following.

- A decision striking down a law that would make it a crime for even married couples to use contraceptives. He called the decision "unsupportable."
- A decision barring the courts from enforcing racially restrictive covenants (of the sort Rehnquist had on his vacation home).
- A decision protecting the right to use obscene language for political purposes (for example, "Fuck the draft"). In fact, he has gone so far as to maintain that only purely political speech is protected under the First Amendment and certainly not art, literature, science, or even moral discourse. He wrote, "It is sometimes said that works of art are capable of influencing political attitudes. But they are not, on that account, immune from regulation."
- A number of decisions extending First Amendment protections to speech that advocates violence or nonviolent civil disobedience for political reasons. Under this construction, Martin Luther King Jr.'s advocacy of opposition to the segregation statutes in Selma, Alabama, would not be considered protected speech. Bork would go much further than to restrict your freedom of speech only when it would cause a clear and present danger to others. Not only wouldn't Bork let you yell "Fire" in a crowded theater, you couldn't even yell "Burn, baby, burn" at a crowded fire.
- Decisions protecting a woman's right to choose an abortion. He has testified that "I am convinced, and I think most legal scholars are, that *Roe v. Wade* is, itself, an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority."
- A decision that overturned a law requiring mandatory sterilization of habitual criminals (see "Bork Chops"). He also supports the death penalty and doesn't believe that hanging, electrocution, or death by lethal injection constitutes cruel and unusual punishment.
- Decisions upholding affirmative-action plans in the workplace, in colleges and universities, and in government hiring.
- Decisions striking down poll taxes and literacy tests (like the kind Rehnquist is alleged to have administered in Arizona in his younger days). He is even on superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among the many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction."

Bork insists that minorities and the poor have little to fear from his majoritarian leanings, while asserting that the Court ought to stay out of the fight for equality. He has written, "The premise that the poor or the black are underrepresented politically is quite dubious. In the past two decades we have witnessed an explosion of welfare legislation, massive income redistributions, and civil-rights laws of all kinds. The poor and the minorities have had access to the political process and have done well through it."

Justice Louis Brandeis once called "the right to be left alone the most comprehensive of rights and the right most valued by civilized men." Bork's view is that the majority should be left alone to impose its whim, will, and morality on the minority without "interference" from the Supreme Court. "Let it be decided in the political arena," he asserts. That is a blueprint for justifying the continued excesses of the entrenched and powerful.

To that end, Bork has consistently ruled in favor of industry claims against regulatory agencies, while coming down against public-interest groups pressing similar claims against the government. Clearly, Bork's theory of "judicial restraint" regarding individual rights has no parallel when it comes to corporate rights. Just about the only constitutional rights Bork seems to recognize regularly are the rights of big business and corporations to do pretty much what they want, unbridled and unrestrained by government interference. He would like to do away with antitrust legislation. He has rejected a challenge to a company policy mandating that women of childbearing age be surgically sterilized as a condition of employment in certain plants as an alternative to cleaning up the workplace to protect mother and fetus from toxic chemicals. And he appears willing to interfere actively whenever our

BORK CHOPS

"Cut off his balls"

by Harvey Silverglate

When I was in college, we learned that the collective knowledge of humankind could be broken down into two categories. There were *mega-cepts* and there were *mini-cepts*. I'm too far removed from today's undergraduate culture to know what the current categories are, but I suppose it's reasonable to call them the macrocosm and the microcosm, or the big ideas versus the small facts, the broad sweep versus the little details. Anyway, you get the point.

The debate over the appropriateness of placing Robert H. Bork on the US Supreme Court has revolved largely around the mega-cepts. The talk is of his "judicial philosophy" and his jurisprudence of "original intent." The fur has been flying around big issues, such as Bork's approach to the separation of powers outlined in the first three articles of the Constitution and his statements on the subject of judicial review of the constitutionality of acts and actions of the two "political branches" of government.

Such debate is legitimate, and these are issues that the US Senate surely has a right — in fact, a duty — to examine before deciding whether to give its advice and consent to a life-tenure position for Bork on the nation's highest court. Indeed, in these very pages during the summer, I engaged in some mega-cept analysis in an attempt to place Bork's jurisprudence in some larger perspective.

