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## **The Constitution: Change and Interpretation**

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# The Constitution: Change and Interpretation

Barry Friedman\*

“any theory worthy of consideration must . . . state an acceptable range of judicial results”<sup>1</sup>

From the 1950s to the 1980s, the Constitution saw terrific change in many areas concerning individual liberties. In response, scholars on the political left and right took widely divergent positions concerning how the Constitution should be interpreted. Neither of these positions found favor with the American public. The left essentially proposed leaving the document itself behind in favor of moral philosophy, a strategy that did not seem like constitutional *law* at all. The right insisted originalism was the only legitimate strategy, but originalism yielded a set of results the public would not accept. In large measure, the public agreed with what the Supreme Court had decided, and accepted the notion of a living Constitution, adaptable to changing circumstances and capable of addressing the felt needs of the times.

During the 1950s and 1960s, the Warren Court decreed sweeping constitutional change. It eliminated racial segregation, imposed dramatic new restraints on police, banned school prayer, decreed reapportionment of legislatures, and handed down many speech-protective First Amendment decisions. The work of the Warren Court was deeply controversial. In general, when it met substantial public opposition, the Warren Court backed off.

The ultimate downfall of the Warren Court was its criminal procedure decisions. Although the public accepted much of this change, when crime rates spiraled in the late 1960s and urban rioting occurred in America’s cities, the public lost its patience. Richard Nixon ran against the Court in 1968, and won.

Nixon came into office with a plan to change not only the Court, but the way it interpreted the Constitution. He vowed to appoint “strict constructionists”—judges who would not “twist or bend the Constitution” to “personal political or social views.”<sup>2</sup> Nixon got four appointments—Burger, Blackmun, Powell and Rehnquist. None was seen as liberal, and each took the pledge to adhere to the Constitution. As Justice Blackmun said during his confirmation hearings, “I personally feel that the Constitution is a document of specified words and construction. I would do my best not to have my decision affected by my personal ideals and philosophy, but would attempt to construe that document in the light of what I feel is its definite and determined meaning.”<sup>3</sup>

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<sup>1</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA* 141 (1991).

<sup>2</sup> The President’s Nationwide Address Announcing His Intentions to Nominate Lewis F. Powell, Jr., and William H. Rehnquist To Be Justices, 7 *WEEKLY COMP. PRES. DOCS.* 1430, 1431 (1971).

<sup>3</sup> Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 *WM. & MARY BILL RTS. J.* 585, 627, fn. 212 (2002).

Despite Nixon's agenda to slow the Court, the Burger/Nixon Court continued the Warren Court's project of social reform. It invalidated existing death penalty statutes in *Furman v. Georgia*,<sup>4</sup> though it later tried to backtrack in the face of hostile public opinion. It established constitutional gender equality. And it created a constitutional right to abortion, grounded in the "privacy" right of *Griswold v. Connecticut*.<sup>5</sup>

The trouble with much of the Warren-Burger agenda was that it was difficult to square with pre-existing conceptions of constitutional meaning. Ruth Bader Ginsburg, then a law professor and women's rights advocate, told a Ford Foundation audience, "It was very clear that the framers of the 14th Amendment did not have women in mind."<sup>6</sup> Indeed, the country rejected the Equal Rights Amendment, which would have enshrined equality for women in text. Yet, in cases like *Reed v. Reed*,<sup>7</sup> *Frontiero v. Richardson*,<sup>8</sup> and *Craig v. Boren*,<sup>9</sup> the Burger Court did much of what the ERA would have. In 1970, Linda Greenhouse was a cub reporter for the New York Times covering early abortion litigation. She wrote "A right to abortion. Such a notion, at first hearing sounds fantastic, illusory. The Constitution is searched in vain for any mention of it. The very phrase rings of the rhetoric of a Women's Liberation meeting."<sup>10</sup>

No case seemed to pose the problem like *Roe v. Wade*.<sup>11</sup> *Roe* came under harsh attack from the "right to life" movement opposed to abortion rights. Yet *Roe* came under equally harsh attack from constitutional scholars of the left, who claimed to support a woman's right to an abortion. Writing scathingly of *Roe* in words that resonated with many, law professor John Hart Ely said the Constitution "simply says nothing clear or fuzzy about abortion." This, he insisted, was "a charge that can responsibly be leveled at no other decision in the past twenty years." As if that were not strident enough, he said *Roe* "is *not* constitutional law and gives almost no sense of an obligation to try to be."<sup>12</sup>

Liberal scholars took on the agenda of justifying the decisions of the Warren and Burger Courts. Scholars like Thomas Grey, Paul Brest, Michael Perry and Ronald Dworkin wrote articles offering interpretive theories. Paul Brest coined the word "originalism" to refer to deciding cases based on constitutional text and the intent of the framers.<sup>13</sup> At the core of these articles—particularly those by Grey and Brest—was a perfectly valid point. This "originalist" methodology could not support much of constitutional law—including everything from the New Deal expansion of federal power, the application of the Bill of Rights to the states, *Brown v. Board of Education*,<sup>14</sup> and more.

