

# The New Criterion

## Books

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### Dismantling the law

by [Robert Bork](#)

A review of *Courting Disaster: The Supreme Court And The Unmaking Of American Law* by Martin Garbus.

A man who had been blind from birth would be most unfortunate if he suddenly gained sight while standing before distorting mirrors in a carnival funhouse. The version suddenly revealed to him—men and women with grotesquely bloated bodies, faces out of surrealist nightmares, people upside down—would make what he supposed to be reality appalling and terrifying. So it is with Martin Garbus's new book, *Courting Disaster: The Supreme Court and the Unmaking of American Law*.<sup>[1]</sup> Should the book fall into the hands of anyone ignorant of the Court's constitutional jurisprudence, which is virtually all of the American public, he will be horrified to learn that extreme right-wing bigots, reactionaries, and toadies to malefactors of great wealth are increasing their control of the Supreme Court and most of the lower courts.

There are three difficulties with Mr. Garbus's argument. It proceeds from a wholly illegitimate view of how the justices should decide constitutional cases. It claims, in the face of all the evidence, that the Supreme Court majority is conservative, if not diabolically reactionary. And it flat out misrepresents what the Court is doing and what conservatives want it to do. The book would be greatly improved if these defects were removed, but then there would be no book left.

The first problem is that Mr. Garbus prefers a constitutional law that has as little as possible to do with the actual Constitution. He sees constitutional law as mere politics, which, sadly enough, it often is, but he thinks that entirely proper. His own politics being extremely left-wing, he thinks that any interpretation of the Constitution which is not left-wing is corrupt. It follows, of course, that judges are not in the least bound by the understanding of those who wrote, proposed, and ratified the document. The constitutional principles they laid down are not merely irrelevant but in large part pernicious. Garbus makes this explicit by stating his agreement with Justice Brennan's reaction to the "conservative" view of the Constitution: "It is not the living charter I have taken to be the Constitution, it is instead [in the eyes of conservatives] a stagnant, hidebound, archaic document steeped in the prejudices and superstitions of a time long past." Well, "prejudices and superstitions" is one way to describe the views of the Founders. Not the one I would have chosen, but then, tastes differ.

According to Garbus, George W. Bush has said he would like to appoint "ultra right ideologues" to the Court. Of course, Bush said no such thing. He said he would try to appoint justices and judges who interpret laws according to the understanding of the principles of those laws when they were enacted. That is the only proper function of the judge, and for Garbus to call it an ultra-right ideology merely emphasizes both his disingenuity and his commitment to an ultraliberal ideology.

The real difficulty is that Garbus never faces the issue of where judges get their authority to override elected federal and state legislators and executives if not from that “stagnant, hidebound, archaic document.” Of course, Brennan never faced that difficulty either. Nor do most justices on today’s Court. Yet a judge’s power to set the democratic process at naught arises only from the Constitution. The asinine metaphor of a “living Constitution,” is designed to divert attention from the otherwise obtrusive fact that the Constitution is being set aside. If the judge feels free to implement not the principles of the framers and ratifiers but rather his own views of better and up-to-date policy, which Brennan and most of his colleagues did, he really does not need a Constitution at all. The existence of the Constitution serves only to provide a convenient cover for what would otherwise be seen as a naked seizure of power by a majority of nine lawyers.

Mr. Garbus must be counting on the gullibility of the public where the constitutional function of courts is concerned, for the picture he draws of an imminent conservative takeover of the courts is a stranger to reality. Garbus would have us believe that a group, variously described as the Far Right, the Religious Right, Bible Belt conservatives, Evangelicals, or the extreme right wing of the Republican party—all terms intended to rouse liberal paranoia—is steadily seizing control of the American judiciary in order to enact a tyrannical agenda. Many liberals suppose that there are armies of foaming Elmer Gantrys somewhere out there, and the Left finds it effective to depict those who want judges to follow the actual principles of the Constitution as beetle-browed, knuckle-dragging primitives who are not too different in their social demands from the Taliban. The threat they pose is expressed in the title of Garbus’s second chapter: “The Twenty-Year Conservative Attack on the Federal Judiciary.” This is the stuff of fantasy, but those who do not follow the courts may believe it.

