

# Michigan Law Review

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Volume 87 | Issue 6

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1989

## Ultra-Wrong About the "Ultra-Right"

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### Recommended Citation

Terry Eastland, *Ultra-Wrong About the "Ultra-Right"*, 87 MICH. L. REV. 1450 (1989).

Available at: <https://repository.law.umich.edu/mlr/vol87/iss6/22>

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# ULTRA-WRONG ABOUT THE “ULTRA-RIGHT”

*Terry Eastland\**

PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION. By *Herman Schwartz*. New York: Charles Scribner's Sons. 1988. Pp. xiv, 242. \$19.95.

## I

Herman Schwartz, aspiring to make “some contribution to the history of our times” (p. ix), describes this book as one not written “in tranquil recollection of things past” (p. ix). That’s an understatement. “High dudgeon,” rather than tranquility, best describes his state of mind: Schwartz adopts an alarmist posture about what he calls “The Conservative Court Packing Campaign”<sup>1</sup> and its implications for the future. Nothing that the Reagan administration did in selecting judges meets his approval, and something like a jurisprudential holocaust apparently awaits us now that the Republican Party has maintained its hold on the presidency.

Schwartz, a law professor at the American University, may be surprised to learn that I agree with him on some things. I agree, for example, that Senators may take a judicial nominee’s ideology into account in the confirmation process, contrary to the stated position of the Reagan administration. And I even agree that President Reagan made some poor choices for the federal bench, Daniel Manion being the most conspicuous example.<sup>2</sup> But I made it to the end of the book only out of a sense of obligation.

It’s not that Schwartz is a bad writer, but the polemical nature of this book will wear out all but the most committed, or already persuaded, readers. The word “ultraconservative” appears no fewer than thirteen times, either as an adjective or adverb, and that doesn’t include the synonyms galore, such as “extremely conservative.”<sup>3</sup>

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1. This is the title of chapter one.

2. Manion was appointed to the U.S. Court of Appeals for the Seventh Circuit in 1986. I do, however, differ with Schwartz as to the reason why Manion was not a good choice. See *infra* text accompanying note 20.

3. Only once does the word “ultraliberal” work its way into a Schwartz sentence, and its use is instructive. Schwartz takes umbrage at the fact some conservatives labeled as “ultraliberal” a lawyer under consideration for a judgeship by the Reagan administration, commenting that this was “a ludicrous characterization to all who know him.” P. 82. I can only conclude that in Schwartz’s political world there are no ultraliberals — not even himself, a proud contributor to *The Nation*, arguably the most liberal magazine there is.

Schwartz's frequent resort to these words suggests the kind of mind that has produced this book: one so smugly confident of its point of view that it asserts and assumes rather than argues. *Packing the Courts* is not simply for the already converted, but for the most zealous adherents of liberal ideology.

Schwartz also has written this book the lazy way. He interviewed very few officials actually involved in judicial selection. Instead, he relied on newspaper and magazine clips. *Packing the Courts* is not the place to go for anything new. The book also has several factual errors that some more diligent reporting could have prevented.<sup>4</sup> Why would a major house publish a book like this? Surely it would want something better reported and argued, whatever its conclusions. Here's my explanation: the major houses tend to be politically liberal, and will publish even a bad book so long as the text ratifies their view of the bad things the Reagan administration has been up to. I offer this with no scientific certainty, only the weight of personal experience. The day after Attorney General Edwin Meese III relieved me of my responsibilities in May 1988 I received a Western Union Mailgram from an editor at none other than Scribner's, which published this book, advising that he was "prepared to offer [a] substantial advance on [my] personal story and on the Justice Department in crisis."<sup>5</sup> Scribner's wasn't the only major house interested in my "personal story." I was obviously a delicious prospect for these houses: who better than a conservative — and one on the inside, no less — to tell the truth about the ogre A.G.! I declined the thoughtful invitation, but I was struck by the apparent politics of Scribner's and others. And I doubt that Scribner's would publish a book on Reagan's judges that was as unoriginal and polemical as Schwartz's, yet written from a conservative political perspective.