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<sup>4</sup> *Furman v. Georgia*, 408 U.S. 238 (1971).

<sup>5</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>6</sup> Ruth Bader Ginsburg and Jane Picker, Discussion of the Equal Rights Amendment at The Ford Foundation 5, May 22, 1972, summary prepared by Lauren Katzowitz.

<sup>7</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>8</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1971).

<sup>9</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>10</sup> Linda Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. TIMES MAGAZINE, Jan. 25, 1970, at 30.

<sup>11</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>12</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 923, 927, 936, 947 (1973).

<sup>13</sup> Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

<sup>14</sup> *Brown v. Board of Education*, 347 U.S. 482 (1954).

But the left-leaning scholars made the odd and ultimately uneasy move of—as one sympathetic commentator called it— “Abandoning the Constitution.”<sup>15</sup> Instead, they argued judges should rely largely on moral philosophy. Paul Brest would have had judges ask, “How well, compared to possible alternatives, does the practice contribute to the well-being of our society—or, more narrowly, to the ends of constitutional government.”<sup>16</sup> Ronald Dworkin, in *Taking Rights Seriously*, said that in interpreting the “vague constitutional provisions” a court “must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.”<sup>17</sup> (Dworkin would later reshape his theory in response to criticism of left-leaning scholars, instead talking of “law as integrity” and condemning activism rather than interpretation.<sup>18</sup>)

It comes as little surprise that this failure to tie interpretation to the text and basis for the Constitution came under attack. Those on the right, troubled by Warren and Burger Court decisions, found an easy target in the theories of the scholarship that defended those decisions on the grounds of moral philosophy. As Attorney General, Edwin Meese III took a swipe at these scholars saying “constitutional adjudication is not primarily a matter of construction at all. They appear to view the United States Constitution as a document virtually without significant meaning.”<sup>19</sup> Gary McDowell is a conservative constitutional scholar who served in the Meese Justice Department. He commented sharply “The question today is not so much how to read the Constitution as *whether* to read the Constitution.”<sup>20</sup>

In contrast with these scholarly efforts, there was a prominent alternative defense of the Warren Court and Burger Court decisions, or at least some portion of them. That was the idea of the “living” Constitution. The idea was that the Constitution would grow over time, largely by adapting in the face of other changes the country was undergoing. This notion of constitutional evolution was like a tic, tripping off the tongues of Burger era judges and commentators. Pauli Murray and Mary Eastwood were activists in the women’s rights movement. In an important law review article, they wrote, “The genius of the American Constitution is its capacity, through judicial interpretation, for growth and adaptation to changing conditions and human values.”<sup>21</sup> In *Harper v. Virginia Board of Elections*, the case invalidating poll taxes, the Supreme Court said, “We have never been confined to historic notions of equality . . . Notions of what constitute equal treatment for purposes of the Equal Protection Clause *do* change.”<sup>22</sup> In *Reed v. Reed*, the first case in which the Supreme Court ruled for women’s equality, Justice Blackmun struggled behind the scenes because he recognized the Fourteenth Amendment “was not intended to meet

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<sup>15</sup> John B. McArthur, *Abandoning the Constitution: The New Wave in Constitutional Theory*, 59 TUL. L. REV. 280 (1984).

<sup>16</sup> Brest, *supra* note 13, at 226.

<sup>17</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 137 (1977).

<sup>18</sup> RONALD DWORKIN, *LAW’S EMPIRE* 378 (1986) (condemning “activism” and insisting that the “justices enforce the Constitution through interpretation, not fiat, meaning that their decisions must fit [existing] constitutional practice, not ignore it”).

<sup>19</sup> Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL’Y 5 (1988).

<sup>20</sup> Gary L. McDowell, *The Politics of Original Intention*, in *THE CONSTITUTION, THE COURTS, AND THE QUEST FOR JUSTICE* (Robert A. Goldwin and William A. Schambra eds., American Enterprise Institute, 1989).

<sup>21</sup> Pauli Murray and Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 237 (1965).

