatives. For example, this charge to judges came from Justice Thurgood Marshall:

We must never forget that the only real source of power that we, as judges, can tap is the respect of the people. We will command that respect only as long as we strive for neutrality. If we are perceived as campaigning for particular policies, as joining with other branches of government in resolving questions not committed to us by the Constitution, we may gain some public acclaim in the short run. In the long run, however, we will cease to be perceived as neutral arbiters, and we will lose that public respect so vital to our function.¹⁶

In my experience, embracing Judge Bork's views about the role of a judge did not raise an eyebrow in a Senate that was divided over the confirmation of President George W. Bush's judicial nominees. During an interview with a key member of Senator Tom Daschle's leadership staff—someone who had been described to me as the architect of the Democratic filibuster strategy that I hoped to avoid—I thought myself a profile in courage for proclaiming that I was a judicial conservative whose views on the role of a judge had been formed in large measure by the writings of Judge Bork. To my surprise, the Senate treated my

the *New York Times* suggested as much when reporting the results of two academic analyses of the Court's decisions, each of which charted what the *Times* author claimed was a marked rightward shift under Chief Justice Roberts. See Adam Liptak, *The Most Conservative Court in Decades: Under Roberts, Center of Gravity Has Edged to the Right, Analyses Show*, N.Y. TIMES, July 25, 2010, at 1. The metrics used in the studies are striking. In the first analysis, the scholars assumed that "[a]lmost all judicial decisions . . . can be assigned an ideological value. Those favoring . . . prosecutors and employers are said to be conservative, while those favoring criminal defendants and people claiming discrimination are said to be liberal." *Id.* In the second analysis, researchers took a similar approach: "[V]otes favoring criminal defendants, unions, people claiming discrimination or violation of their civil rights are, for instance, said to be liberal. Decisions striking down economic regulations and favoring prosecutors, employers and the government are said to be conservative." *Id.*

16. Justice Thurgood Marshall, *The Importance of Judicial Neutrality*, Address at the Second Circuit Judicial Conference (May 8, 1981) in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 187, 189 (Mark V. Tushnet ed., 2001).

confession, which I feared might sink my chances of garnering bipartisan support, as something quite unexceptional.

Judge Bork's view of the judicial role, however, is inconsistent with the views of many in the academy and the media, and some prominent political figures. On the political left, Professor Ronald Dworkin argues that "judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement. . . . [And] the rest of us must accept the deliverances of a majority of the justices."¹⁷ On the political right, Judge Richard Posner contends that pragmatic judges should resolve hard cases in light of *their* best judgments of a fair and sensible outcome.¹⁸ Newspaper accounts of controversial decisions invariably name the president who appointed the presiding judge as if to provide an explanation for the case's outcome. Some in the media likely thought my appointment by President Bush was a sufficient explanation for my vote to strike down the District of Columbia's gun control laws as a violation of the Second Amendment,¹⁹ even though my personal policy preferences before becoming a judge favored government regulation of gun ownership. Why else would press accounts of the panel decision have identified me as a Bush appointee?²⁰

During the most recent presidential campaign, then-Senator Barack Obama vowed to appoint judges who had "the heart, the empathy, to recognize what it's like to be a young teenage mom The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old."²¹ Who could

17. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 383 (1992).

18. See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 242 (1999); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 4 (1996).

19. See *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

20. See, e.g., Robert A. Levy, Op-Ed., *A Victory for Self-Defense: In the D.C. Gun Law Case, a Chance to Affirm the Second Amendment*, WASH. POST, Mar. 12, 2007, at A13 ("Senior Judge Laurence H. Silberman wrote the majority opinion, joined by Judge Thomas B. Griffith, a recent Bush appointee."); David Nakamura & Robert Barnes, *D.C.'s Ban On Handguns In Homes Is Thrown Out: Fenty Promises to Fight Appellate Court's Ruling*, WASH. POST, Mar. 10, 2007, at A1 ("Silberman, a staunch conservative, was nominated to the appellate court by President Ronald Reagan, and Griffith was nominated by President Bush.").