*Packing the Courts* does offer, albeit unintentionally, one thing that is new: a clear view into the political culture of Washington. That culture is heavily liberal and Schwartz is a part of it. In several passages he discusses how he and his liberal allies went to work to thwart Reagan judgeships. Chapter six begins this way: "Sometime in November 1984, a few days after the Reagan reelection landslide, I met Nan Aron and William Taylor for lunch at a Chinese restaurant in Washington to talk about the federal courts" (p. 74). There follows an account of how a number of liberal groups — twenty-nine to begin with — organized the "Judicial Selection Project," the purpose of which was to oppose "'really terrible' nominees" (p. 76). The number of groups opposed to Reagan's judicial selection efforts grew during

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4. Contrary to what Schwartz writes (p. 6), Bruce Fein was *not* one of Attorney General Edwin Meese III's speechwriters. And Grover Rees was in charge of judicial selection at the Justice Department for only one year, not several. P. 49.

5. I left the Department on May 16. The Mailgram, from which I quote, arrived on May 17.

the second term, and the anti-Reagan forces enjoyed their greatest success — a great political success by any measure — when the Senate rejected the Supreme Court nomination of Robert H. Bork in 1987.

Schwartz's account of the strategy of the anti-Bork groups is noteworthy. He describes how they realized that pro-abortion types and pro-gay activists should stay out of sight, lest their views displace Bork's in the public eye and become an issue.<sup>6</sup> Schwartz and others knew perfectly well that the Bork battle would be lost if it turned into a referendum on cultural liberalism. In passages like these, Schwartz demonstrates how "inside the Beltway" liberalism can undo the efforts of a conservative president elected with the overwhelming support of the American people.

Alas for Schwartz, he published this book before the 1988 political conventions, so he did not have the benefit of seeing George Bush run against the forces that opposed Bork.<sup>7</sup> But Bush skillfully turned the 1988 election, at least in part, into the referendum on Bork that never was.<sup>8</sup> The Bork battle did not end with his rejection in the Senate, nor, I should add, with the election of Bush. The battle is ongoing. If Bush nominates a conservative like Bork, it will be joined again, with Herman Schwartz no doubt writing op-eds, organizing his friends, perhaps defeating a conservative nominee or two, and maybe getting Scribner's to publish *Packing the Courts II*.

## II

Schwartz's tale begins with the 1980 election, which, he says, "raised hopes on the right that this time the courts could be brought under control" (p. 4). Court-packing wasn't pursued aggressively until the second term, he says, but "Reagan's plans to bend the federal judiciary to the right were made very early" (p. 5). For proof, he quotes from the Republican Party Platform of 1980.<sup>9</sup> While conceding that "[e]very president wants judges who will see the world the way he does" (p. 8), Schwartz says that the Reagan administration

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6. P. 134; see also Eastland, *Bork Vote: Just a Battle in a 50-Year War*, Wall St. J., Oct. 27, 1987, at 34, col. 3.

7. The American Civil Liberties Union publicly opposed Bork. Significantly, Bush made the ACLU an issue in the presidential campaign.

8. Democratic complaints about Bush's "negative" campaigning (his use of "the Pledge issue," the Willie Horton story, and the like, to identify Michael Dukakis as a liberal) were amusing. But what Bush did was nothing as compared to what liberals did to Judge Bork just a year earlier.

9. Reagan pledged to pick judges who would be women and men who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens . . . is consistent with the belief in the decentralization of the federal government and efforts to return decision-making power to state and local elected officials . . . who respect traditional family values and the sanctity of innocent human life . . . [and] who share our commitment to judicial restraint.

went "beyond prior efforts" (p. 9). It "aimed at a much wider range of issues than any previous president . . . tried to affect, and it . . . pressed with much greater determination and much more systematically" (p. 9). In Schwartz's view, the reason for this "heightened zeal" lies in the fact that the only feasible way for Reagan to maintain right-wing support was to pick conservative judges (p. 9).

Schwartz writes that the "conservative crusade" targeted the transformation of American life and law that began in the 1920s: the increased openness and freedom; the refusal of those who had always been outside the favored circle of power and privilege like women, blacks, and homosexuals, to stay in their place; the ever more powerful role of government in social and economic matters, and concomitant with that, the implicit denigration of the rugged, Darwinian individualist. [p. 10]

The "court-packing campaign" thus was nothing less than "part of a wide-ranging assault on the modern era," the goal being "a return not just to the pre-Warren Court years but to the era of Ronald Reagan's hero Calvin Coolidge" (p. 43). Because the federal courts, led by the Supreme Court, "helped make this transformation possible," Schwartz says, they became "a natural target for the reaction" (pp. 10-11).

