BOOK REVIEWS

Paul Kerlogue*

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW by Robert Bork, 1990 New York Free Press.

Robert Bork is a self confessed, un-repentant conservative. A fervent admirer of the United States' Constitution and of the republican form of government. This form embodies, as he comprehends it, a strict adherence to the Constitution, and above all in the separation of powers. Bork works through the history of constitutional litigation, analysing judgements to show where the Supreme Court has erred. He claims that the Supreme Court has become a super legislature, not restrained by the checks and balances to which the other branches of government are subject. There is nothing new in these criticisms. However they have a special, contemporary purpose as *The Tempting of America* soon makes clear. They become a foundation for his appraisal of the arguments and accusations used against him by members of the Senate Judiciary Committee who successfully opposed his nomination to the Supreme Court. In essence, the book becomes a legalistic justification of the author's political views rather than a more reasoned assessment of judicial review in the American constitutional context.

Bork asserts the Supreme Court has abandoned its true constitutional role to become a more political organ of government. He analyses some of its most controversial constitutional decisions to show that it has neglected the Constitution in favour of a liberal political agenda. Through this process, he claims, the Court has usurped the functions of the other branches of government and placed itself above the law. He senses a conspiracy, as he puts it (at p 42):

> The security furnished by the interest, wisdom and justice of the legislature is at least as good as that provided by free ranging judges, with the added advantage that legislative despotism . . . can be cured at the polls. But logical demonstrations based on our republican form of government, in which courts do not rule as they see fit, is, apparently no match for the passions of judges. In such behaviour, of course, judges are encouraged not only by those who share their politics but by lawyers who see in the absence of law, and the existence of unguided judicial discretion, always the possibility of winning.

The Supreme Court, in Bork's view, has particularly introduced public policy making into its determinations with the use of the due process Clauses of the Fifth and Fourteenth amendments. The decision in *Brown v Board of Education* 347 US 483 (1954) according to Bork was a matter of policy not procedure. The de-segregation schemes which followed went further beyond the courts' proper functions. 'The court can do what it wishes, and there is almost no way to stop it, provided its result has a significant political constituency.' (p 77) The Supreme Court, as he sees it, has also invented in *Roe v Wade* 410 US 113 (1973) (the case which held it unconstitutional for governments to ban abortion) a right of privacy not found in the Constitution. With these illustrations he affirms that the Supreme Court has assumed a policy making role which has gone too far; imposing its will on the states and on the people to the point of endangering the system of government. As he asserts: 'Any court that imposes values not found in the Constitution to that degree makes national policy and obliterates local and state policies.' (p 129)

Bork is a firm believer in a 'rule of law' as he defines this particularly elusive phrase. As he sees it, the law is not to be determined by judges on a whim. It is to be found in the Constitution itself with the methodology that normally accompanies it. As he puts it: 'Lawyers and judges should seek what they seek in other legal texts: the original meaning of the words.' (p 145) The only way for the Supreme Court to remain true to the Constitution, he asserts, is to engage in a neutral search for the original meanings of the Clauses of the document. This is precisely what the Supreme Court has not done says Bork. Supreme Court judges, in league with liberal law professors, are imposing an ultra-liberal left agenda on the American people against their will. It is one of the greater weaknesses of this book, however, that he does not ever justify this assertion.

As Bork sees it an ideal judge would determine the original intent of the Constitution then neutrally apply it to any challenged legislation. As he describes this process: 'The ratifiers of the Constitution and today's legislators make the political decisions and the courts do their best to implement them.' (p 117) Where do we find this original intent? The answer, it seems, is that the judge must undertake an historical enquiry to determine what the framers and ratifiers thought the provisions meant. The Constitution is a legal document and the court should interpret it so as to avoid any interference in political processes. In applying the Constitution politics has no role to play.

How can a Constitution, and especially a revolutionary one such as that of the United States, be anything other than political? If it is a political document, embodying values and moral choices, how is it possible to interpret it neutrally? That the Constitution can be nothing other than political is evident from its historical role. It establishes a political framework, delimits powers and guarantees rights. These are the ground rules for politics and their interpretation involves political choices. The original intention of the founders does not provide an obvious neutral standard. As Justice Jackson remarked in *Youngstown Sheet & Tube Co v Sawyer*,

> 'Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.' 343 US 579, 634 (1952)

The framers and ratifiers of the Constitution sought to establish a system of government and a set of values on which the United States would operate. The political paradigm is established by the words of the Constitution and politics goes on within it. The Court, in defining the limits must always affect the content of policy. The choice is not whether to be neutral or not but which political choices to make.

If the Anti-Federalists had won, the Supreme Court would not have had the power of judicial review. Anti-Federalist intentions are some of the original intentions that Bork seems to regard with reverence. In contrast, *Marbury v Madison* 5 US (1 Cranch) 137 (1803) decided that the Supreme Court would be a political player. With this decision the Supreme Court asserted a political role for itself and has continued to exercise it. Judicial review is itself political, the only way to have a neutral Supreme Court is to deny that it has such a power. Once the power of judicial review is established, the courts decisions can never be neutrally arrived at, there is no politically neutral ground for them to take.

