# BOOK REVIEW

**The New Right and the Constitution: Turning Back the Legal Clock,** BERNARD SCHWARTZ, Northeastern University Press, Boston, Massachusetts, 1990, pp.310.

*Kevin H. Marino**

Toward the end of *The New Right and the Constitution: Turning Back the Legal Clock*, Bernard Schwartz states: "The constantly evolving nature of constitutional doctrine has alone enabled our system to make the transition from the eighteenth to the twentieth century."[1] With those words, Schwartz recaps and explains the book's principal argument: that New Right constitutional theory, which specifically rejects the notion of an organic, evolving constitution, "would turn back the constitutional clock by two centuries and fossilize our public law."[2] By juxtaposing the New Right's reliance on "original intention" against the settled notion that the Constitution "must be construed to meet the changing needs of different periods,"[3] Schwartz effectively illustrates that New Right thinking reflects a significant departure from our constitutional jurisprudence.

But Schwartz's attack on the New Right ideology is not limited to disproving the notion that constitutional construction should turn solely on the framers' intentions. He goes on to discredit a whole range of mainstream and radical New Right tenets and arguments, principally by showing the anachronistic and often frightening results they would work. Schwartz repeatedly demonstrates that in practice, as in theory, New Right analysis of the Constitution would ignore Holmes' "felt necessities of the time,"[4] leaving many members of the public sadly bereft of its protections. Schwartz accomplishes his repudiation of the New Right approach by analyzing various New Right positions on their own terms, examining academically each argument, from original intention to Judge Posner's economic analysis of individ-

* B.A., Drew University, 1980; J.D., Seton Hall University School of Law, 1984, Director of Litigation, Department of the Public Advocate for the State of New Jersey.

1 B. SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK 265 (1990).

2 *Id.* at 7.

3 *Id.* at 265.

4 *Id.* at 8 (quoting HOLMES, THE COMMON LAW 1 (1881)).

ual rights and Professor Epstein's radical expansion of the fifth amendment takings clause.

By carefully dissecting and debunking a broad range of New Right positions, Schwartz resists the temptation to dismiss even the most extreme of those notions as too wrongheaded to have any real impact on American law. That is good, because New Right philosophy has had an increasing impact on judicial decisionmaking over the past decade. Unfortunately, however, Schwartz's careful scholarly approach to New Right philosophy is not without its drawbacks. In elevating New Right constitutional theory to the status of a "juristic philosophy," Schwartz does not expose it for what it really is: a hodgepodge of result-oriented notions, by turns judicially activist and restrained, bound together only by the conservative political agenda they advance.

Perhaps as an additional byproduct of his academic approach to New Right theory, Schwartz understates its significant political implications. The clash between New Right theorists and more traditional legal thinkers is not merely an academic debate. Over the past decade, the Reagan and Bush administrations have attempted, with great fervor, to pack the federal courts with New Right ideologues. Nevertheless, Schwartz says precious little about those attempts to reshape the judiciary. Hence, although Schwartz devotes an entire chapter to proving that New Right jurisprudence does, in fact, matter, he never states the most important reason why it matters: because it is an anachronistic, long-repudiated philosophy, totally out of sync with our developed society, which is taking root through the blatant politicization of the judicial selection process.

Nevertheless, Schwartz's book is an outstanding contribution to the legal literature, confronting and persuasively disproving New Right notions in a manner largely accessible to lay readers and lawyers alike. If it does not sound the clarion call about the immediate threat these theories pose, it provides an excellent and compelling analysis of the reasoning on which they are based.