Yet there is one aspect of Bork's work that has been all but ignored, and that is his *performance as a judge*, in contrast to his performance as an academic, as a judicial philosopher, or as a political theorist. After all, the foremost role of judges, including Supreme Court justices, is to rule on the unique cases and

itself, an unconstitutional decision, a serious and wholly unjustifiable usurpation of state legislative authority."

- A decision that overturned a law requiring mandatory sterilization of habitual criminals (see "Bork Chops"). He also supports the death penalty and doesn't believe that hanging, electrocution, or death by lethal injection constitutes cruel and unusual punishment.
- Decisions upholding affirmative-action plans in the workplace, in colleges and universities, and in government hiring.
- Decisions striking down poll taxes and literacy tests (like the kind Rehnquist is alleged to have administered in Arizona in his younger days). He is even on *record as opposing* the historic one-man, one-vote decision establishing that legislative districts should be equal in size to ensure equal protection and prevent gerrymandering of districts.
- Decisions striking down state laws permitting prayer in the schools. In a 1985 speech Bork argued that it would be a good thing to reintroduce religion into the classroom. If you or your children don't like that, he wrote, the remedy is "to leave the classroom."

Bork maintains that, because the 14th Amendment doesn't explicitly mention women or homosexuals, they have no judicial protections against discrimination on the basis of sex and sexual preference. He has argued that Title VII of the Civil Rights Act doesn't protect women from on-the-job sexual harassment, and he opposes the Equal Rights Amendment.

Bork also refused to recognize a constitutional right to privacy when James L. Dronenburg was dismissed from the Navy solely on the grounds that he had participated in homosexual sex. In that case, Bork speculated that "episodes of this sort are certain to be deleterious to morale and discipline, to call into question the evenhandedness of similar claims against the government. Clearly, Bork's theory of "judicial restraint" regarding individual rights has no parallel when it comes to corporate rights. Just about the only constitutional rights Bork seems to recognize regularly are the rights of big business and corporations to do pretty much what they want, unbridled and unrestrained by government interference. He would like to do away with antitrust legislation. He has rejected a challenge to a company policy mandating that women of childbearing age be surgically sterilized as a condition of employment in certain plants as an alternative to cleaning up the workplace to protect mother and fetus from toxic chemicals. And he appears willing to interfere actively whenever our elected representatives attempt to regulate the behavior of our corporate citizens.

In *Bellotti v. Nuclear Regulatory Commission*, for example, Bork decided not to give the people of Massachusetts an opportunity to be heard on the issue of safety or licensing of the Pilgrim nuclear-power plant. Attorney Jo Ann Shotwell, who argued the case for former Massachusetts attorney general Francis Bellotti, said, "He seems more concerned with the rights of nuclear utilities to be licensed than with the right of the public to be safe."

So the case builds that Robert Bork interprets the Constitution the way Jerry Falwell interprets the Bible — as it suits his purpose. Despite Reagan protestations to the contrary, he is a "result oriented" judge who makes his decision first, and uses and interprets the law after the fact to justify his judgment.

"He's not operating in an intellectual vacuum. There are historical precedents for his result-oriented judicial philosophy. Very ugly precedents. In Nazi Germany in the '30s, or in Chile, Iran, and perhaps Argentina," observes legal scholar and *Phoenix* contributor

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Yet there is one aspect of Bork's work that has been all but ignored, and that is his *performance as a judge*, in contrast to his performance as an academic, as a judicial philosopher, or as a political theorist. After all, the foremost role of judges, including Supreme Court justices, is to rule on the unique cases and the individual litigants who come before them seeking justice. If justice is not done, particularly if it is not done because the judge has twisted and turned the case in order to fit it and the outcome into his or her preconceived judicial philosophy (and if the litigant is sacrificed in the name of some larger principle that the facts of the unique case have been tortured into supporting), then the system has not worked as intended.

So let's forget the mega-cepts for a moment and look at how Robert Bork is likely to *perform* as a Supreme Court justice. The most logical way to determine this is to examine how he handled a case that came before him on the US Court of Appeals, or how he says he would have handled a case that has come before the Supreme Court. The idea is to put some flesh and blood, a human face, so to speak, onto the skeleton of Robert Bork's philosophy.

