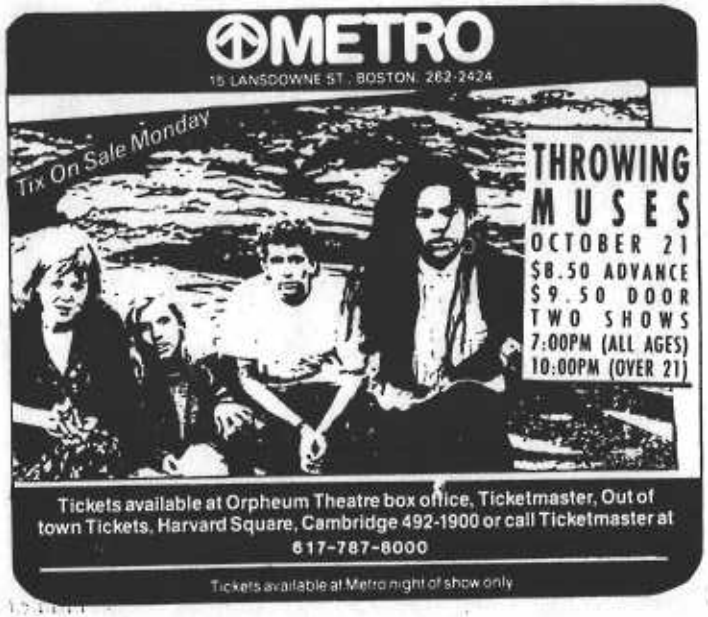

he can restore his reputation by removing himself from that arena. But, in fact, the taint of dishonesty, of disingenuity, of insincerity will continue to follow Biden long after reporters cease to. Thus crippled, he cannot successfully continue as chairman of the Bork hearings.

Even before accusations of academic

cast that way, this controversy was not about character. I believe the senator when he says he has, in the past, credited the orators whose remarks he has lifted. (He might more appropriately have cited their speech writers, but that's another issue.)

Still, the revelation that Biden was in

BORK CHOPS

Freedom to segregate

BY HARVEY SILVERGLATE

AP/WIDE WORLD

The discriminating Mr. Bork

Chops

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California, the American Association for the United Nations, the National Bar Association, the American Unitarian Association, the American Jewish Congress, the Protestant Council of New York, the General Council of the Congregational Christian Churches of the United States, the National Lawyers Guild, the American Civil Liberties Union, the St. Louis Civil Liberties Committee, the Civil Liberties Department of the Grand Lodge of Elks, the American Veterans Committee, the Non-Sectarian Anti-Nazi League to Champion Human Rights, and various labor organizations, among them the American Federation of Labor and the Congress of Industrial Organizations. Indeed, the US Department of Justice filed a brief opposing enforcement of the covenants, thereby throwing the weight of the government behind the Shelleys and the McGhees.

The Supreme Court opinion, written by Chief Justice Fred Vinson and delivered on behalf of a unanimous Court (with three of the nine justices not participating), said "we have no doubt" that the courts' enforcing such covenants is the equivalent of "state action" to enforce segregation, which is in violation of the Fourteenth Amendment's guarantee of "equal protection of the laws." Without "the full coercive power of government" aiding in the denial to blacks of the right to own property wherever they chose and could afford to buy, the bigoted white citizens would have to rely solely upon the strength of the voluntary agreement among the neighbors to sell only to whites. Although at that time such voluntary agreements were lawful (they were later outlawed by federal civil-rights statutes), they could only

Bork went on, however, to argue that the problem underlying the *Shelley* decision went even further than a misapplication of the "equal gratification clause." He said that the Court had effectively found in the Constitution "a sweeping prohibition of private discrimination." The Court, he said, had made its own choice "between equality and freedom in private affairs," its own selection "between competing gratifications."

Bork's theory is that local majorities are entitled to impose their morals and views on minorities. And any minority member who doesn't like it is free to move to a more congenial area. What Bork has never bothered explaining, of course, is why it is the black, rather than the white, who must move to another area or state in order to buy a home in a "good" neighborhood. If the case boils down to nothing more than choosing between "competing gratifications," why does the Fourteenth Amendment prohibit courts from weighing in on the side of enforcement of the segregationist's "gratification?" Can we really tolerate the specter of an American court ordering the constable physically to carry a black family out of the home they bought, merely because of their race?

At his confirmation hearing, Bork claimed, in responding to a question posed by Senator Joseph Biden, that his criticism of the *Shelley* case pertained only to the *reasoning* behind the decision and not to the result achieved. He said that, under the Court's logic, if a homeowner calls the police to eject a dinner guest whose political rantings upset the owner, the guest can claim that the police are violating his free-speech rights by helping the homeowner toss him out.

Bork's "parade of horribles" is ridiculous, of course. People have the indisputable right to decide who will and who will not enter or remain in their homes. It is

be enforced by "gentlemen's agreement" and not by resorting to the courts. Concluded Chief Justice Vinson: "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."

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And what has Robert Bork had to say about this case?

In his 1971 article in the *Indiana Law Journal*, Bork wrote that he doubted "that it is possible to find neutral principles capable of supporting" the outcome of cases like *Shelley*. The Court's reasoning and outcome, argued Bork, "would require the court to deny the freedom of any individual to discriminate in the conduct of any part of his affairs simply because the contrary result would be state enforcement of discrimination." He went on to draw a picture known in the law as "a parade of horribles" — a series of vignettes and examples of what could happen if the principles underlying this Court opinion were applied with excessive consistency. He hypothesized that the courts could just as easily refuse to enforce a white person's property rights when, for example, the property owner sought to exclude from his home a trespasser of color "because of the homeowner's racial preferences." Indeed, wrote Bork, this same reasoning could apply "to any situation in which the person claiming freedom in any relationship had a racial motivation." Bork ridiculed the "equal protection" clause thus interpreted, dubbing it "the equal gratification clause."

quite another matter, however, to seek the intervention of a court to enforce a private agreement seeking to restrict a willing white owner from selling to a willing black buyer. Although Bork favors "judicial restraint" and opposes "judicial activism" when it comes to enforcement of rights that most Americans consider fundamental and inalienable, he would nevertheless allow state courts quite an "active" role in ordering blacks thrown out of their own homes purchased with their own hard-earned money.

Bork's very claim that he might support the same outcome as the Court did in *Shelley* but by a different intellectual route is a good example of what one skeptical senator labeled Bork's "confirmation conversion." That claim is belied by his 1971 article, in which he decried the very fact of the Court's "selecting" one person's "gratification" over another's. Clearly, it was the *result* that bothered Bork. What troubled him was not simply the court's reliance on equal-protection analysis rather than some other mode of legal reasoning. He criticized the fact that the Supreme Court had decided to prohibit state-court enforcement of these private restrictive agreements.

Robert Bork is a judicial nihilist. He doesn't believe in the concept of rights of citizens. He doesn't believe that the Constitution sets forth a general scheme of rights of free citizens in a society where both governmental and majoritarian power are limited, and where such power is bound in order to respect the inherent and inalienable rights of all citizens. He believes that the judicial branch should in essence sit out the great debates and battles over liberty, even though our judiciary — as well as judiciaries in nearly every free nation in the world — has always played an essential role in the preservation of individual rights. □