Schwartz's first target is the New Right contention that constitutional construction should turn entirely on the intention of the framers, perhaps the defining notion of New Right jurisprudence. Correctly identifying original intention as "one of those delusively simple concepts that promises a facile solution to the

most difficult of our legal problems,"[5] Schwartz promptly repudiates the concept by showing that the framers' precise intentions are often unknowable and, more important, largely irrelevant. Despite Robert Bork's claim that "[w]e have abundant sources for an understanding of particular provisions of the Constitution,"[6] Schwartz demonstrates that the only hard evidence of the framers' intentions — the record of proceedings at the Philadelphia Convention of 1787 — is "strikingly incomplete."[7] He also notes the difficulty in identifying the particular framers whose intent is to govern. Most convincingly, however, Schwartz argues that the original intention of the framers, even if ascertainable, should not determine the meaning to be afforded the Constitution through the ages. Paraphrasing Cardozo, Schwartz explains that "[t]he Constitution states, not rules for the passing hour, but principles for an ever-expanding future."[8] Schwartz continues: "With a basic document such as ours, drawn in so many particulars with purposed vagueness, constitutional law must be more than machinelike exegesis of a fundamental text."[9]

That the Constitution is "a living instrument that must be construed so as to meet the practical necessities of government during each period in the nation's history"[10] is a basic premise one either accepts or rejects. Recognizing that fact, Schwartz refuses to engage in a lengthy harangue about the evolving, elastic nature of the Constitution.[11] Rather, he proceeds directly to an examination of the untoward results that a contrary view of the Constitution would engender. First, he seizes upon the question of whether the framers intended to vest in Congress the power to issue paper currency. This is an excellent example for Schwartz's

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5 *Id.* at 7.

6 R. BORK, THE TEMPTING OF AMERICA 165 (1989). Specifically, Bork notes:

> We have, after all, the constitutional text, records of the Philadelphia convention, records of ratifying conventions, the newspaper accounts of the day, the Federalist Papers, the Anti-Federalists Papers, the constructions put upon the Constitution by early congresses in which men who were familiar with its framing and ratification sat, the constructions put upon the document by executive branch officials similarly familiar with the Constitution's origins, and decisions of the early courts, as well as treatises by men who, like Joseph Story, were thoroughly familiar with the thought of the time.

*Id.*

7 B. SCHWARTZ, *supra* note 1, at 9.

8 *Id.* at 10 (citing CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921)).

9 *Id.*

10 *Id.*

11 *Id. Compare* R. BORK, *supra* note 6.

purposes, for the framers clearly did not wish Congress to have such power, although paper money is indispensable to our modern economy. Thus, in this instance, reliance on original intent would compel a result — the invalidation of Congress' power to issue currency — clearly unacceptable to even the most rigorous New Right thinker. As Schwartz rightly observes, "[o]riginal intention had been tried and ultimately found wanting, even though this was the one case where the framers' intent was as clear as it could possibly be."[12]

Schwartz accomplishes a similar repudiation of original intention with respect to the eighth amendment's prohibition against cruel and unusual punishment. Noting that at the time the Constitution was adopted, punishments such as maiming or disfiguring criminals were very much in vogue, Schwartz observes that "the very element of degradation, which makes such punishments repulsive to modern penology, was what made them seem so suitable to a community in large part still dominated by the puritan ethic."[13] Again, even the most radical New Right theorist would have to concede that some punishments which were once viewed as suitable are simply no longer acceptable to society. That is precisely why, as Schwartz observes, Chief Justice Warren was correct in noting that the eighth amendment " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' "[14]

Schwartz next turns to the due process and equal protection clauses, which he aptly characterizes as the "crucial skeleton clauses in the Constitution."[15] Noting that the original intention behind the due process clause was clearly to ensure procedural, as opposed to substantive, safeguards against the deprivation of life, liberty and property, Schwartz demonstrates that today, such a reading would eviscerate the constitutional provision most responsible for maintaining "the balance between authority and liberty."[16] Most notably, Schwartz explains that were the due process clause read not to ensure substantive limitations on arbitrary governmental power, the Supreme Court's decision outlawing segregation in the Washington, D.C. public schools[17] would not have been possible. Similarly, if the equal protection clause

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12 B. SCHWARTZ, *supra* note 1, at 14.
13 *Id.* at 16.
14 *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).
15 *Id.* at 17.
16 *Id.* at 21.
17 Bolling v. Sharpe, 347 U.S. 497 (1954).

were read in light of the framers' intentions, the decision outlawing segregation in the public schools throughout the country[18] could not have been reached.