This, then, is the first installment of "Bork Chops," a series of articles focusing on the mini-cepts of Bork's career.

* * *

In 1942, three years before the Allied Forces put an end to Adolf Hitler's Third Reich experiment in unspeakable human cruelty and depravity, the case of *Skinner v. the State of Oklahoma* was decided by the United States Supreme Court. Skinner challenged the constitutionality of Oklahoma's Habitual Criminal Sterilization Act, which provided for the sterilization of any person who had been convicted two or more times in any court in the country for crimes "amounting to felonies involving moral turpitude" and who had been subsequently convicted of such a felony in Oklahoma.

Skinner's criminal record was not particularly heinous. In fact, one of the two underlying felonies that was to serve as the basis for his forced vasectomy was a 1926 conviction for stealing chickens. (His second conviction was for armed robbery, as was his third.)

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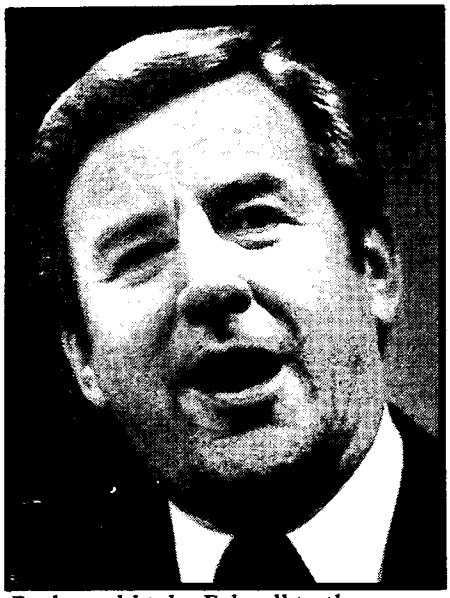
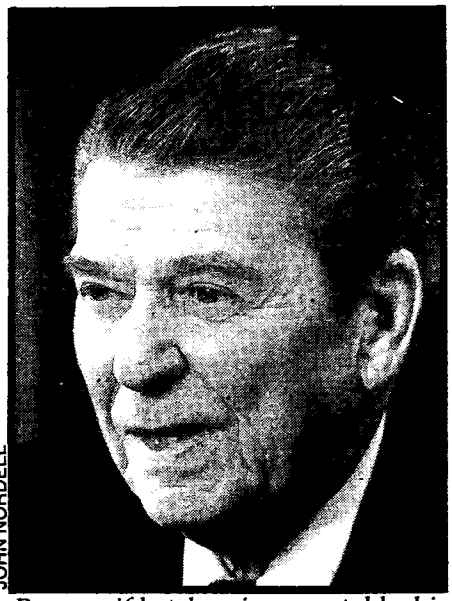
The author wishes to acknowledge the research assistance of Boston University law student Joseph Kelly in the preparation of this series.



Bork could take Falwell to the promised land.



JOHN NORDELL

Reagan: if ketchup is a vegetable, his nominee is a moderate.

Truth

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Harvey Silverglate. "And though no one on the Court currently shares his more extreme views, I imagine Rehnquist and Scalia, and maybe one or two more justices, could be persuaded. Bork is an eloquent, persuasive, and very dangerous man."

So sit tight and pay attention, because the outcome of the Senate confirmation hearings will affect everyone's rights and liberties. And if Bork's nomination to the Supreme Court is confirmed, and you are either poor, black, Hispanic, gay, or a woman seeking an abortion, consider incorporating. That seems to be the only way to get Bork to defend your rights. And if you don't like it, move. □