21. Robert Barnes, *Conservative Federalist Society Can Expect Its Status to Shrink*, WASH. POST, Nov. 21, 2008, at A21.

quarrel with empathetic judges? I will not, if the sense is that we prefer nice people to mean people on our courts, or if “empathy” means a commitment to understanding the arguments of all parties in a dispute. I will quarrel, however, if the sense is that empathy will lead a judge to side with the disadvantaged, or the privileged for that matter (depending on which way one’s empathy runs), in the face of law that requires a different outcome. You may recall what Chief Justice Roberts said about this issue at his confirmation hearing:

I had someone ask me in this process . . . “Are you going to be on the side of the little guy?” And you obviously want to give an immediate answer, but as you reflect on it, if the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win, well, then, the big guy is going to win, because my obligation is to the Constitution. That’s the oath.²²

Before then-Judge Sonia Sotomayor’s confirmation, some observers, relying on past statements,²³ suggested that she believed that a judge who had experienced racial discrimination might be more inclined to side with minorities. When asked to explain her judicial philosophy, however, then-judge Sotomayor responded: “[S]imple: fidelity to the law. The task of a judge is not to make the law—it is to apply the law.”²⁴ According to Sotomayor, her record reflected a “rigorous commitment to interpreting the Constitution according to its terms; interpreting statutes according to their terms and Congress’s intent; and hewing faithfully to precedents established by the Supreme Court and [her] Circuit Court.”²⁵ Some in the legal academy derided Judge Sotomayor’s decidedly Borkian philosophy as a “fairy tale” definition of judging that does not account for “what

22. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 448 (2005) [hereinafter Roberts Hearing] (answer of John G. Roberts, Jr. to question posed by Sen. Richard Durbin).

23. See Alec MacGillis et al., *Sotomayor Speeches Woven with Ethnicity: High Court Nominee Criticized Stereotypes*, WASH. POST, June 5, 2009, at A1.

24. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1344 (2009) (statement of Sonia Sotomayor).

25. *Id.*

courts actually do and what constitutional law consists of.”²⁶ Yet, Elena Kagan adopted a similar approach in her recent Supreme Court confirmation hearing. When Senator Jon Kyl asked Kagan if she agreed that the law only decides ninety-five percent of cases, with the remaining five percent decided by “what is in the judge’s heart, or the depth and breadth of a judge’s empathy,” she replied: “[I]t’s law all the way down.”²⁷ Describing her method of constitutional interpretation, Kagan stated, “if it’s a Constitutional question, it’s what the text of the Constitution says, it’s what the history says, the structure, the precedent. But what the law says, not what a judge’s personal view [is].”²⁸

Perhaps Judge Bork’s (and Justices Sotomayor’s and Kagan’s) view does not describe what judges do in every instance, but I am convinced it describes what they *should* and *must* do. Otherwise, courts will fail to fulfill their constitutional responsibility, thereby diminishing the liberty of We the People, to make law.

The great Judge Learned Hand told the story of a revealing exchange with Justice Oliver Wendell Holmes Jr.:

I remember once I was with [Justice Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: “Well, sir, goodbye. Do justice!” He turned quite sharply and he said: “Come here. Come here.” I answered: “Oh, I know, I know.” He replied: “That is not my job. My job is to play the game according to the rules.”²⁹

The “game,” as Justice Holmes called it, is the resolution of disputes properly before the courts. The “rules” are the constitutional limits that define the role of judges.

The reflection of Peter Edelman—law professor at Georgetown, famed civil rights warrior of the sixties, and tireless advocate for the poor—on his clerkship with Justice Arthur

26. Peter Baker & Charlie Savage, *Groundwork For Next Time: Sotomayor’s Hearing is Setting a Standard*, N.Y. TIMES, July 16, 2009, at A1 (quoting Georgetown University Law Center Professor Louis Michael Seidman) (internal quotation marks omitted).

27. *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, WASH. POST., June 29, 2010, at 34, <http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf> (answer of Elena Kagan to question posed by Sen. Jon Kyl).

28. *Id.* at 9 (answer of Elena Kagan to question posed by Sen. Jeff Sessions).

29. Learned Hand, *A Personal Confession*, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 302, 306–07 (Irving Dilliard ed., 3d ed. 1960).

Goldberg is one measure of how much the legal terrain has changed in a relatively short period of time:

Working for [Justice Goldberg] was an eye-opening experience. His first question in approaching a case always was, "What is the just result?" Then he would work backward from the answer to that question to see how it would comport with relevant theory or precedent. It took me a while to get used to that approach. The way I had learned the law at Harvard was that you looked up the answer in a book. The law was composed of "neutral principles" that you could apply to get the proper result, and you never really asked whether it was just or not. Justice Goldberg opened my consciousness to the fact that the overarching purpose is about justice.³⁰

I have my own story about the changed legal terrain. The day after the Senate confirmed my nomination to the D.C. Circuit, I was the happy recipient of many congratulatory messages. One such message came from a former law partner who had clerked on both the D.C. Circuit and the Supreme Court, and whose judgment I valued. "Tom," he asked, "may I give you some advice about being a judge?" Eager to learn, I anxiously waited to hear what he had to say. He said:

The first day of my clerkship on the D.C. Circuit, my judge told me, "This is how we go about our work: We learn the facts of the case, then we think long and hard about the fair outcome, the equitable disposition, the just result. Finally, we go find law to support our conclusion." From what I have observed, that is how most judges go about their work, and rightly so.