"The reaction" included an attack on decisions in specific constitutional areas, and Schwartz treats at some length the efforts to reshape two areas in particular. One is abortion, signified by *Roe v. Wade*,<sup>10</sup> "the number one target of the social counterrevolution" (p. 12). The other is school prayer, although Schwartz actually deals with the whole notion of church-state separation.<sup>11</sup> Efforts to reverse these decisions failed during the Reagan era, but Schwartz warns that they could be overturned through the addition of a more conservative Supreme Court Justice or two (pp. 25-26).

The conservative "reaction" also includes advocacy of "a judicial philosophy that challenges basic constitutional premises and doctrines," which, if adopted, "would undermine the very legitimacy of the courts' efforts to advance constitutional rights" (p. 29). Schwartz points first to speeches by Attorney General William French Smith that attacked "judicial activism" and "political policymaking," and then to speeches by his successor, Edwin Meese III, that criticized the incorporation doctrine and called for a "jurisprudence of original intent" (pp. 30-32).

To read Schwartz, nothing that either Attorney General ever said makes any sense. Schwartz defends the incorporation doctrine not on textual but political grounds, claiming that "our liberties" would be unsafe without it (p. 33). Voicing conventional criticisms, he rejects an originalist or interpretivist approach because such positions "would

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10. 410 U.S. 113 (1973); see pp. 12-21.

11. Pp. 21-26.

keep the Constitution in a powdered wig and knee breeches" (p. 34), and slow if not stop the judicial creation of new rights.<sup>12</sup> "[T]he Ninth Amendment explicitly allows for rights not enumerated in the constitutional text," he says (p. 38), implying that judges must discern these rights, since, after all, it is judges — no one else — upon whom we must rely for the protection of individual rights.<sup>13</sup> Schwartz embraces the view that courts must assume "an affirmative, political — activist, if you must — role" (p. xii).

In chapter four, "Judicial Selection, 1793-1980" (pp. 42-57), Schwartz summarizes the familiar history of Supreme Court nominees who were spurned by the Senate — twenty-nine in all, about one of every five nominated. About one-third of these were not confirmed because of their views on public issues (p. 45), and Schwartz maintains that a "nominee's philosophy and ideology are proper subjects for consideration by the Senate" (p. 48). The Constitution, he says, certainly "entitles" the president to try to appoint judges who reflect his judicial philosophy, but "not necessarily to succeed" (p. 49), and a senator has "the same obligation as the president to ensure that a judicial nominee will further and not undermine the senator's vision of the Constitution" (p. 49). As to the lower courts, Schwartz concludes that "attention to ideology" by either the president or the Senate "has usually been limited in scope and episodic in operation" (p. 55). The closest parallel to the Reagan administration's attention to ideology, Schwartz says, occurred in 1801, when the Federalists tried "to pack the judiciary with 'midnight judges'" (p. 55). Certainly by this point it becomes clear what Schwartz means by "packing the courts": *not* the scheme pushed by President Franklin D. Roosevelt to increase the number of Justices on the Supreme Court and fill the new vacancies, but an effort to appoint judges (throughout the federal judiciary) who share the president's judicial philosophy. "Packing the courts" of course, smells of something bad; "selecting judges," or "nominating judges," or "appointing judges" would be accurate, but lack the requisite bite for this kind of book. But Schwartz's term, in addition to being biting, is misleading. President Reagan wound up appointing almost half of those now sitting on the federal bench. While it is true that he looked for individuals committed to judicial restraint, it is sim-

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12. Original intent, he says, is "often difficult to discern," p. 35, and even if it can be discerned, it "should not be dispositive." P. 36. Schwartz insists that "it is only by the exercise of a contemporary judgment, as twentieth-century Americans," that judges can decide the scope of a constitutional provision. P. 35. "There is no escape . . . from the exercise of contemporary judgment and wisdom" (p. 35), Schwartz says, but this is a point no serious originalist would dispute. The issue is how and where the judge finds the rule he will apply. Originalists will be constrained by constitutional text and history, while nonoriginalists have been willing to turn quickly to other sources. See G. McDOWELL, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* (Center for Judicial Studies monograph, 1985).