Schwartz goes on to reveal the inadequacy of original intention in interpreting the first amendment's establishment clause. Specifically, Schwartz examines Chief Justice Rehnquist's dissent in an establishment clause case, in which the Chief Justice concluded that the framers sought only to prohibit a national religion, or perhaps to proscribe discrimination among religious sects, but not to require government neutrality regarding religion.[19]

Clearly, the framers saw the establishment of a national religion as inimical to their newly won and much cherished religious freedom. What they could not have seen, prior to living under a system in which church and State were separate entities, were the many opportunities for an implicit establishment of a religion or religions — through the granting of preferences, etc. — which have since been found violative of the establishment clause. It is only with the benefit of experience under such a system that our courts can continue to understand the spirit and articulate the evolving meaning of the establishment clause. To use history in construing the establishment clause, as Schwartz correctly notes, "is to ask questions of the past that the past cannot answer."[20]

Having demonstrated the wholesale inadequacy, in theory and in practice, of the original intention approach to constitutional construction, Schwartz moves to the other basic premise of the New Right: that constitutional protection should not be extended to rights not specifically enumerated in that instrument. Again, the notion of an organic constitution is integral to Schwartz's repudiation of the New Right's insistence on strict constructionism. In this context, Schwartz relies, most persuasively, on Justice Harlan's dissent in *Poe v. Ullman*,[21] where the Court refused to invalidate the ban on contraceptives later found unconstitutional in *Griswold v. Connecticut*.[22] In that dissent, Schwartz observes, Harlan expressly noted that it "is not the particular enumeration of rights . . . which spells out the reach of constitutional protection. On the contrary, the 'character of

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18 Brown v. Board of Education, 347 U.S. 483 (1954).

19 B. SCHWARTZ, *supra* note 1, at 29 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985)(Rehnquist, J., dissenting)).

20 *Id.* at 33.

21 367 U.S. 497 (1961).

22 381 U.S. 479 (1965).

Constitutional provisions . . . must be discerned from a particular provision's larger context. And . . . this context is one not of words, but of history and purposes.' "[23]

Although Schwartz also relies on the ninth amendment's language that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"[24] his principal argument for recognizing rights, like the right of privacy, which are not specifically enumerated in the Constitution is identical to his argument for rejecting the original intention approach to constitutional construction. The question of what specific rights fall within the Constitution's broad outlines must be determined according to the needs of an evolving society. "Each new claim to Constitutional protection . . . must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed."[25]

Having repudiated the two main principles of mainstream New Right constitutional theory, original intention and strict construction, Schwartz next focuses on the foremost proponents of New Right extremism. His first target is Professor Bernard Siegan, whose nomination by President Reagan for a federal appellate judgeship was rejected by the Senate Judiciary Committee in 1988. Remarkably, Siegan contends that the Supreme Court should revive its long-discredited reasoning in *Lochner v. New York*[26] and once again use the due process clause to invalidate laws which restrict freedom of contract or otherwise impinge on the right of property. Under Siegan's analysis, substantive due process is a tool that the Court can and should use to strike down statutes based on unsound economic theory — which, in his view, includes any law that conflicts with the laissez faire economics of a century ago.

Although Holmes' dissent in *Lochner*, with its famous line, "The [f]ourteenth [a]mendment does not enact Mr. Herbert Spencer's Social Statistics,"[27] has been settled law for over fifty years, Schwartz patiently examines and discredits Siegan's theory

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[23] B. SCHWARTZ, *supra* note 1, at 67 (quoting *Poe*, 367 U.S. at 540, 541, 542-43 (Harlan, J., dissenting)).

[24] U.S. CONST. amend. IX.