However much Bork may affirm a doctrine of original intent, it does not provide a judge with a method of neutral interpretation. History must itself be interpreted and the history found amongst the mass of possibly relevant material, will reflect the values of the judge, the social and political context in which the decision is made and its likely effect. Different framers and ratifiers of the Constitution had different ideas and intentions as to how it would work. Marshall, Hamilton and the Federalists clearly disagreed with the Anti-Federalists on the issue of judicial review. Bork sides with the Federalists. But there is no reason why this necessarily deserves to be the correct neutral interpretation of history.

Ultimately, what Bork really seems to be protesting is the overtly political nature of some interpretations of the constitution rather than matters of broad principle. As he states: 'Once a principle is derived from the Constitution, its breadth or the level of generality at which it is stated becomes of crucial importance.' (p 148) What he does not acknowledge is that his interpretations are no less political simply because they may be narrower. His criticism of the Supreme Court's interpretations equally involve political choices. The assertion that the ballot box is the only legitimate political redress in these circumstances may also be viewed as a political choice. This is not only legally conservative but politically conservative. It makes assumptions about the political relations in United States' society which Bishin, for example, has persuasively argued are wrong. ('Judicial Review in Democratic Theory', (1977) 50 *Sth Calif LR* 1099.)

Bork's approach is more pragmatic than it might seem in pursuing a Supreme Court which turns against activism, refusing determinations unless they can be decided within his notion of original intent. This style of judicial self-restraint is also no more than a political decision. The Constitution is central to the structure of politics in the United States. It is also ambiguous, embodying a delicate compromise from the Eighteenth Century. Once judicial review is admitted, it is difficult to see how the Court could avoid making decisions which reflect political choices. Bork is really asking that the Court make political decisions in a non-political way.

It is the ballot box, Bork says, where moral and political choices should be made. He talks of the freedom of electors being legitimately expressed through their representatives. However he recognises the limitations of the representative system. The senators who argued against his nomination to

the Supreme Court lied he says. They represented the views and interests of the intellectual elite, not of the electors. Yet Bork was rejected because his was seen as a political nomination. What his opponents feared was that he would achieve the political ends of the Reagan Administration in a legal way. (See Lasser *The Limits of Judicial Power: The Supreme Court in American Politics*, 1988 Chapel Hill NC, University of North Carolina Press, pp 267 to 268.)

Bork explains why it is that the Supreme Court has become a political battleground. The electors' representatives in the Senate had their own political agenda. In opposing his nomination, they pursued this agenda in spite of the interests of ordinary Americans, according to Bork. Can he be so naive as to suggest that secret political agendas do not exist in other areas of public policy? What Bork does not explain is why it should be only in the Senate Judiciary Committee that the representative system breaks down.

The Supreme Court in the United States has been political because its system of government and the political balance within it often cannot redress grievances over a complex range of public issues. As Justice Brennan pointed out in *NAACP v Button*, '[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances' 371 US 415, 429-430 (1963). The court, faced with a plaintiff and a defendant, does what it is supposed to do, it hears the case and gives judgement. The Supreme Court's function is to interpret the Constitution, whether or not one agrees with the political choices it makes in doing so. It is hard to avoid the conclusion that Bork is justifying his political beliefs in not very convincing legal terms. It was those political beliefs, not his constitutional theory, which led the Senate to reject his nomination to the Supreme Court.

Bork has taken the Supreme Court and its decisions out of context in order to examine them. What he has given us is a critique of a Supreme Court which does not exist. His analysis fails because it is, in the end, myopic. In failing to examine the social and political context of the Supreme Court's decisions, Bork has not put the court in perspective. *The Tempting of America* is a call for judicial restraint without a clear notion of what the Court should be doing. Lasser (*op cit*) shows that the Court is not simply active to achieve its own ends. As he remarks: 'The court remains a politically sensitive institution, hardly unaware of the actions and opinions of other actors on the political scene.' (p 269) The Supreme Court is part of the political system of the United States. Bork has examined its constitutional role out of context. He has surely also overestimated its ability and willingness to govern alone.

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SOUTH AUSTRALIA'S CONSUMER LAWS by S K Trenowden, 1989 Longman Cheshire.

My first thought on picking up this book was, what a useful *practical* publication this will prove to be for the South Australian community and in particular its legal profession. South Australia, in common with the other Australian jurisdictions enjoys a veritable morass of so called consumer protection statute law. As the author notes in the preface (at xv)

> One of the troubling features of Australian consumer law is its growing complexity. Another is its apparent inaccessibility, contributing to widespread ignorance of it. Even to lawyers, . . . the statutory and regulatory rules of consumer law are many and complicated.

One might add to these criticisms, (as the author does throughout the text generally) that of the substantial lack of uniformity in this area across the various jurisdictions.