<sup>22</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966).

any sex differentiation when it was adopted a hundred years ago.” Nonetheless, “my own feeling is that these constitutional provisions must have some flexibility and expansiveness in them as, in theory, we ourselves progress and expand in our concepts of equality.”<sup>23</sup> Similarly, on his retirement Justice Powell said “I have been alive eighty of the two hundred years of our Constitution. This country is very young. How can you say the Constitution should be frozen in time, that it is not a living document that must be interpreted?”<sup>24</sup>

Admittedly, the idea of a living Constitution has its difficulties, as does any interpretive theory. One is that it cannot impose sharp constraints on judges. This, however, is a challenge most theories cannot meet, among them originalism. However, the idea does have its appeal. In attacking the notion of the living Constitution, then-Justice Rehnquist conceded: “At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution.” Then, in prescient words, he continued to speculate that if a poll were taken as to whether the Constitution should be living or dead, “the overwhelming majority of the responses doubtless would favor a *living* Constitution.”<sup>25</sup>

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The response of the right to contested Warren and Burger Court interpretations was political mobilization. This is a long story that cannot be recounted here. Suffice to say that in response to the Equal Rights Amendment and the abortion decisions, as well as other issues, grassroots activists worked to bring change from within the Republican Party. One result was the election of Ronald Reagan as President in 1980 and again in 1984.

The Reagan Administration was committed to working to change judicial rulings on issues that mattered to social conservatives.<sup>26</sup> It devoted huge efforts—documented elsewhere—to judicial selection.<sup>27</sup> Before and after the 1984 election the administration increased its efforts, in part because it became clear political solutions were unavailing.

The right needed a vocabulary of constitutional change. In the past, conservatives had spoken of “judicial restraint.” Though use of this language continued, the idea of restraint was not congenial given that the right wanted to see existing decisions swept away. The problem was *stare decisis*, a conservative doctrine of restraint that would serve only to enshrine the disliked judicial interpretations of the Constitution.

Numerous thinkers and groups on the right devoted themselves to concerns about a new judicial agenda and a vocabulary to sustain it. Chief among them was The Federalist Society, begun by a group of law students. Over time it grew to become an important locus for

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<sup>23</sup> Quoted in LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 210-11 (2005).

<sup>24</sup> Interview with Powell, *quoted in* ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 24 (1989).

<sup>25</sup> William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 693 (1976).

<sup>26</sup> STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: ORGANIZATIONAL MOBILIZATION AND POLITICAL COMPETITION* (forthcoming 2007).

<sup>27</sup> Terry Eastland, *Reagan Justice*, *Public Affairs*, Fall 1988, at 21.

conservative constitutional thought. Attorney General Meese brought into the Justice Department many conservative thinkers, including prominent Federalist Society founders.<sup>28</sup>

In 1985, the Attorney General gave speeches setting out the new interpretive methodology of the right: originalism. He called for a Jurisprudence of Original Intention.<sup>29</sup> This interpretive move was designed precisely to deal with entrenched precedents. As Robert Bork explained, “An originalist judge would have no problem whatever in overruling a non-originalist precedent because that precedent, by the very basis of his judicial philosophy, has no legitimacy.”<sup>30</sup>

It would be foolish to claim conservative scholars on the right invented originalism. Judges had long used this as one of many ways to interpret the Constitution.<sup>31</sup> Justice Black regularly relied on originalism during the Warren Court to justify liberal outcomes.<sup>32</sup> Raoul Berger made originalism a genre with his many books.

Still, it is clear that conservative scholars tailored this idea into a theory designed to justify conservative outcomes. Indeed, the jurisprudence of original intentions underwent significant sculpting and modification in a rapid two years. In 1987, the Justice Department’s Office of Legal Policy released the new and improved product—“Original Meaning Jurisprudence: A Sourcebook.”<sup>33</sup> The sourcebook moved the focus off the framers’ subjective intentions, where it long had been, to objective views of the framing times. Stephen Markman was the head of the Office of Legal Policy in the Meese Justice Department. He also founded the District of Columbia Lawyers’ Chapter of the Federalist Society. He described how Society debates helped “refine” Meese’s original “nomenclature” and spoke with real enthusiasm about “our debate, to try to render more sophisticated what it is we are talking about.”<sup>34</sup> Similarly, Federalist Society Executive Director Eugene Meyer described how “these discussions and debates led not all but most conservatives to abandon original intent and adopt original meaning.”<sup>35</sup>

There is nothing wrong with this sort of tailoring. People with a philosophical vision, constitutional or otherwise, naturally look for a vocabulary to capture and describe it. This is

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<sup>28</sup> CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 151 (1992) (describing Meese’s Department of Justice as under “the influence of New Right” groups and discussing personnel).