[25] B. SCHWARTZ, *supra* note 1, at 70 (quoting *Poe*, 367 U.S. at 544).

[26] 198 U.S. 45 (1905). In *Lochner*, under the guise of the contracts clause, the Court invalidated a state health law prohibiting bakery employees from working more than 10 hours a day or 60 hours a week.

[27] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

on its own terms. Indeed, rather than rely on the Holmes truism rejecting the social Darwinism of *Lochner*, Schwartz correctly notes that Justice Harlan's Lochner dissent "in many ways probed more deeply into the issues at stake."[28] As Schwartz explains, "According to Harlan, it was not for the Court to consider whether any particular view of the economic issues involved presented the sounder theory. If there were reasons to support the view that excessive hours worked by bakers might endanger their health, that should end the matter."[29]

Unfortunately, Schwartz offers a less than satisfactory explanation for modern courts' greater willingness to invalidate laws that impinge on personal rights than those that restrict economic rights as a function of social evolution. As Schwartz somewhat cryptically describes it, quoting Rudolf von Ihering, "Formerly high valuing of property, lower valuing of the person. Now lower valuing of property, higher valuing of the person."[30] He does not specifically address the apparent inconsistency between approving the use of substantive due process to protect personal rights but disapproving its use to safeguard economic rights. Instead, he relies on a general discussion of the history of American labor during the last century to dispel the notion that they are inconsistent. As Schwartz explains, the prevailing view at the turn of the century "was that the community had no legitimate interest in the regulation of labor because the condition of inequality between the parties that justifies infringement of freedom of contract did not exist."[31] Schwartz continues, "Such an approach was rendered obsolete by modern industrial society. The helplessness of the individual employee, unaided by government or collective action with his fellows, has been a basic fact of labor history since the industrial revolution."[32]

Despite its lack of clarity Schwartz's approval of the somewhat tenous dichotomy between personal and economic rights is in keeping with his overriding theme that the Constitution is a

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28 B. SCHWARTZ, *supra* note 1, at 75.

29 *Id.*

30 *Id.* at 79 (quoting Ihering, quoted in 1 POUND, JURISPRUDENCE, 429-30 (1959)).

31 *Id.* at 90.

32 *Id.* at 91. Professor Laurence Tribe offers a much more satisfactory explanation for the apparent inconsistency in modern courts' treatment of economic and non-economic rights. As Tribe succinctly notes, "[t]he point of Lochner's downfall was not the rejection of human freedom as an idea, but the recognition that there was less of such freedom, in the ordinary workings of the economy, than sometimes met the eye." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1336 (1988).

living document adaptable to the needs of each era. To Schwartz, this means that in the post-industrial age, this means that laws which impinge on personal rights deny due process while those which remedy economic imbalance do not.

From Siegan's attempt to revive *Lochner*, Schwartz turns to Professor Epstein's expansive view of the fifth amendment takings clause. That clause provides: "nor shall private property be taken for public use, without just compensation."[33] Epstein contends that any governmental diminution in the free use, enjoyment, and disposal of property constitutes a taking under the fifth amendment.

In rejecting that radical view, which has little to do with the text of the fifth amendment or any plausible intention of the framers, Schwartz explains how Epstein's theory would completely eviscerate the traditional police power to restrict or infringe upon a use of property that threatens the public welfare.[34] He goes on to explain that Epstein's view would also invalidate progressive taxation and all governmental redistributive programs, including unemployment insurance and welfare assistance.[35]

After describing Epstein's extreme views and explaining that they are contrary to any plausible interpretation of the Constitution, Schwartz includes a useful discussion of recent caselaw that suggests that the Epstein view has begun to have an incremental impact on judicial decisionmaking. Schwartz persuasively and frighteningly argues that recent Supreme Court and lower court opinions have relied increasingly on a reading of the takings clause consistent with Epstein's. In his powerful repudiation of Epstein's theory and his explicit acknowledgement that courts have begun to adopt that theory, Schwartz performs perhaps his most valuable function: demonstrating the pragmatic effect of New Right thinking on society as we know it.

