

# BORK CHOPS

Talking out of turn

BY HARVEY SILVERGLATE

**R**obert Bork believes — at least according to his latest pronouncements on the subject — that the First Amendment to the US Constitution protects *only* speech that relates in some way to the nation's political processes. The free-speech right, he has said and written, protects speech that "is essential to running a republican form of government." This includes "speech about moral issues, speech about moral values, religion and so forth, all of those things [that] feed into the way we govern ourselves."

That is a radically and dangerously narrow view of this most fundamental right, which Americans have long claimed as a "natural right," not a gift granted by the government — a judgment shared by the framers of the Constitution. They left a Bill of Rights out of the original document altogether, largely on the theory that such rights were so fundamental and well understood that to specify them could be construed as a hint that citizens have only those rights and no others.

Yet in his all-important 1971 article in the *Indiana Law Journal*, Bork argued that "there is no [constitutional] basis for judicial intervention to protect any other form of expression [other than 'pure' political speech], be it scientific, literary or . . . pornographic." He went so far as to argue that "constitutionally, art and pornography are on a par with industry and smoke pollution."

To give the devil his due, in areas where he has found speech to be "political," Bork has strongly protected it. Thus, in one case that came before him on the Court of Appeals in the District of Columbia, he wrote an opinion prohibiting the transit authority from refusing to display as a paid advertisement on the subway a poster depicting Ronald Reagan in a decidedly unfavorable light. He also ruled — in a celebrated libel case — that a Marxist professor could not win a lawsuit against conservative journalists Rowland Evans and Robert Novak for their column claiming that he "had no status within the profession." When one is active in an area of public controversy, wrote Bork, one has "to accept the banging and jostling of political debate."

Yet even his professed support for political speech has a gigantic loophole. Once that speech starts to get a bit uncomfortable — that is to say, once it begins

# CONTENTS

## NEWS



WOODWARD

### 1 ON THE COVER

*In this era of chilling neoliberalism and Big Chill revisionism, the '60s, it seems, are good for nothing more than a nostalgic laugh. Not so, says former SDSer Howard Husock, who explains how an insightful chronicle of those times puts the beleaguered New Left in a hopeful new light.*

### 4 LETTERS

### 6 THE BEIRUTIZATION OF MANILA

 by Trisha Thomas

*There's trouble for Cory as the Philippines get gory. A firsthand look at a nation being held at gunpoint.*

### 8 NO LAZY SUSAN

 by Scot Lehigh

*Michael Dukakis has begun picking up the pieces of his campaign by going to his bench and choosing Susan Estrich, a tough, sharp, and shrewd successor to the fallen John Sasso. But will she be able to jump-start a stalled candidacy?*

### 10 CASEY'S FINAL COUP?

 by Francis J. Connolly

*Who gets the best of it when spy battles scribe (in this case, William Casey and Bob Woodward)? One never knows, do one?*

### 14 SON OF BORK

 by Spurious

*With the White House's flawed Supreme Court nominee going up in smoke, we await, with a shudder, Ronald Reagan's next move.*

## LIFESTYLE



### 1 COMMON THREADS

 by Ric Kahn

*What's the difference between a Southie and a Hoodsie? Come on a style tour of five Boston neighborhoods and find out.*

### 2 URBAN EYE

 by Jean Callahan

### 8 PERMANENT WAVES

 by Lauren MacCarthy

*We've come a long way from barber shops and beauty parlors, but just what the future holds for the volatile hair-and-beauty biz in Boston only your hairdresser knows for sure.*

### 10 TALKING SHOP

 by Madeline Drexler

*Carol Small's big job as a registered nurse.*

advocate civil disobedience, lawbreaking, or violence — it ceases to be protected, according to Bork. On first impression it is not so obvious why advocacy of lawless activity should be protected. Though this protection is considered by civil-libertarians to be the bedrock of the First Amendment — without protection of the most unpopular and even feared speaker, there can be no assured protection for anyone — it runs against the grain to insist that one's enemy be given a public speaking platform to spew out every manner and kind of verbal trash. Yet the reason for such broad toleration of unpopular or even vicious speech was stated forcefully by Justice Louis D. Brandeis in a 1927 Supreme Court opinion in the case of *Whitney v. California*: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."