Judging from the blurb he contributed, E. L. Doctorow is just such a person: “Mr. Garbus’s brilliant book argues that the ideological lock put on our federal court system in the past thirty years by the Republican right wing constitutes a clear and present danger to the basic legal and moral assumptions of a modern democratic republic. He lays out the evidence, all the way up to the Supreme Court, and his case is sound.”

His case is, in truth, preposterous. The justices of the Supreme Court confirmed in the last thirty years are John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas, Ruth B. Ginsburg, and Stephen G. Breyer. Scalia and Thomas are considered conservative; O’Connor and Kennedy are swing votes, not clearly identified with either bloc; while Stevens, Souter, Ginsburg, and Breyer must be classified as liberals. Some ideological lock. If the Republican right wing can’t do any better than that, it is either powerless or incompetent.

The 2000 presidential election, according to Garbus, gave the “partisans of the political and religious right” the chance to add to their Supreme Court majority. What majority? He claims that the Rehnquist Court “has already substantially eviscerated the work of the Warren and early Burger Courts in areas of abortion, school prayer, affirmative action, and school integration,” thus cramming four falsehoods into a single sentence. Would that it were so, but it is not. He asks us to imagine, presumably as a plausible conservative scenario, that abortions might be “totally banned, no exceptions.” This is an appeal to the ignorant who really believe that overturning *Roe v. Wade* would outlaw all abortions. The truth, of course, is that the result would be to return the subject to the states where it was until *Roe*’s unprecedented power grab by liberal justices did precisely what Garbus claims conservatives would do—remove control of a moral issue from the people to an imperialistic judiciary. There is no more constitutional warrant for a court decision banning abortions than there was for *Roe v. Wade*, and no reputable constitutional scholar, liberal or conservative, thinks there is. Far from eviscerating the invented right to abortion, the Rehnquist Court protected that right so fiercely that in *Stenberg v. Carhart* (2000) it struck down Nebraska’s

prohibition of partial birth abortions (a procedure morally indistinguishable from infanticide) in a way that may well doom all such statutes in the future.

School prayer, even a moment of silence with no requirement of prayer, remains absolutely prohibited despite the fact, amply demonstrated in Philip Hamburger's recent book, *Separation of Church and State*, that the Court's extreme antagonism to religion that touches any aspect of government is without justification in constitutional text or history. The Court's rulings are radical departures from the Establishment Clause of the First Amendment.

Affirmative action (a.k.a discrimination against white males) is sanctioned despite the Fourteenth Amendment's guarantee of the equal protection of the laws and the 1964 Civil Rights Act's explicit prohibition of disparate treatment of individuals because of their race or sex. Though some justices have recently developed a few qualms about racial and sexual preferences, the Court still has not adopted the simple no-discrimination rule that the law calls for, and racial and sexual preferences continue in many places.

School integration was compelled by busing decrees that accomplished little if anything of value but denied children access to their neighborhood schools, heightened racial tensions, and sacrificed education to sociological dreams. The decline in busing orders is due to the realization of their harmfulness, but it remains illegal for any school system to discriminate in pupil assignments to schools. Integration now occurs as a result of the demise of segregation.

As he proceeds, Garbus recklessly scatters falsehoods on every page. The "declared goals of the radical right who now dominate the Republican Party on matters related to the judiciary" include severe cutbacks on workplace standards of health and safety, the abolition or weakening of child labor laws, reduction to meaninglessness of minimum hour and wage laws (he must mean maximum hour laws), the teaching of creationism in the public schools, and the gutting or handcuffing of the Food and Drug Administration, the Securities and Exchange Commission, the Federal Trade Commission, and the Environmental Protection Agency. Not only is there no radical right in this country outside of a few obscure militia movements but these are not the "declared goals" of any politician or judge. He informs us that *Brown v. Board of Education*, the 1954 decision outlawing state segregation by race in the public schools, and *Miranda v. Arizona* (1966), the source of the famous *Miranda* warnings, have been so eviscerated as to be "nearly meaningless." The fact is that any state-sponsored segregation remains completely illegal and the Court, in an opinion by Chief Justice Rehnquist, converted the warning from policy to a constitutional requirement. Garbus is either establishing new records for nonstop prevarications or he is seriously delusional.