13. Schwartz writes, "Reliance on the popular branches of government for the protection of individual liberty is . . . a contradiction in terms." P. 38.

ply not true that every appointee was equally committed, or even at all committed, to the administration's judicial philosophy. As those involved in the selection process knew, and as Schwartz could have discovered through interviews, the number of lawyers who had thought about the administration's judicial philosophy was small, so the "pool of applicants" from which the President could select was not very deep. In many instances traditional political considerations — geography, political friendship — influenced the choice of a nominee more than anything else.

By 1981, Schwartz writes, "most federal judges shared two basic conceptions of their role: first, that a major function of the federal judiciary was to protect individual rights, and second, that they should interfere as little as possible with economic and other activities not related to civil rights and liberties" (p. 59). Schwartz adduces no evidence to support this statement. It is no doubt the case that most judges in 1981 did regard protecting rights as a major judicial function. Contrary to what Schwartz says, the Reagan administration agreed with them. But it is open to doubt whether most judges, in 1981, conceived of their work in such liberal political terms as Schwartz suggests.<sup>14</sup> Certainly the administration did disagree with this understanding of a judge's role.

During President Reagan's first term, Schwartz says, judicial selection aroused little opposition, although there were "harbingers" of what was to come (p. 62). One highly qualified candidate, Judith Whittaker, considered for a vacancy on the U.S. Court of Appeals for the Eighth Circuit, was rejected by the administration "because of conservative pressure" (pp. 62, 64-66), even as "ultraconservative candidates" (that word again) were easily seated.<sup>15</sup> Only J. Harvey Wilkinson ran into serious confirmation problems, but the Senate did ultimately approve his nomination.<sup>16</sup>

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14. Gertrude Himmelfarb brilliantly illuminates the contemporary liberalism to which Schwartz believes most judges in 1981 subscribed:

The same liberals who insist upon the largest measure of individual liberty in one area — the freedom to see, read, say, and act as they please, to be free of moral restraints and social conventions — also tend to insist upon the largest measure of social and government controls in other areas — to provide for economic security, racial equality, social justice, environmental protection, and the like. That the latter involve a considerable diminution of individual liberty is not denied by liberals; nor does this mitigate their zeal. The disjunction is in fact so deeply ingrained in the modern liberal sensibility that to remark upon it, to see it as a problem, is taken as the sign of a conservative disposition.

G. HIMMELFARB, *ON LIBERTY AND LIBERALISM: THE CASE OF JOHN STUART MILL* 324 (1974). The disjunction, I think, is deeply ingrained in the sensibility of Professor Schwartz, and my remarking on it no doubt will be seen as a sign of a conservative disposition.

15. Pp. 66-73. The "ultras" were Robert Bork, appointed to the U.S. Court of Appeals for the D.C. Circuit; Ralph Winter, to the Second Circuit; Antonin Scalia, to the D.C. Circuit; J. Harvey Wilkinson to the Fourth Circuit; and Pasco Bowman, to the Eighth Circuit. All were academics. Schwartz notes that twenty percent of the appellate nominees were academics, "a modern record." P. 73.

16. See pp. 70-73.

“The Conservative Campaign to Pack the Courts” intensified in 1985, following the reelection of President Reagan, who not only had to fill routinely occurring vacancies but also eighty-five new positions created by the Congress in 1984. As Schwartz tells it, there were conservative attempts to block “insufficiently pure” judicial candidates and actual nominees,<sup>17</sup> a trend “particularly marked on the appellate level,” where the administration largely has control of the selection process (pp. 89-96). Gradually liberal opposition developed, and in the summer of 1986 the Reagan administration suffered its first defeat in the Senate when the Judiciary Committee voted 10 to 8 to reject the nomination of U.S. Attorney Jefferson B. Sessions III to a district court seat (pp. 95-96). Meanwhile, the ABA became a tougher hurdle that some judicial candidates failed to clear; when it became apparent that some candidates would run into ratings problems with the ABA, they were quietly dropped from consideration.<sup>18</sup> Later, Daniel Manion, a political conservative of thin judicial qualifications, was nominated to the U.S. Court of Appeals for the Seventh Circuit and eventually was confirmed, by one vote (pp. 103-09). Schwartz is right to conclude that getting Manion on the Seventh Circuit probably cost the administration a Senate seat.<sup>19</sup> Says Schwartz: “The Administration could easily have found an equally ideological candidate with more acceptable professional credentials and who could have been confirmed easily” (p. 109).