Justice Brandeis was voicing his support of an earlier doctrine announced by the Court in a case involving dissent during World War I, an opinion written by the legendary Justice Oliver Wendell Holmes, which held that even speech advocating lawlessness and violence is constitutionally protected unless there is "a clear and present danger" that it will produce imminent lawlessness. "It is a question," wrote Holmes, "of proximity and degree." In short, the law perceives a substantial difference between suggesting that lawless activity might be a good idea and actually ordering someone to engage in it or engaging in it oneself.

Though this may sound like a thin line, it is a crucial one. After all, had general advocacy of lawless activity been deemed a crime in the 1950s and '60s, Martin Luther King Jr. would not have found constitutional protection for his lectures and sermons advocating the peaceful violation of Jim Crow laws in the South. Innumerable antiwar activists would have been guilty of crimes for their general advocacy of opposition to the Vietnam War. (Indeed, the government's prosecution in Boston of Benjamin Spock, the Reverend William Sloane Coffin, and others for "conspiring" to interfere with the military draft by their speeches ran afoul of the First Amendment and was thwarted.)

Robert Bork opposes giving constitutional protection to such advocacy, even when it presents no clear and present danger. "Speech advocating . . . the frustration of . . . government through law violation has no value in a system whose basic premise is democratic rule," Bork said in a speech at the University of Michigan in the late '70s. As the American Civil Liberties Union has noted, such a view "would . . . give no constitutional protection to the work of writers advocating of civil disobedience such as Thoreau, Gandhi or Martin Luther King Jr."

Continued on page 22

## THREADS

- Purnima Sahgal has a third eye for fashion.*
- 12 RESTAURANTS** by Robert Nadeau  
*Despite a quirky location and an even quirkier mix of takeout, magazines, baked goods, and dinners, Café Freesia is worth the find.*
- 14 PUZZLE** by Don Rubin
- 15 CLASSIFIEDS**

## ARTS



SANKAI JUKU

- 1 DOING 70** by Bob Blumenthal  
*In celebration of the master's 70th birthday, which he'll be celebrating in Boston this week, a glimpse at what it's like to be on the road with Dizzy Gillespie.*
- 2 8 DAYS A WEEK: THE WEEKEND**  
*Wondering what to do when work is done? Our guide to what's hot — and where, and when, and why — is the place to start your weekend. And in "Next Weekend," Lisa Deeley Smith looks forward, not back, to the Boston Camerata's L'Orfeo.*
- 4 ART**  
*"PROTECT ME FROM WHAT I WANT" — that got your attention, didn't it? Which is precisely the idea of Jenny Holzer's message boards. David Bonetti also examines the drawings of Terry Winters.*
- 5 DANCE**  
*Lisa M. Friedlander is mesmerized by the everydancers of the Japanese butoh troupe Sankai Juku and applauds Fernando Bujones's Boston Ballet debut.*
- 6 THEATER**  
*Skip Ascheim buys John Guare's House of Blue Leaves; and Bill Marx ponders whether to cast or not to cast Richard Thomas as Hamlet.*
- 7 CHUCK BERRY**  
*Both the film and the autobiography promise to introduce us to the man behind the music, and if they don't tell everything, they may reveal more than he intended. Charles Taylor on Chuck Berry: Hail! Hail! Rock 'n' Roll; Mark Moses on Chuck Berry: The Autobiography.*
- 8 FILM**  
*Owen Gleiberman asks himself whether we're all Dogs in Space; and Steve Vineberg wishes Dancers would skip the plot and concentrate on the dancing. Plus, in "Trailers," Hey Babu Riba; Surrender; Three O'Clock High; and Like Father, like Son.*
- 10 MUSIC**  
*Lloyd Schwartz listens to blue notes from John Harbison; Michael Ullman sings the blowing eclectic of the ROVA Saxophone Quartet; and Michael Freedberg traces the diverging paths of the Isley brothers. Plus, in "Live and on Record," Tom Waits and Top Jimmy & the Rhythm Pigs.*

- 20 HOT DOTS**  
**21 EIGHT DAYS: THE WEEK**  
**22 LISTINGS**  
**31 ART LISTINGS**

- 34 PLAY BY PLAY**  
**36 OFF THE RECORD**  
**37 FILM LISTINGS**  
**40 FILM STRIPS**

# Chops

*Continued from page 3*

Furthermore, Bork's view would give no protection to more indirect "political" speech, such as literature or other forms of art. "It is sometimes said," he admitted in his Michigan speech, "that works of art . . . are capable of influencing political attitudes. But . . . [they] are not on that account immune from regulation." Such a view is a clear invitation to literary censorship.