The author correctly observes (ibid) that this area of the law is almost entirely 'statute driven' and adopts the following quote from Moore ('Consumer Litigation before the Credit Tribunal' (1977-78) 6 *Adel LR* 304 at 310)

> One of the greatest problems caused by South Australia's mass of consumer legislation is that the jurisdiction is too small for many of the legislative ambiguities to be ventilated and authoritatively resolved . . . in the area of South Australian consumer law, law making is almost solely the work of parliament unaided by the courts.

Not much has changed since that was written and therein lie the seeds of potential weakness in a book of this nature. Whilst it can be said that the author has made an excellent attempt at the primary aim which was to provide a 'useful practical resource as an introduction to South Australia's consumer legislation', the book is substantially descriptive of statutory material and fails to address this fundamental problem identified by Moore. When one comes up against a statutory provision which is difficult to interpret, one turns first to any available judicial analyses of the provision. Failing that one turns to the text books or journal literature to see what another practitioner or academic thinks as to its meaning or the way in which it ought to be applied. This book will be of no assistance in this respect. It will operate as a research tool in order to ascertain legislation relevant to the problem at hand and as a readily available guide as to the content of that legislation, but it will provide little more than that. However, this is to criticise the author for not writing one book when the author has set out to write another, which is, perhaps, less than fair.

The content of the book is as follows. Chapters 1 and 2 are introductory; chapter 2 gives a very useful account of 'who's who' within the Government's administration of South Australia's consumer laws and what role each functionary performs. Chapters 3 to 12 are substantive and cover fair trading legislation (chapter 3) and statutory regulation of the following areas: land transactions (4) credit transactions (5) general transactions (6) the credit industry (7) the real estate industry(8) the building industry (9) and second hand motor industry (10) the private agents industry (11) and the travel industry (12). Chapter 6 (general transactions) considers inter alia, statutorily implied terms into contracts for goods and services, manufacturers warranties (state legislation only) weights and measures law,

product standards (state legislation only) misrepresentation, domestic building work contracts and second-hand motor vehicle purchase contracts.

Chapter 13 discusses the move toward uniform (Australia wide) credit laws and in chapter 14 the author ventures a brief discussion of basic policy questions such as 'what is a consumer' and reiterates the often heard plea for more uniformity and more rationalisation of the multiplicity of statutes that purport to protect consumers. For example, the author roundly (and rightly, in this reviewer's opinion) criticises the drafters of the fair trading legislation for simply importing the consumer protection provisions of the Trade Practices Act (Cth) into State legislation without any real attempt to consider their relationship to already existing State legislation.

In general, the author has excluded from the discussion legislation already well treated in standard texts. Thus, for example, passing reference only is made to the Trade Practices Act; the focus is on South Australia's consumer laws. Furthermore, in the land transactions chapter, no treatment is given to landlord and tenant law. Again, other texts exist for this area.

In conclusion, the author is to be commended for providing an almost comprehensive conspectus of South Australian consumer statutes and one that will guide many practitioners and members of the public to and through them.

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THE LAW OF NEGOTIABLE INSTRUMENTS IN AUSTRALIA by Brian Conrick, 2nd ed 1989 Butterworths

Mr Conrick has succeeded in producing a comprehensive, up to date exposition on the Australian law relating to negotiable instruments. This is an area of law dominated by statutes which is well navigated and explained by the author. A consistent approach was adopted throughout the book in examining the relevant case law in concise detail. Often the case law only elucidates the principles established by the statutes but this marries the law to its commercial setting.

The law of negotiable instruments derives from the law merchant and the principal legislation in this context, the Bills of Exchange Act 1909, takes its blueprint from the much vaunted English legislation prepared by Sir MacKenzie Chalmers. Despite this pedigree there is a discreet Australian law of negotiable instruments and the author has emphasised Australian case law, in particular leading High Court decisions, in his book.

A little over the first half of the book is devoted to the Bills of Exchange Act. All the important concepts such as parties to a bill, issue, negotiation, holder in due course and proceedings on dishonour are thoroughly dealt with. This lays the ground work for what largely comprises the second half of the book devoted to cheques. Although there is a new Cheques and Payment Orders Act 1986 the key concepts are often the same. The author does not repeat his explanation of these concepts but highlights any differences between the law applicable to bills and cheques. Also the relationship of banker and customer is explored and the ramifications for each of us with a cheque account explained.

The author usefully places his analysis both in its historical context (Chapter 1) and its wider international context by explaining relevant conflict of laws issues that are particularly pertinent to foreign bills. The author can be commended for not being shy in delving into independent areas of law of relevance such as contractual capacity, forgery, fraud, agency subrogation and contribution. Such forays were handled concisely and adequately.

I consider that the one significant weakness in the work is its lack of critical analysis of the law. For example the results for a holder of a bill are different depending on the modus operandia of a swindler (forgery or fault; real or fictitious payee) which is an untenable distinction vis-a-vis the holder. In this and other areas a more critical analysis would have been appropriate. However, its stated aim 'to present a comprehensive and readable explanation of the law in this area within a concise framework' has been achieved.

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