<sup>29</sup> Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 *TEX. L. REV.* 455 (1985).

<sup>30</sup> Quoted in BRONNER, *supra* note 24, at 258-59 (quoted in Bork Hearings, Part I, p. 523).

<sup>31</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982) (describing the intentionalist, or originalist, modality of interpretation as just one of many well established strategies for interpreting the Constitution).

<sup>32</sup> James Jackson Kilpatrick, *A Very Different Constitution*, *NATIONAL REVIEW*, Apr. 12, 1969, at 795-6. (When Justice Hugo Black relied on originalism to defend the Warren Court’s liberal criminal procedure decisions, Kilpatrick responded, “[t]his séance theory, which treats Supreme Court Justices as table-knocking mediums, speaking in a trance through the spirits of the founding fathers, is a theory of convenience.”).

<sup>33</sup> Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, *Original Meaning Jurisprudence: A Sourcebook* (Mar. 12, 1987).

<sup>34</sup> TELES, *supra* note 26.

<sup>35</sup> TELES, *supra* note 26.

what the left-leaning scholars were doing when searching for a way to understand decisions they favored. It is also what led so many to speak of a “living” Constitution in the 1970s, just as Americans had in the 1930s.

However, these Federalist Society debates to “refine” originalism do give the lie to claims that an originalist jurisprudence is the one true faith or inexorable. One does not need to engage in sustained skull sessions to develop or hone a long-time existing methodology. In his book, *The Tempting of America*, Robert Bork says a telling thing. Discussing his view of the relationship between original understanding jurisprudence and democratic legitimacy, he observes that if it did not exist, “we would have to invent the approach of original understanding in order to save the constitutional design.”<sup>36</sup> In a sense, they did.

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It does not always work out this way, but in 1987, the country actually had the chance to witness a contest between the originalist methodology and the results of the Burger and Warren Courts. The occasion was the nomination of Robert Bork to a seat on the Supreme Court. That spring, Justice Lewis Powell resigned. He had been the important swing voter in many 5-4 decisions involving issues like affirmative action, abortion and the death penalty. “All at once,” said Time Magazine, “the political passions of three decades seemed to converge on a single empty chair.”<sup>37</sup>

Bork’s nomination was the moment of which conservatives had dreamed. “We are standing at the edge of history,” said the Reverend Jerry Falwell. Daniel Popeo, of the Washington Legal Foundation, applauded the “opportunity now to roll back thirty years of social and political activism by the Supreme Court.”<sup>38</sup>

The strategies of both sides guaranteed a fight on the basis of “judicial philosophy.” The White House asked conservatives to suppress debate over hot button issues like abortion and gay rights. Bork was sold on the basis of credentials and his originalist methodology, which would ensure judicial “restraint” rather than “activism.” The left conducted polls to determine which issues would garner most support from the American people.<sup>39</sup> They too largely left the issue of abortion to one side. Their chief arguments would be that Bork would—as Popeo had said—“turn back the clock” on civil liberties and reverse the “right of privacy” found in cases like *Griswold v. Connecticut*.<sup>40</sup>

The left mounted an enormous publicity campaign against the nomination, but in a sense, the key moment was Bork’s five days of testimony in front of the Senate Judiciary Committee. After it, polls turned against Bork. Then, as a bloc, the Southern Democrats in the Senate

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<sup>36</sup> BORK, *supra* note 1, at 155.

<sup>37</sup> Richard Lacayo, *The Battle Begins*, TIME, July 13, 1987, p. 10.

<sup>38</sup> Quoted in MICHAEL PERTSCHUK and WENDY SCHAETZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 27 (1989).

<sup>39</sup> BRONNER, *supra* note 24, at 158.

<sup>40</sup> PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE: THE FIGHT FOR BORK* 40 (1990) (noting that Biden said he was worried about Bork’s outspoken views on ‘fundamental questions such as is there a right of privacy’’).

decided to vote against the nomination. In doing so, they were following the deeply-felt wishes of their African-American constituents who opposed Bork.<sup>41</sup> In 1986, Reagan had run against these Senators, saying it was important to elect Republicans to the Senate so he could appoint the judges he wanted. The Democrats owed their election to the loyal African-American voters, and they went with them on Bork. However, polls also showed opposition to Bork among whites or conservatives in the South.<sup>42</sup> Largely, polls showed Bork on the losing end of public support.