Demonstrating his boundless capacity to invent conservative hobgoblins, Garbus writes that "The pernicious *Bush v. Gore* decision ending election 2000, effectively decided by five, played a valuable role in showing us the naked partisanship of this Court." Everything is wrong with that statement. Seven of the nine Justices, including the quite liberal David Souter and Stephen Breyer, agreed that the Florida election procedures violated the Constitution. The only difference was that the latter two would have allowed Florida and its runaway Supreme Court to try again, even though the looming deadline for certification of the vote made success impossible. There is no evidence, moreover, that the other five members of the majority were nakedly partisan (Sandra Day O'Connor and Anthony Kennedy cannot be supposed even by Garbus to fit that description). Worse, the only opinion that made good constitutional sense was the concurrence written by Chief Justice Rehnquist and joined by Justices Scalia and Thomas. Garbus owes his readers an explanation of why that opinion was not eminently sound. He offers none here, and I suspect we will have to wait a while to see it.

With stunning disregard for history, Garbus assures us that "no Court in this century has seized power the way the Rehnquist Court has." That is, of course, literally true, since we are in the

twenty-first century and have had no other Court. But Garbus undoubtedly means the twentieth century and, so read, his statement is brazenly nonsensical. He seems to have forgotten the Warren Court which, often without the slightest support in constitutional text, history, or precedent, produced one constitutional revolution after another and thoroughly politicized the interpretation of statutes dealing with such matters as antitrust, taxation, criminal law and procedure, patents, administrative law, and much more. The theme in its statutory interpretation as in its constitutional decisions was equality, regardless of what the law said. Thus, the antitrust defendant, the taxpayer, the patent holder, the prosecutor all lost on a regular basis. Not even the Warren Court's defenders claimed that legal reasoning rather than social sympathies dictated results.

Professor Milton Handler, then of the University of Columbia law school, wrote: "Eminent scholars from many fields have commented upon [the Warren Court's] tendency towards over-generalization, the disrespect for precedent, even those of recent vintage, the needless obscurity of opinions, the discouraging lack of candor, the disdain for the fact finding of the lower courts, the tortured reading of statutes, and the seeming absence of neutrality and objectivity." Far from unmaking the Warren Court's law, the Rehnquist Court has preserved its constitutional inventions and added quite a few of its own along the same lines.

Five years before Mr. Garbus's book, a monograph with the same title, *Courting Disaster*, appeared. It was written by Lino Graglia, a professor at the law school of the University of Texas. That Garbus came up with the same title is probably a coincidence, but nothing else about the two works coincides. Garbus's subtitle, *The Supreme Court and the Unmaking of American Law*, refers to the alleged overthrow of decisions that further the liberal agenda and remove control of major social and cultural issues from the democratic process. That is the law he wants preserved. By contrast, Graglia's subtitle, *The Supreme Court and the Demise of Popular Government*, deplors that law. The authors offer very different versions of what the Court is doing and of what qualifies as a disaster. Graglia contends that the Court continues to produce a constitutional law that has very little to do with the Constitution. That "law" moves American culture steadily to the left.

Graglia points out that the "Court's constitutional decisions of the last four decades have ... overwhelmingly served to substitute the policy preferences of persons on the far left of the American political spectrum for the policy preferences that prevailed in the ordinary political process." He cites chapter and verse: The Court has effectively created a right to abortion on demand; removed state-sanctioned prayer from public schools; prohibited most forms of government aid to religious schools and the display of religious symbols on public property; severely limited capital punishment; created criminal procedures more complex and costly than those of any other nation, procedures in which the guilt of the defendant is almost a secondary consideration; denied states the right to operate bicameral legislatures modeled on the federal Congress; disabled states from suppressing pornography; disallowed state-run all-male military schools; destroyed vagrancy laws with the consequent deterioration of the quality of city life; authorized lower courts to supervise the administration of prisons, mental institutions, and welfare programs; excluded public school children from their neighborhood schools on the basis of their race; invalidated term limits; created special constitutional rights for homosexuals; and more. That list is accurate, though not exhaustive, and it utterly destroys Garbus's thesis and his credibility.

It is becoming the routine tactic of the far Left to picture the courts as right-wing and therefore in need of balancing by a large infusion of liberals. We are urged to believe that our courts, if conservatives have their way, will destroy America's freedoms. The fact is that liberals for half a century have been using their control of the Supreme Court to erode our most basic freedom—the freedom, unless the Constitution actually says otherwise, to make our own moral and prudential choices democratically. As a result, America's culture is moving steadily to the left, and there is, for the foreseeable future, nothing the people or their elected representatives can do about it. In fact,

there is nothing liberal legislators want to do about it, other than to speed up the process. The purpose of Garbus's rant is to weaken opposition to the radicalization of the judiciary.