How a man so out of step with virtually everything the Supreme Court has been saying about free speech during this century could be nominated to a lifetime seat on that Court might be a mystery to anyone who did not know Ronald Reagan and Edwin Meese. And how such a man could be presented to the Senate Judiciary Committee as a "mainstream conservative" jurist is even more baffling. It is no wonder that Bork aroused the vociferous opposition of liberal and conservative jurists alike, Northerners as well as Southerners, "strict constructionist" as well as "activist" legal scholars. It is no wonder that Bork generated such passionate opposition among citizens who do not normally concern themselves with the fine points of constitutional law. After all, even school kids understand that they are allowed to say or believe what they want because "it's a free country." This simple truth is something that Robert Bork, on a fundamental level, did not and does not appear to understand.

Bork's supporters seem to be suffering from a serious lack of what the shrinks call "reality testing." The *Boston Herald* editorialized — shortly after the Judiciary Committee had rejected the nomination — that "Bork's crime, it seems, was that he was a conservative jurist who refused to assure his inquisitors that the liberal twisting of the Constitution over the last five decades would continue." Neo-conservative commentator and sometimes intellectual crackpot Norman Podhoretz wrote a vituperative piece in which he wondered how the nation's law professors (40 percent of whom bothered to sign a letter opposing the nomination) could let down their colleague.

*Continued on page 24*

# Chops

*Continued from page 22*

To these professors, wrote Podhoretz, "the overriding consideration is supposed to be a judge's knowledge of and respect for the legal process itself. How then could they in all conscience turn on an acknowledged master of judicial craftsmanship like Bork?"

The answer to Podhoretz's anguished question is simple: smarts ain't enough. One has to ask an additional question: to what end are those smarts to be directed?

And in any event, after Bork's three days on the witness stand at the Judiciary Committee hearings, there is some reason to suspect that the *Herald's* characterization of him as "the most brilliant legal scholar this country had produced in 20 years" was a bit overstated. Bork is probably the most brilliant advocate for his brand of judicial "conservatism," but that is because his views are so far off-base that he has the field virtually to himself. I'll bet that back when Robert Bork — in earlier stages of his political evolution — was a socialist, and later a New Deal-style progressive, no one ever said he was the "most brilliant legal scholar" in the country. Bork created a very small pond and became the biggest — if not the only — fish in it.

The illusion of brilliance, however, is hardly a reason to put the man on the Supreme Court. Bork lacks the most fundamental requirement for the job. He does not believe in the American system of limited government and "natural" rights and liberties embodied in the Constitution. Americans, it seems, are a bit

more attached to their liberties than had widely been assumed. Public-opinion pollsters have for some time moaned and groaned over the small percentage of people who respond affirmatively to such questions as "Do you think someone has the right to call for the violent overthrow of the government?" A negative answer to this question has been interpreted as a general lack of support for free speech. And the betting was that if the Bill of Rights were put to a vote today, nearly all the amendments would go down to defeat. Few politicians in recent memory have seen fit to run on a platform that elevated "law" over "order" or citizens' liberties over governmental power — notwithstanding all that hypocritical Reaganite nonsense about "getting government off the backs of the people" by failing to enforce regulatory schemes like the Clean Air Act.

But those pollsters must have been asking the wrong questions. When it came down to whether Americans were prepared to accept a Borkian view of their freedoms and of the role of the courts in protecting them, the answer was a resounding no. It is a lesson that Bork, Reagan, Meese, Podhoretz, and others may take a long time to understand. Perhaps they'll get the point in time for the bicentennial of the Bill of Rights, in 1989. □

## Personally

*Continued from page 2*

market lately have remained obscure, Hite — who is thin, has good cheekbones, and has published two big sex books — is something of a celebrity. So her