Chops

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Every single member of the Supreme Court of that day found this penalty to be unconstitutional, though there was some difference of opinion as to precisely why. (Indeed, the Oklahoma Supreme Court had affirmed Skinner's penalty by a mere one-vote margin, 5-4.) The majority view, expressed in a short three-and-a-half-page opinion authored by Justice William O. Douglas, held that the Oklahoma sterilization act ran afoul of the "equal protection of the laws" clause of the 14th Amendment in that this extreme and permanent penalty was visited upon petty thieves, but not

difference of opinion as to precisely why. (Indeed, the Oklahoma Supreme Court had affirmed Skinner's penalty by a mere one-vote margin, 5-4.) The majority view, expressed in a short three-and-a-half-page opinion authored by Justice William O. Douglas, held that the Oklahoma sterilization act ran afoul of the "equal protection of the laws" clause of the 14th Amendment in that this extreme and permanent penalty was visited upon petty thieves, but not, for example, upon large-scale embezzlers or fraud artists, as their crimes were not defined as involving "moral turpitude." In other words, sterilization was essentially a remedy for blue-collar malefactors, not for "respectable" white-collar types.

"We are dealing here with legislation which involves one of the basic civil rights of man," wrote Justice Douglas. The power to prevent procreation of an entire group, he added (presumably with one eye on Nazi Germany), may have "far-reaching and devastating effects." Indeed, he continued, "in evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear."

Justice Robert Jackson wrote his own concurring opinion. Jackson, who a few years later would become a member of the US team prosecuting the Nazi war criminals at Nuremberg, concluded without the slightest doubt that "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority." He thus found it unnecessary even to consider the question of equal treatment since he found the punishment to be inherently cruel and violative of the "due process of law" requirement of the Constitution.

And Chief Justice Harlan Fiske Stone found the statute wanting because Skinner was not even allowed an opportunity to present evidence showing that his criminal conduct was not inheritable and hence that sterilization was an inappropriate "remedy" by which to protect society from future generations of (heaven forbid!) chicken thieves. "There are limits," wrote Justice Stone, "to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned."

Thus every sitting member of

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Chops

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the Supreme Court, long before the advent of the so-called Warren Court, held the sterilization statute unconstitutional without the slightest hesitancy. (Indeed, taken together, the three opinions consume a mere five and a half pages in the law reports, a sure indication that the justices felt confident that the statute was unconstitutional.)

And what has Robert Bork had to say about the Supreme Court's handling of Mr. Skinner's case? Here's the answer, taken from Bork's 1971 article in the *Indiana Law Journal*:

The equal protection clause has two meanings. It can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot be properly read into the clause. The bare concept of equality provides no guide for the courts. All law discriminates and thereby creates inequality. The Supreme Court has no principled way of saying which nonracial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of "fairness" or to what it regards as "fundamental" interests in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases as intellectually empty as Griswold v. Connecticut *[declaring the use of birth control by married couples to be a fundamental right]. Any casebook lists them, and the differing results cannot be explained on any ground other than the Court's preference for particular values:* Skinner v. Oklahoma *(a for-*

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Bear in mind that when Bork castigated the Court's resolution of the Skinner case on "equal protection" grounds as "intellectually empty," he did not say that he agreed with either or both of the concurring opinions, which were grounded in even more fundamental attacks on the penalty of sterilization for the crime of theft.

Bork was asked by Delaware Senator Joseph Biden about his criticism of the Skinner case on the first day of his testimony before the Senate Judiciary Committee. He responded to the question by claiming that he was criticizing only the intellectual route by which the Court had achieved its result and had not meant to say that the statute could not have been invalidated on other grounds, such as that there is no proven relationship between genetics and criminality. What Bork failed to tell the Judiciary Committee, however, was that this was precisely the reasoning of Chief Justice Stone, and yet in his 1971 article Bork never said he agreed with Justice Stone's view of the case.

Indeed, the crux of Bork's attack on the Court was that it had relied on "simplistic notions of 'fairness'" and something called "'fundamental' interests." Bork's attack was based on his favorite mega-cept — that there is no such thing as a fundamental or inherent right, and hence there is no reason why the good people of Oklahoma, represented by their popularly elected state legislature, may not sterilize a chicken thief. In short, Bork sought to mislead the Judiciary Committee, for there is no intellectual route by which he would have arrived at the conclusion that a court may stop a legislature from decreeing sterilization for chicken thieves. The majority rules — from "cut off his head" to "cut off his balls." *Vox populi, vox dei.* □