Actually, the administration probably could have found a *more* ideological (or philosophical) candidate who could have been confirmed more easily. It was seldom noted during the Manion fight that the nominee was as politically conservative as the President (perhaps even more conservative) but had probably thought only slightly more about judicial philosophy than the President had. He was hardly a Bork (or a Scalia) when it came to deep thinking about the Constitution. The Manion nomination was much less one of ideology than politics; in this sense his nomination was made “the old-fashioned way.” Past administrations have rewarded friends and supporters, and Manion, son of a “name” conservative, was clearly a “friend.” His nomination is less an example of “court-packing,” if that means choosing persons of clearly defined and thought-through judicial phi-

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17. Pp. 77-89. For the most part, Schwartz identifies the Reagan administration with the conservative campaign to pack the courts. But he occasionally includes in this effort conservatives outside the administration, including Senators Orrin Hatch and Charles Grassley.

18. Schwartz correctly observes that the administration screened judicial candidates, introducing an interviewing process for that purpose, and also sought to reduce the role in the process played by the American Bar Association. Pp. 60-61.

19. P. 109. The state of Washington refused to return Republican Senator Slade Gorton, who had agreed to vote for Manion when the White House promised to nominate William Dwyer, a liberal Democratic friend of his, to a District Court seat. Many Washington voters apparently were disgusted by the “swap.” Pp. 107-08.

losophy, than of cronyism, a feature of judicial selection since the time of George Washington.

The battles over Sessions and Manion caused the most sparks in 1986, although they obviously were far less important than the nominations of William Rehnquist to become Chief Justice and Antonin Scalia to take Rehnquist's seat. Schwartz concedes that Rehnquist is "personally charming" and has a "brilliant, swift intellect," but calls him "the most reactionary justice in modern times" (p. 110). Quoting approvingly from Justice Lewis Powell, Schwartz says the mission of the Supreme Court is to afford "protection [to] . . . the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action."<sup>20</sup> Thus, "[t]o elevate to leadership someone like Rehnquist . . . is to mock and disparage that mission" (p. 116). Rehnquist nonetheless was confirmed, but by a 65-33 vote, the largest vote ever against a Chief Justice. Scalia then was approved without a single dissent, probably because, as Schwartz says, potential opponents "were preoccupied with the simultaneous Rehnquist nomination, and it was felt that no major changes would result from Scalia's election — he was simply replacing an almost equally conservative Burger" (p. 118).

Control of the Senate reverted to the Democratic Party in the 1986 election. The loss of a Republican majority weakened Reagan "considerably in the judgeship wars," writes Schwartz (p. 119). A Democrat, Senator Joseph Biden, became chairman of the Senate Judiciary Committee, and Biden created a special task force to screen nominations, naming Senator Patrick Leahy as its leader (pp. 120-21). As things turned out, Biden's time became consumed with the successive Bork, Ginsburg, and Kennedy nominations — all three of whom were nominated by Reagan in an effort to fill the vacancy created by Powell's retirement on June 26, 1987. Schwartz mercifully spends just a few pages on what he and others have called "the Ginsburg fiasco" (pp. 143-48), and he devotes just a page to the Kennedy nomination, which the Senate did finally approve. He spends many more pages on the Bork nomination.

