Editorial

Our Secular Constitution

September 17 marks the 200th anniversary of the completion of the drafting of the United States Constitution. Despite its faults (tolerance of slavery, no mention of women, etc.), the Constitution has endured as the best blueprint for a democratic government for a diverse, pluralistic people ever to be put into practice.

Although Jerry Falwell's ideological kinsmen like to read some of their religious views into the Constitution, the plain truth of the matter is that the Constitution is a secular document intended to set up a secular government, one neutral toward all religions.

Unlike the claims of many governments of the past to rule "by the grace of God," the United States Constitution states that our federal government derives its "just powers from the consent of the governed," as the Declaration of Independence stipulated. "We the People," the Constitution begins, "do ordain and establish this Constitution for the United States of America" for certain specified secular purposes: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

The Constitution gave the federal government no authority whatever to meddle with religion, to tax citizens for the support of religion, or to interfere with freedom of expression and other liberties, which is why the Framers did not consider it necessary to include a bill of rights in the original document. Public pressure, however, led the Framers to promise that a bill of rights would be high on the order of business of the first Congress if the new charter were ratified.

In the original Constitution the only mentions of religion are in Article VI, where religious tests for public office are prohibited and where all federal and state office holders are permitted to substitute an affirmation for an oath, in deference to the conscience claims of Quakers and others to exemption from oath-taking.

Getting ahead of our story, the First Amendment, ratified four years later, prohibited federal government action or laws "respecting an establishment of religion or prohibiting the free exercise thereof," thus erecting a "wall of separation between church and state," as Jefferson explained it in 1802. Finally, the Fourteenth Amendment, pressed after the Civil War, applied the Bill of Rights to state and local government.

It is unfortunate that some of our highest officials—President Reagan, Attorney General Meese, Chief Justice Rehnquist—want to read into the Constitution and Bill of Rights ideas that the Founders/Framers rejected, such as the notions that government may provide "nonpreferential" aid to all religions, that government agents should have the power to regiment our children in religious activities, and that there is no constitutional right to be let alone by government in private moral decisions that do not violate the equal rights of other persons.

Although the Constitution is not perfect, it is the best we are likely to get. And it can be and has been amended from time to time to extend rights or improve the structure of government.

The Constitution faces two serious challenges today. One is the threat of a new constitutional convention, which Congress must call if 34 state legislatures pass the requisite resolutions. To date 32 have done so, though most of them did so without adequate hearings or debate. The danger is, as Madison himself warned two centuries ago, of a runaway convention which would change the Bill of Rights to allow all sorts of violations of the liberties we have come to take for granted.

The other danger is that President Reagan will succeed in packing the Supreme Court and lower federal courts with judges unfriendly to religious liberty, church-state separation, the right to privacy, and other liberties. That is why the Senate contest over confirmation of Robert Bork to the Supreme Court is so important. Bork would very probably tip the balance of the Court against individual liberties. Bork has ranted for years about the importance of giving "moral majorities" the right to impose their view on everyone else.

Those who love our Constitution and Bill of Rights should do all they possibly can to prevent a new constitutional convention and to get the Senate to block the Supreme Court nomination of Robert Bork or any other person hostile to our basic liberties.

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Bork Confirmation, *continued from page 1*

morality," and asserted in another speech that "the enforced privatization of morality deprives most individuals of freedom," i.e., the "freedom" to impose by law a "moral majority" morality. In a 1985 speech at West Point, Bork spoke of the "right, found in the Constitution, of the rest of us to legislative about our . . . moral environment." With such a view, it is no wonder that Bork has been endorsed by Mr. Moral Majority himself, Rev. Jerry Falwell.

In a Brookings Institution speech in September 1985 Bork said that one of the tests which the Supreme Court has devised to determine whether an enactment is constitutional under the establishment clause of the First Amendment, whether the enactment creates an "excessive entanglement between religion and government" (a test promulgated by conservative former Chief Justice Burger), is "obviously designed to erase all traces of religion in governmental action, to produce as [ultraconservative propagandist] Richard John Neuhaus put it, a 'public square naked of religious symbol and substance'." In a 1984 University of Chicago speech, Bork expressed support for the notion that "the first amendment was not intended to prohibit the nondiscriminatory advancement of religion." However, the recently published *Religious Liberty and the Secular State,* by John M. Swomley, and *The Establishment Clause,* by Leonard Levy, show clearly that the framers of the First Amendment intended to prohibit nonpreferential, nondiscriminatory government aid, especially financial aid, to religion. As he shows elsewhere, Bork does not understand that the "original intent" of the Framers of the Constitution and Bill of Rights really was, as Jefferson pointed out, to "build a wall of separation between church and state." Church-state separation is not hostile to religion; it protects religion from government.