Thus it is that we have arrived at a new stage in the battle for control of the American judiciary. Our political parties, which have for some time fought ideological battles over Supreme Court nominations, are for the first time engaged in partisan battles over the appointment of federal court of appeals judges. That is part of a larger trend. The two parties are becoming polarized and increasingly representative of warring ideologies. The mood in Congress has grown more acrimonious than at any time in living memory. Nowhere is this more evident than in the confirmation or nonconfirmation of the president's judicial nominees. The Senate Judiciary Committee, headed by the venomously partisan Patrick Leahy, has been delaying action on those nominees, sometimes for well over a year, and defeating a number by party-line votes. The Subcommittee on Courts, chaired by Charles Schumer, recently held hearings entitled "The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court," a transparent effort to load the dice against a George Bush nominee.

The call for "balance" is in itself an admission that courts are properly political bodies. Ideology is not the proper concern of a nonpolitical judge. His is the traditional lawyer's task of discerning the most reasonable of the allowable meanings of the constitutional text as disclosed by its wording and history. Though I have been using the conventional terms "liberal" and "conservative" in describing judges, that is not the proper distinction. The struggle today is whether judges are to be originalists, men and women who seek to discern the understanding of a constitutional principle's meaning at the time it was ratified, or activists, those who bring an ideological perspective, and often not much else, to the task of applying the Constitution's general terms. Though there were conservative activists in the first third of the twentieth century, today the activists are liberals.

Activism in the service of any ideology is the ultimate judicial sin, but it may be that originalism is no longer politically viable. The Senate Judiciary Committee now requires nominees to answer how they will vote on particular issues, and the answers are judged in political terms. An originalist nominee will offend a variety of constituencies intensely committed to activist decisions of prior courts. These organized constituencies are primarily liberal to left. Only a nominee who in the past has written nothing relevant to constitutional interpretation can survive by saying he cannot discuss issues that may come before him once he is on the bench. The purpose of Garbus's book is to energize those constituencies and to add the uninformed to their numbers. He urges that the tactics of "filibuster, stallings, trade-offs, the force of interest groups" be employed to defeat conservative nominees. Except for filibusters, these tactics are already in use.

Given Garbus's view that the Supreme Court should be accepted as a political body, one not bound by the historic meaning of the Constitution, it is impossible to justify the practice of ruling on the constitutionality of legislation. It is difficult to see why a political Supreme Court should be placed above a political Congress which is much more representative and accountable. Or, if the Court's power is retained, it is impossible to see why justices should not periodically stand for election. The filibuster is a decidedly peculiar means of arriving at a Court with a politically acceptable complexion. Given the strength of the myth that the Court is interpreting the Constitution and the reality of the politics that suffuses the selection of justices and, in most cases, their performance on the Court, it is all too likely that we will get the worst of both the myth and the reality: a left-liberal Court whose power rests on the misperception that it governs according to the actual Constitution. That prospect appears to be confirmed by experience in other Western nations that have written constitutions and judicial review. It is, nevertheless, important to see what is actually going on instead of being misled by propaganda of the sort contained in this book.

Garbus's cavalier misrepresentations of the record may perhaps be accounted for by the fact that he is a trial lawyer. Someone, I think it was Leslie Fiedler, remarked on the close resemblance of a

certain kind of lawyer's jury summation to Joseph McCarthy's wilder perorations. It is astounding, however, that Garbus would put his fabrications in print where they can be examined by people who know the facts. A reviewer in *The Washington Post's* "Book World" recounted other blatantly untruthful assertions than those discussed here and said, "Ultimately, the problem with this book is that you just can't believe it." Exactly. She concluded, nevertheless, that Garbus "provides a timely and important reminder of the Supreme Court's crucial place in our lives." You might say with equal pertinence that giving perjured testimony against a defendant in a criminal trial provides a timely and important reminder of the seriousness of crime.

## Notes

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1. *Courting Disaster: The Supreme Court and the Unmaking of American Law*, by Martin Garbus; Henry Holt, 256 pages, \$25. [Go back to the text.](#)

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