As he tells it, Powell was "a moderate, humane conservative" who was the key vote on affirmative action, abortion, church-state relations, and other contentious issues (pp. 122-25), and his departure was "greeted with shock and dismay by civil rights and other liberal groups" (p. 125). Bork, an "ultraconservative" (again that word) was "a rigid, hard extremist,"<sup>21</sup> yet his "handlers" tried to sell him not as

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20. Pp. 115-16 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

21. P. 122. What is a rigid, hard extremist? Is a rigid extremist different from a hard extremist? Would Schwartz approve of one but not the other? Or is it bad enough, in his view, just to be an extremist?

the ideologue he was but as a “moderate conservative” (p. 125). This campaign “may well have been doomed from the start” because Bork had a “paper trail,” having written a major book and scores of articles, speeches, and judicial opinions for more than a quarter century (p. 126). Bork was an advocate of “original intent” and had disagreed with, among other things, the Supreme Court’s assertion of a right to privacy in *Griswold v. Connecticut*.<sup>22</sup> Bork willingly answered questions from the Senate Judiciary Committee regarding his various positions, but the hearings were his “downfall” (p. 137). He didn’t come across as a moderate conservative but as “a right-wing ideologue” (p. 138). What’s more, “he faced the problem of remaining true to what he had previously said and yet appearing moderate” (p. 138). In their ads and public statements, Bork opponents were “occasionally guilty of hyperbole,” Schwartz concedes, but he concludes that “how Bork had come across at his hearing . . . was decisive” (p. 139). And it was “his narrow view of the Constitution and the role of the judiciary in protecting constitutional rights that were the issues causing his downfall” (p. 139).

This is, to say the least, a highly partisan and incomplete account, and one is well advised to read other histories of the Bork battle.<sup>23</sup> Suffice it here to note that Schwartz does not condemn the words spoken by Senator Edward Kennedy on the very day Bork was nominated. “Judge Bork’s America,” Kennedy said, “is a land in which women would be forced into backalley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, . . . and the doors of the federal courts would be shut on millions of citizens.”<sup>24</sup> Schwartz does not even quote these words, which set the appalling tone for the campaign against Bork, and which, for history’s sake, should at least have been provided in a footnote. But Schwartz merely alludes to a “speech some criticized as intemperate” (p. 135).

Schwartz concludes that the Bork confirmation struggle was “a national plebiscite on what Americans wanted from their Constitution and their courts” (p. 140). But that’s about as plausible as saying that the 1988 presidential election was a national plebiscite on the view of the courts held by Michael Dukakis and the ACLU. A more compelling conclusion is that the Bork struggle was one skirmish in an ongoing cultural war, which the left won because of certain political dynamics. The Senate was in the hands of Democrats; the President was weakened by the Iran-Contra affair; and the White House failed to make the case for Bork in effective political terms once Senator Kennedy and his allies mounted their unprecedented campaign. (Bear in

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22. 381 U.S. 479 (1965).

23. See, e.g., Garment, *The War Against Robert H. Bork*, 85 COMMENTARY 17 (1988).

24. Quoted in *id.* at 19.

mind that never before had a multimillion dollar advertising campaign, complete with television commercials, been waged against a judicial nominee.<sup>25</sup>) ABC's Sam Donaldson had it at least partially right when he quipped that the Bork nomination was lost in August on the beaches of southern California, where Reagan and his senior staff had repaired for his customary month-long vacation.

Interestingly, Schwartz believes that the Bork controversy demonstrates the wisdom of the tradition, followed until at least 1925, of a nominee declining to explain his philosophy to the Senate. Schwartz wants to return to that tradition but doesn't think it will happen. "The ground rules have now changed," he writes, "and it appears inevitable that future Supreme Court nominees will be questioned on the specifics of their philosophy" (p. 142).

Schwartz finished his manuscript in early 1988 so the final year of the "Conservative Campaign to Pack the Courts" is not reported. His final concerns are the impact of the court-packing and the future after Reagan. Schwartz draws conclusions that are obviously true: that Reagan has failed to push the Supreme Court to the "far right"; that the immediate effect of his three appointments to the Court "may be only a marginal shift to the right" (p. 151); and that, nonetheless, Reagan has ensured that "for some time to come it will be very difficult to move the Court substantially to the left, even if future appointments are made by Democratic presidents" (a consequence Schwartz does not applaud) (p. 151). Schwartz concludes that Reagan judges have had no jurisprudentially important impact on the trial court level, but he believes that the "most significant changes" have occurred in the courts of appeals, inasmuch as "ideologues and law professors" have been placed on these benches (p. 152). Without providing evidence for his conclusions, Schwartz says many of the courts of appeals judges "have ignored precedent or unambiguous law," and that the Seventh Circuit and the District of Columbia Circuit, especially, have become "forums hostile to civil rights or civil liberties claimants" (pp. 152-53). Schwartz admits that to assess the judges' actual impact, one must make "qualitative studies of the developing law in the circuit[s] in certain crucial areas and of the rulings of specific judges" (p. 155) — which he does not do. Schwartz, like everyone else, is left to agree with Stephen Markman, the Justice Department's point man for judicial selection for the past three years, who says "[i]t will take five to ten years before the full impact of the process is felt" (p. 163).