Bork told a 1982 New York University Law School audience that the Supreme Court erred in the 1962 *Engel v. Vitale* ruling, which held that public school officials could not require students to recite a state-sanctioned prayer. At his 1985 Brookings appearance, Bork indicated that he saw nothing wrong with a teacher calling on a student for a devotional reading of scriptures of a different religion. At the same meeting, Bork sharply criticized the Supreme Court's 1985 ruling in *Aguilar v. Felton,* which held unconstitutional placing public school teachers in sectarian private schools. Bork also called for "a relaxation of current rigidly secularist [Supreme Court] doctrine" in order to allow tax aid to sectarian schools and "the reintroduction of some religion into public schools and some greater religious symbolism in our public life." Since public schools may now offer academic instruction *about* religion, and since individual students have never lost the right to engage in personal, private prayer, Bork seems to have in mind the reintroduction of sectarian religion into public schools and government intrusion into the area of religion.

The Bill of Rights, Bork has stated, is a "hastily drafted document upon which little thought was expended." He has also said that the Fourteenth Amendment, which applies most of the Bill of Rights to state and local government, was something most of those who voted for it "had not even thought . . . through." Bork apparently ignores the record of the congressional deliberations on these vital amendments because he does not approve of their full application.

Bork has argued that the Supreme Court was wrong in its rulings explaining constitutional privacy rights. He has sharply criticized the 1965 ruling in *Griswold v. Connecticut* that a state law banning use of contraceptives by married couples violated the constitutional right to privacy, as well as the 1973 *Roe v. Wade* ruling that the right to privacy covers a woman's right to choose to terminate a problem pregnancy. Bork believes, in other words, that legislatures should have the power to decide whether people can practice birth control and whether women can be forced to bear children against their will.

Bork wrote in the *Indiana Law Journal* (Fall 1971) that the First Amendment guarantee of freedom of speech applies only to "explicitly political speech," but not to "scientific, educational, commercial or literary expressions as such." In an interview with *Conservative Digest* in 1985 Bork said he agreed with the views he expressed in the 1971 article.

Bork has criticized the Supreme Court's 1962 ruling requiring that both houses of state legislatures be apportioned according to population. He evidently believes that a state legislature may be organized in such a way as to give some voters far greater weight than others.

A report by the Public Citizen Litigation Group (2000 "P" St., NW, Suite 700, Washington, DC 20036, $8), *The Judicial Record of Judge Robert H. Bork,* analyzed Bork's record on the D.C. Circuit Court of Appeals and concluded:

"Judge Bork's performance on the D.C. Circuit is not explained by the consistent application of judicial restraint or any other judicial philosophy; instead in split cases, one can predict his vote with almost complete accuracy simply by identifying the parties in the case. In split cases where the government is a party, Judge Bork voted against consumers, environmental groups, and workers almost 100% of the time and for business in every such case. In 14 split cases, Judge Bork denied access to the courthouse every time; among the many losers was the U.S. Senate, which, according to Judge Bork's dissent, could not bring a case of major constitutional significance to the federal courts. Judge Bork is far less a friend of the First Amendment than some have suggested, as evidenced by four cases in which he voted against the First Amendment claims of political demonstrators. On several occasions, Judge Bork's colleagues have been extremely critical of him for misinterpreting Supreme Court precedent and going beyond the facts of a particular case. Judge Bork generally adhered to the policy [of judicial restraint] only in cases brought by individuals or organizations other than a business."

According to the Public Citizen report, Bork sided with government over individuals and public interest groups in 24 out of 26 split decisions, for business over government in 8 out of 8 split decisions, and against access to the federal courts in 14 out of 14 split decisions. "In summary, when split cases in which Judge Bork participated during his five years on the D.C. Circuit are combined, on 48 out of 50 occasions (or 96% of the time) Judge Bork voted to deny access, voted against the claims of individuals who had sued the government, or voted in favor of the claims of businesses which had sued the government." The report analyzed only split rulings because unanimous rulings in a court rather evenly divided between liberals and conservatives are generally noncontroversial and tell little about a judge's views. (Bork supporters have noted that Bork voted with his liberal Court of Appeals colleague Judge Ruth Bader Ginsburg in 90% of the cases decided by the Court of Appeals. However, 86% of that court's rulings were unanimous. In split decisions Bork voted with the liberal judges only about 12% of the time.)

Back in 1973, during the Watergate investigation, President Nixon ordered Attorney General Richardson to fire special prosecutor Archibald Cox. Richardson refused and resigned his

(continued on page 4)