Many commentators said the Bork nomination showed the public choosing results—i.e. general approval of the Warren and Burger Court decisions—over the originalist methodology.<sup>43</sup> Nina Totenberg at National Public Radio said “the public seemed to support most of the Court’s decisions in the areas of race and sex discrimination, free speech, privacy, and even abortion.”<sup>44</sup> Ethan Bronner of the Boston Globe wrote a book about the battle, deeply sympathetic to Bork. Still, he was unequivocal. Bork, he said, had argued the Court “stretched the national charter beyond its capacities, stitching together new rights with random bits of constitutional cloth” but “the results of his nomination indicated that most Americans disagreed.”<sup>45</sup>

Conservatives preferred to ascribe the loss to other causes. They frequently pointed to what they believed was a smear campaign against Bork. Certainly, the media effort from the left had its low points, something the Washington Post noted firmly.<sup>46</sup> There were also those who said Bork just did not play to the American people. His beard, for example, got undue attention.<sup>47</sup>

In moments of candor, however, even conservatives conceded the central point. Patrick McGuigan was a conservative activist deeply engaged in the Bork fight. He was deeply troubled that liberals “frequently lied in their advertising” but still admitted that Bork was attacked “not because he was misperceived by his opponents, but because he was *correctly* perceived.”<sup>48</sup> Terry Eastland, who was Ed Meese’s spokesperson, wrote in the aftermath that Bork never managed with his “legal arguments” what was stated in “laymen’s language.”<sup>49</sup> Senator Howell Heflin, who voted against, showed great ability to mix jurisprudential metaphors in a telling way. He worried that Bork “would be an extremist who would use his position on the Court to

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<sup>41</sup> Dale Russakoff, *How the South Was Swayed*, WASHINGTON POST, Oct. 8, 1987, at A1.

<sup>42</sup> MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER’S ACCOUNT OF AMERICA’S REJECTION OF ROBERT BORK’S NOMINATION TO THE SUPREME COURT 287 (1992) (“A Roper poll...showed overall opposition in the south...with Southern whites the number was a startling 46 percent to 42 percent against”).

<sup>43</sup> Maggie Gallagher, *For Want of a Nail*, NATIONAL REVIEW ONLINE, Nov. 20, 1987, available at <http://www.highbeam.com/library/docfree.asp?DOCID=1G1:6102807&ctrlInfo=Round20%3AMode20e%3ADocG%3AResult&ao> (“The American people agree with the Supreme Court. They don’t agree with Judge Bork.”) (quoting Senate Majority Leader George Mitchell) (last visited Feb. 6, 2007).

<sup>44</sup> PERTSCHUK, *supra* note 38, at 242.

<sup>45</sup> BRONNER, *supra* note 24, at 348.

<sup>46</sup> The Bork Nomination, THE WASHINGTON POST, July 2, 1987, at A20 (The *Post*, which finally came down against Bork, said the campaign “did not resemble an argument so much as a lynching”).

<sup>47</sup> Stuart Taylor, *Politics in the Bork Battle*, N.Y. TIMES, Sept. 28, 1987, at A1 (noting that “public reactions to Judge Bork’s appearance and demeanor—his beard, his naturally gruff voice, his dignified but somewhat professorial display of stamina, patience and intellect in the face of harangues by impassioned opponents—may count for as much as his positions on such issues as when precedents should be overruled”).

<sup>48</sup> MCGUIGAN, *supra* note 40, at 209.

<sup>49</sup> MCGUIGAN, *supra* note 40, at 213.

advance a far-right, radical judicial agenda” rather than being “a conservative justice who would safeguard the living Constitution and prevent judicial activism.”<sup>50</sup> Apparently the living Constitution and conservatism were not incompatible.

President Reagan’s ultimately successful nomination of Anthony Kennedy to the Court perhaps marked the symbolic (though not literal) end of the Warren and Burger Court eras. In his confirmation hearings, Kennedy revealed himself a very different judge than Bork. He said he had no “overarching” interpretive theory, and insisted that the liberty afforded by the Constitution was “spacious.” His view of original intention sounded much like the living Constitution. “I think 200 years of history gives us a magnificent perspective on what the framers did intend.”<sup>51</sup> In short, Kennedy’s view of constitutional interpretation squared with public opinion, eschewing both rigid originalism and moral philosophy for the middle ground of a living Constitution. Perhaps the best measure of how closely Kennedy’s articulated philosophy tracked that of the public can be seen in the vote on his nomination; he was confirmed unanimously.

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<sup>50</sup> See BRONNER, *supra* note 24, at 314.

<sup>51</sup> *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 139, 154, 183 (1<sup>st</sup> Sess. 1987) reprinted in *THE SUPREME COURT OF THE UNITED STATES NOMINATIONS: 1916-1987*, Vol. 15, at 415, 428, 457 (1991).