Schwartz worries about what that impact might be, but his immediate concern is with other consequences. Court packing "introduces an intensely partisan and divisive note into the selection process" (pp. 165-66); it damages public perceptions of the courts; and it can produce "a mirror-image determination in a liberal administration" to

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25. *Id.*

pack the courts (p. 166). If this were to happen, it could impair "the aura of objectivity and fairness on which the authority of our courts ultimately depends" (p. 167). Schwartz doesn't want that to happen, so he offers some criteria for selecting judges. These include: high intelligence, integrity, experience, and distinguished credentials as a lawyer (p. 168). Schwartz goes on to prove that, after Reagan, the argument is no longer *whether* judicial philosophy should be central to the selection process but *which* judicial philosophy should be used. Thus, he spells out the kind of views judges should possess. For starters, a judge should recognize that the Constitution protects a right of intimate relationships, of marital and other forms of privacy (p. 170). Also, a judge must accept "the fundamental proposition that state officials are bound by the Bill of Rights, even though there can be differences as to specifics" (p. 170). And a judge must recognize that "free speech is fundamental to any free society and that any restriction on speech must meet a heavy burden" (p. 170). Schwartz also wants judges who are concerned about "injustice" (p. 172).

Yet he also wants judges to recognize the "other side of the coin," namely that "[t]he line between adjudication and legislation is often thin and even invisible" (p. 172). What Schwartz is getting at is that "there are limits imposed by logic, precedent, and the imperatives of democracy that assign primary policymaking authority to the elected branches and require self-discipline and self-restraint on the part of so unaccountable a branch of government as the judiciary" (p. 172). This remarkable sentence occurs on page 172 of *Packing the Courts*, six pages from the end. It is the first and only time Schwartz recognizes judicial policymaking as any kind of problem. To be sure, he does not dwell on it. He sings the praises of judicial review, which he defines as "[j]udicial review to preserve and advance individual rights" (p. 177). And without this kind of judicial review, "without courts willing and able to make the majestic generalities of the Constitution respond to the ever-changing necessities of the times, our heritage of liberty and justice is in jeopardy" (p. 178). This, he concludes, "is the danger that is posed by the conservative court-packing campaign" (p. 178).

### III

Schwartz exaggerates and overstates even as he fails to address the fundamental issue involving the courts today. Perhaps there are some conservatives who yearn for the pre-Coolidge period, and perhaps there are some conservatives who want to repeal much more than the Court's abortion decision.<sup>26</sup> But those who have given serious thought to this subject understand that even if a Supreme Court decision is

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26. It is worth noting, however, that the Court does indeed change its mind. The Congressional Research Service reported in 1986 that the Supreme Court had by that year overruled 184 of its own precedents. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE

wrong, it does not follow that the Court should overturn it. As the discussion with respect to *Patterson v. McLean Credit Union*<sup>27</sup> makes clear, considerations of *stare decisis* must also be weighed in the balance. Further, as Raoul Berger has written, "past events are not so easily undone." As he has put it, "overruling decisions cannot restore the status quo ante."<sup>28</sup>

The real issue is less the past than the present and the future: Will the federal judiciary continue to expand its reach into American life through the creation and protection of new rights? It's not just conservatives (or even "ultraconservatives") who worry about this question, and it's not merely a political motive (such as placating the right-wing, which Schwartz attributes to Reagan) that will move a president to address it. There is now a large and growing literature on the issue, by authors of various political persuasions.<sup>29</sup> While Schwartz pays lip service to the problem of judicial policymaking, his book asks for more and more of it. He offers no principle by which judges might be limited in their work of "preserving and advancing rights"; one is simply told that judges should do that, and it is clear that for Schwartz judges may advance rights that cannot be found in or reasonably inferred from the Constitution.