Schwartz's next subject is Professor Lino Graglia, who has written what Schwartz describes as "a violent polemic against the [Supreme Court's] decisions on school segregation."[36] Although Graglia and other New Right jurists object to the Court's conclusion that segregation denoted and perpetuated black inferiority, they agree that *Brown v. Board of Education* was correctly decided.

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[33] U.S. CONST. amend. V.

[34] B. SCHWARTZ, *supra* note 1, at 126.

[35] *Id.* at 126-27.

[36] *Id.* at 137.

Graglia objects, however, to the Court's orders implementing its desegregation rulings. He contends that the Court's resort to its equity powers to eradicate segregation was unauthorized and unnecessary. Additionally, Graglia lashes out at affirmative action programs as instances of reverse discrimination. For his part, Schwartz correctly notes that "the elimination of segregation could not realistically be left to elected representatives."[37] Further, he notes, in implementing its desegregation orders, "the Court was only exercising the traditional enforcement powers of courts of equity, which rested on the principle that the chancellor may order whatever may be deemed necessary to correct the wrong done in the given case."[38]

As to Graglia's complaint about affirmative action programs, Schwartz concedes that such programs present a dilemma not present in desegregation cases because granting preferences to members of some racial groups necessarily disadvantages members of other such groups. In Schwartz's view, however, the *Bakke*[39] decision adequately resolved that dilemma by outlawing quotas but permitting the use of race as a factor in admissions decisions.

Graglia's work, like that of Epstein and Siegan, has more to do with reasoning backward from a result than with careful constitutional analysis. As he does throughout the book, however, Schwartz meets Graglia's arguments with logic and grace. Moreover, he convincingly demonstrates that the Court's implementation of its desegregation orders and its approval of race as a factor in admissions decisions are examples of an organic constitution responding to the needs of the day.[40]

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[37] *Id.* at 159.

[38] *Id.* at 161.

[39] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[40] As the Bakke Court explained:

> In . . . [a consitutionally permissible] admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. . . . The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

*Id.* at 317-18.

The final and perhaps most formidable legal thinker Schwartz takes on is Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. Posner is the foremost proponent of the economic view of law Schwartz attacks in a chapter entitled "Priceless Rights Made Worthless." As Schwartz explains, "[t]he primary criterion for those who see economics as the foundation of law is efficiency, and to them, efficiency is best promoted by the free operation of the market."[41] Schwartz continues, "Thus, they are drawn inevitably to the *Lochner* rationale — that governmental interference with the market promotes inefficiency and must be considered arbitrary."[42]

Schwartz goes on to explore Judge Posner's efficiency-based, cost-benefit analysis (CBA) in a variety of legal contexts. In ultimately repudiating this economic approach to law, Schwartz explains:

> CBA in constitutional law reduces our basic rights to the level of the counting house. Those rights were placed in the organic charter "as fundamental choices of principle, not as instrumental calculations of utility or as pseudo-scientific calibrations of social cost against social benefit — calculations and calibrations whose essence is to deny the decision makers personal responsibility for choosing.[43]

Despite the facial appeal of Posner's theory, which — like original intention — promises a simple solution to a difficult problem, it is not a suitable replacement for human decisionmaking. Moreover, in constitutional analysis, CBA does not *really* replace qualitative judgments with quantitative ones. Before Posner's "purely mathematical" calculation is undertaken, the decisionmaker necessarily makes value judgments about the rights at issue. Those decidedly qualitative choices, which inevitably devalue individual rights, are simply masked beneath the economist's ostensibly value-neutral, quantitative equation. As Schwartz correctly concludes, "[a] system that values basic rights in more than dollars-and-cents terms should hesitate before following an approach according to which, *priceless* may too often mean *worthless*."[44]

Having revealed the fundamental flaw in Judge Posner's economic analysis of law, Schwartz devotes his next chapter to a lengthy discussion of the effect New Right thinking would have on our administrative law. It is here that Schwartz is most in danger of losing