Because the call's purpose was congratulatory, and not an invitation to engage in an extended discussion of the role of a judge under the Constitution, I thanked him for his words. But as I hung up the phone, I took a vow that I would never follow my friend's advice.

On their first day in chambers, I tell my law clerks that We the People, exercising the most fundamental political liberty protected by the Constitution, have elected representatives who make the laws that express the value choices by which we govern our society. Professor Akhil Reed Ahmar accurately observes that: "No liberty was more central than the people's liberty to govern

30. Tim Wells, *Legends in the Law: A Conversation with Peter B. Edelman*, WASH. LAW., Apr. 2008, at 29.

themselves under rules of their own choice”³¹ When a federal judge is called upon to resolve a dispute, he must first understand the nature of the dispute (on this count my friend’s advice was sound), and then he must determine the value chosen by We the People, through elected representatives, that governs the disposition of the case. That value is expressed in law. And the judge must apply *that* value—*that* determination of what is right, what is wrong, what is useful, what is not, what is fair, what is just—to resolve the dispute. The one thing a judge must never do under our Constitution is replace the value choice made by the American people and expressed in the Constitution, statutes, and regulations with his own sense of the right, regardless of how well developed his sense might be.

Any judge will be tempted on occasion to substitute his own policy determination for the choice made by the American people because sometimes their choice is wrong-headed, unjust, or unfair. But it is simply not the role of a judge to correct the American people’s mistakes. As Chief Justice Roberts told the Senate, “[Judges] do not have a commission to solve society’s problems, as they see them, but simply to decide cases before them according to the rule of law.”³²

A judge’s use of his own highly developed and nuanced sense of right and wrong to resolve cases bypasses the Constitution’s carefully prescribed method of making law, which provides lawmaking roles for the Congress (bicameral passage) and the President (presentment for approval or veto) but leaves out the judiciary altogether.³³ That process of making law is itself an expression of fundamental values. The Founders’ choice of bicameralism and presentment reflects their fundamental distrust of any group of self-interested citizens making rules to govern the conduct of others. Allowing those rules to be made by judges, whose life tenure and salary protection insulate them from most forms of political accountability to We the People, would betray the careful process created by the Constitution, which gives that power only to elected representatives.

Finally, I will address judicial humility, an indispensable temperament for a judge in our system. Often, the judicial of-

31. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 10 (2005).

32. *Roberts Hearing*, *supra* note 22, at 121A (response of John G. Roberts, Jr. to S. Comm. on the Judiciary Questionnaire).

33. *See* U.S. CONST. art. I, § 7.

rice does not connote humility in the public's mind; indeed, judges and humility do not seem to belong together. To borrow the imagery of Christopher Buckley, putting them together "is like fitting wings on a pig: You and the pig look ridiculous, and the pig still isn't going to fly."³⁴ In contrast to Professor Dworkin's view that judges must answer the great questions that have been debated throughout history, Justice Felix Frankfurter insisted that judges must abide by the "duty of restraint, th[e] humility of function as merely the translator of another's command."³⁵ Even if it is correct that liberty involves defining the "concept of existence, of meaning, of the universe, and of the mystery of human life,"³⁶ defining those concepts plainly exceeds the role of a judge.

Professor Gordon Wood, scholar of the intellectual history of the founding of the American republic, described our traditional unease with what some now call "activist judges":

From the very beginning of our colonial history we Americans have struggled over the role of the judiciary. Indeed, one of the major complaints of the American colonists against royal authority in the eighteenth century was the extraordinary degree of discretion exercised by royal judges. At the Revolution in 1776 Americans sought to severely limit this judicial discretion. . . . The aim, as Jefferson put it, was to end "the eccentric impulses of whimsical, capricious designing man" and to make the judge "a mere machine."³⁷

As a graduate of Mr. Jefferson's University, I hold him in high regard (though he has had a tough decade on the reputational front). His characterization of an ideal judge, however, goes several steps too far. I much prefer the view advanced by Professor Brett Scharffs:

When authoritative texts or precedents are on point, a humble judge will be more inclined to follow those authorities, while a less humble judge will be more inclined to . . . implement her own vision of what is right. . . . Following the

34. Christopher Buckley, Op.-Ed., *Let's Keep the Pol in Politics*, N.Y. TIMES, Feb. 4, 1997, at A23.

35. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 534 (1947).

36. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

37. Gordon S. Wood, *Comment* in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 49–50 (Amy Gutmann ed., 1997).

law places a judge in a role that is, in large part, clerical, where he labors largely as a functionary, applying and implementing the law. To be sure, the volume, variety, and complexity of the issues that a judge encounters make[] his work difficult, but the judge's primary task is to find and follow the law.³⁸

I would rather be a clerk than a machine.

Furthermore, I have some confidence that with hard work and attention to detail, my colleagues and I can understand the nature of a dispute before us, and that with study and argument we can identify the legal principles that resolve that dispute. I have far less confidence that we can answer the "intractable, controversial, and profound questions of political morality" that Professor Dworkin encourages us to address.³⁹ Leaving aside the issue of whether judges are competent to answer those questions for society, the Constitution clearly does not intend for judges to make those types of controversial decisions. Instead, that decision-making power belongs to We the People. In those areas where the We the People have provided for majority rule, elected representatives decide controversial issues. In those areas where the Founders have safeguarded individual liberty from majority rule, that decision is inviolate. The courts' only role is to resolve disputes properly before them by applying the value choices made by We the People.

No remarks on the role of a judge are complete without reference to the patron saint of lawyers, Saint Thomas More. In *A Man for All Seasons*,⁴⁰ the classic play by Robert Bolt that describes the events leading to More's martyrdom, a colloquy occurs between More and his son-in-law, William Roper—a religious zealot with a passionate and sure sense of morality. Roper and Margaret, More's daughter, have just urged More to seek the arrest of Richard Rich, whose suspicious conduct has raised concern that he might be in league with More's enemies. When More asks about the grounds for Rich's arrest, Margaret replies that Rich is a "bad" man.⁴¹ More and Roper then have the following colloquy:

38. Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 187, 189–90 (1998).

39. Dworkin, *supra* note 17.

40. ROBERT BOLT, *A MAN FOR ALL SEASONS* (Vintage Int'l 1990) (1960).

41. *Id.* at 65.

MORE There is no law against that.

ROPER There is! God's law!

MORE Then God can arrest him.

ROPER Sophistication upon sophistication!

MORE No, sheer simplicity. The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal.

ROPER Then you set man's law above God's!

MORE No, far below; but let me draw your attention to a fact—I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester.⁴²

Despite his piety and erudition, More lacked confidence that he could determine God's will in any matter that would define relative rights and responsibilities among competing claims. Judge Hand captured this sense of humility by quoting Oliver Cromwell: "I beseech ye in the bowels of Christ, think ye may be mistaken."⁴³ Judge Hand also added: "I should like to have [Cromwell's words] written over the portals of every church, every school, and every court house, and, may I say, of every legislative body in the United States."⁴⁴

Lest I be misunderstood, you should know that I have firmly held views about right and wrong, which I call upon to make decisions in my own life, teach my family, and participate actively in my faith and as a citizen of this nation. I do not, however, call upon these views in my work as a judge. My duty as a judge—a duty I have taken a solemn oath to uphold—is to use all the skill I can muster to identify the value choices made by the American people and expressed in law, and then to apply *those* value choices—the legislated morality of We the People—to a dispute before me. When my judicial colleagues and I do that, we reinforce the most fundamental values that undergird the Constitution. Should judges yield to the temptation to

42. *Id.* at 65–66.

43. Notes and Comments, *Learned Hand: 1872–1961*, 71 *YALE L.J.* 108, 108 (1961); see also *THE YALE BOOK OF QUOTATIONS* 336 (Fred R. Shapiro ed., 2006) (quoting Judge Hand's testimony before a Senate committee, June 28, 1951).

44. *THE YALE BOOK OF QUOTATIONS*, *supra* note 43.

apply their own views of what is right and fair and just, no matter how developed they might be, they not only flout the Constitution and violate their oaths of office—significant transgressions in themselves—but also undermine the very foundations of democratic governance. Doing so takes from We the People the liberty that is most fundamental: to create “government of the people, by the people, for the people.”⁴⁵

45. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *in* LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 536 (Don E. Fehrenbacher ed., 1989).