Schwartz's view of the ninth amendment (p. 38), the subject of so much debate during the Bork hearings, is worth examining. As he says, the ninth amendment does indeed allow for unenumerated rights, but only since 1965 has any Justice said what Schwartz also maintains: that the amendment protects unenumerated *constitutional* rights. (Significantly, no Supreme Court majority has ever said this.) It is astonishing that Schwartz would oppose nominees who differ with his view on this matter. And there remains, of course, the important question: What are the rights Schwartz would discover and protect if *he* were a judge? Would they include those thought basic by many colonists — rights to property and contract? Or would they include ones favored by political liberals? Would they embrace the right of the people to education or to work or to recreation? And how about, as the ACLU

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27. No. 87-107 (U.S. argued Oct. 12, 1988); see, e.g., *Symposium: Patterson v. McLean*, 87 MICH. L. REV. 1-137 (1988).

28. R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 179-80 (1987).

29. See, e.g., J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984); R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1978); W. BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1969); G. McDOWELL, *CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER* (1988); C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986); and *TAKING THE CONSTITUTION SERIOUSLY: ESSAYS ON THE CONSTITUTION AND CONSTITUTIONAL LAW* (G. McDowell ed. 1981).

and other liberal interest groups have argued, the right to engage in homosexual conduct? Or to commit incest or take illegal drugs? Where do judges get the authority to discover and enforce rights that the ninth amendment (and the rest of the Constitution, for that matter) does not mention and that cannot reasonably be inferred from the text? Schwartz simply skirts all of these questions. But surely they are important questions for a society based on the view that all government derives from the people. And the fact is, the judicial authority Schwartz assumes has never been clearly established.<sup>30</sup> Neither the history nor the text of the Constitution confers on judges the power to enforce extra-constitutional rights. What the Constitution does contain is Article V, which provides a process by which it can be amended in light of contemporary needs.

Whatever else may be said about interpretivism, it does take seriously this question of judicial authority.<sup>31</sup> It regards the Constitution as law, and respects the fact that it is a *written* document, binding on those who consent to it, including judges. As Chief Justice Marshall observed in *Marbury v. Madison*, "the framers of the constitution contemplated that instrument as a *rule for the government of courts, as well as of the legislatures.*"<sup>32</sup>

Schwartz's failure to deal with the fundamental question of judicial authority stems from an even more basic failure — his misunderstanding of the design and structure of our government. Contrary to what he says, it is not the courts alone that protect rights. So too do the legislative and executive branches, as well as the states. The founding generation understood this. Those who signed the Declaration of Independence not only believed in inalienable rights, but said that "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." The written Constitution, informed by "a science of politics" that included separation of powers, federalism, a bicameral legislature, and an independent judiciary, instituted just such a government. And it was this understanding that led Alexander Hamilton to say that the Constitution was itself "A Bill Of Rights."<sup>33</sup> The original document, amended more than two dozen times, has provided a structure of government that

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30. Originalism is far less monolithic than some critics may think. It involves determination of the constitutional principle to be applied, and application of that principle in a particular case, but originalists have differed on what those principles are and how to apply them. Furthermore, an originalist judge can manipulate historical materials or misapply a correct principle. See Bork, *Foreword* to G. McDOWELL, *supra* note 12. For a statement of how one originalist conceived his task as a judge, see Bork's opinion in *Ollman v. Evans*, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

31. "The question non-interpretivism can never answer is what legitimate authority a judge possesses to rule society when he has no law to apply." Bork, *Foreword*, in G. McDOWELL, *supra* note 12, at viii.

32. 5 U.S. (1 Cranch) 137, 179-80 (1803) (emphasis added).

33. THE FEDERALIST No. 84, at 515 (A. Hamilton) (C. Rossiter ed. 1961).

over the years has well secured our rights. "The Conservative Campaign to Rewrite the Constitution" is not that, but an effort to save the written Constitution from those, like Herman Schwartz, who would use it illegitimately to advance their political agenda through the courts.