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41 B. SCHWARTZ, *supra* note 1, at 164.
42 *Id.*
43 *Id.* at 179 (quoting L. TRIBE, CONSTITUTIONAL CHOICES iii).
44 *Id.* at 181 (emphasis in original).

the lay reader. His point is an important one: that New Right theorists would transform independent federal agencies into agents of the President. The essence of the New Right's position is that independent agencies like the ICC and the FTC violate separation of powers since they are responsible for implementing statutes, but are not subject to the unlimited removal power of the President. Unfortunately, Schwartz's analysis of that position is mired in a somewhat convoluted discussion of Supreme Court rulings on the subject. Schwartz clarifies the issue with the help of the justices' letters and conference notes, to which he was permitted access in writing this book. Those materials not only permit the reader rare insights into the justices' views on independent agencies and the separation of powers, but also demonstrate the evolving, sometimes compromise-driven process of Supreme Court decisionmaking. As Schwartz ultimately explains, "the object of the laws . . . setting up . . . independent agencies is to give to the citizen a guaranty that his case will be decided by them in independence of the political executive."[45] Schwartz concludes, "It is as legitimate to give effect to that guarantee as it is to safeguard the tenure of a judge from executive interference."[46]

From the many New Right notions Schwartz carefully explores, it becomes quite clear that New Right thinking would have a dramatic and undesirable effect on our system of jurisprudence. In the book's penultimate chapter, entitled "New Right on the Bench," Schwartz examines opinions by Justice Scalia and Circuit Judges Posner and Alex Kozinski to determine whether and to what extent those opinions reflect the New Right philosophy of their authors. Not surprisingly, Schwartz uncovers a clear New Right bent in the opinions of all three, from Justice Scalia's strict interpretation of the separation of powers doctrine to Judge Posner's reliance on economic theory in labor relations cases and Judge Kozinski's invalidation of a rent control ordinance as violative of the takings clause.

Schwartz segues neatly from that chapter's alarming message to the question posed in the book's final chapter, "Does New Right Jurisprudence Matter?" Schwartz concludes, of course, that it does matter, for a variety of reasons. The danger, as Schwartz sees it, is not that New Right philosophy "will suddenly be elevated to the level of accepted judicial doctrine,"[47] but that such theories will take root incrementally, altering our settled jurisprudence bit by bit. In

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45 *Id.* at 219.

46 *Id.*

47 *Id.* at 255.

this regard, Schwartz credits not only the "academic scribblers"[48] themselves, but law clerks who, "fresh from exposure to New Right doctrine"[49] in law schools, quickly "translate what they have learned into the law of the land."[50]

Schwartz is right, of course, about the incremental change New Right academics and their students-turned-law clerks can work upon American law. What he does not focus on is the remarkable speed with which New Right theorists are being elevated to the federal bench. Although neither Robert Bork nor Professor Siegan gained Senate approval, the Senate Judiciary Committee has rejected precious few judicial nominees in the past ten years.[51] And given the nature of the Committee's screening process, it is unlikely that any but the most outspoken extremists will fail to pass muster in the future.

Although Bernard Schwartz does not call attention to the recent rash of New Right appointments to the federal bench, his careful, scholarly work does a great service to the people of this country. With few exceptions indeed, the very important ideas expressed in *The New Right and the Constitution: Turning Back the Legal Clock* are set forth with great clarity, making them accessible to a very broad readership. It is to be hoped that this book, with its timely warning about the real-life consequences of New Right theory, will find its way into the hands of that readership. For only a public fully informed as to the threat of New Right extremism can act to prevent that philosophy from taking hold.

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48 *Id.* at 254.

49 *Id.* at 263.

50 *Id.*

51 Biskupic, *Bush Boosts Bench Strength of Conservative Judges*, 49 CONG. Q. 171, 173 (Jan. 19, 1991).