BORKING AMERICA

WHAT ROBERT BORK WILL MEAN FOR THE SUPREME COURT AND AMERICAN JUSTICE

By Jamie Raskin, Senior Fellow, People For The American Way

photo courtesy of Gage Skidmore

People For the American Way

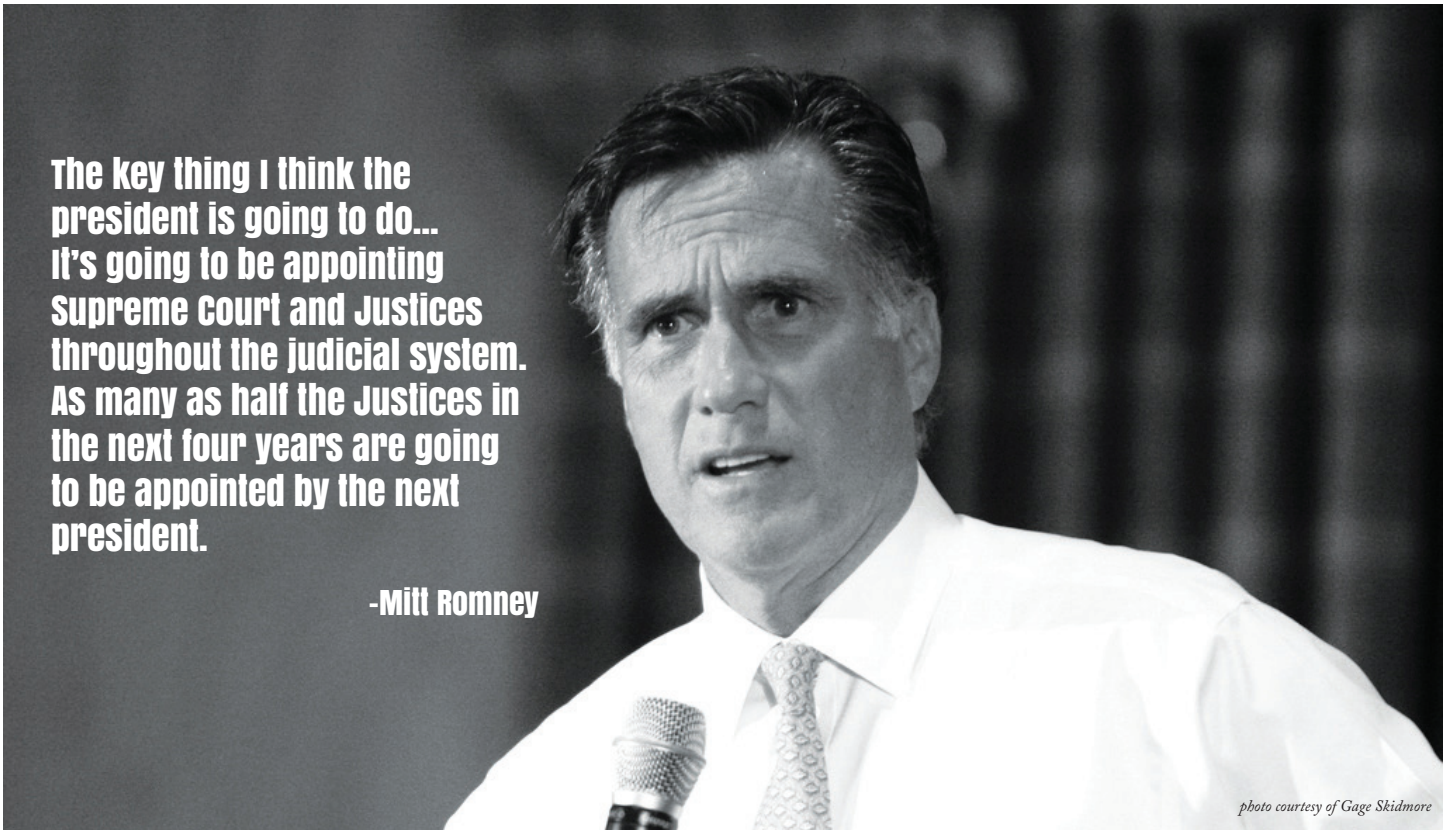


photo courtesy of Gage Skidmore

YES, AMERICA, ROBERT BORK IS BACK

Many presidents leave their most enduring legacy to the nation in the Justices that they name to the Supreme Court and the federal judges that they put on the bench. So what inspired former Massachusetts governor Mitt Romney to name former judge Robert Bork to co-chair his presidential campaign advisory committee on law, the Constitution and the judiciary?

Surely Governor Romney meant to persuade activists on the Religious Right and in the Tea Party that he is ready to do battle--not just to entrench the Corporate Court that rules today, but to nominate people to the bench who will dismantle what remains of modern civil rights and civil liberties law. What better proof that the formerly pro-gay rights and pro-choice Massachusetts governor has completed his conversion to right-wing conservatism than to pick America's scowling critic of abortion, gay rights, free speech, progressive regulation and the separation of church and state as his constitutional in-house counsel? Even if it fails to convince the Right that Romney is a deep-down true believer like Rick Santorum or Michelle Bachmann, at least his appointment of Bork expresses his complete and total surrender to the most right-wing forces in the Republican Party.

But what does this appointment say to the rest of us? Surely Romney must be assuming that it is safe to accede and pander to the Right because we have all forgotten about Bork's anti-consumer, anti-environmental and anti-worker record as a judge, not to mention his snarling opposition to women's rights, civil rights and civil liberties — the hard-core positions that moved the Senate to reject his nomination by President Ronald Reagan to the United States Supreme Court on a bipartisan vote of 58-42.

Romney is also presumably trusting that, ever since Bork resigned from the United States Court of Appeals for the District of Columbia Circuit to launch a career as a conservative polemicist with the American Enterprise Institute,[1] most of the public has tuned out his increasingly bitter diatribes against the "feminized"[2] Supreme Court and his embarrassing tirades against "American cultural decline," and the social "rot and decadence" of our country.

But Romney's elevation of Bork to advise him on the kinds of judges who should serve on the Supreme Court and the federal bench spells serious trouble for the American people. At a time when a pretty reliable 5-4 majority on the Supreme Court is already sanctifying the power of large corporations and closing down individual Americans' access to the courts, when reproductive freedom and voting rights hang by a thread, it is a cause for public alarm that Romney wants to try once again to put Robert Bork in the driver's seat of America's constitutional journey.

What follows are key highlights from Robert Bork's legal career and a brief reminder of what a court system remade in his image would mean for the rights of the people. This refresher course is essential given the current effort to rehabilitate Bork and blame Democrats for being "mean-spirited and unfair" to him when he was denied a seat on the United States Supreme Court, an effort exemplified by Joe Nocera's remarkable October 22, 2011 op-ed in the New York Times ("The Ugliness Started with Bork"). Consider this round-up an antidote to the national amnesia about who Robert Bork is and what he stands for.

THE STRANGE CAREER OF ROBERT BORK

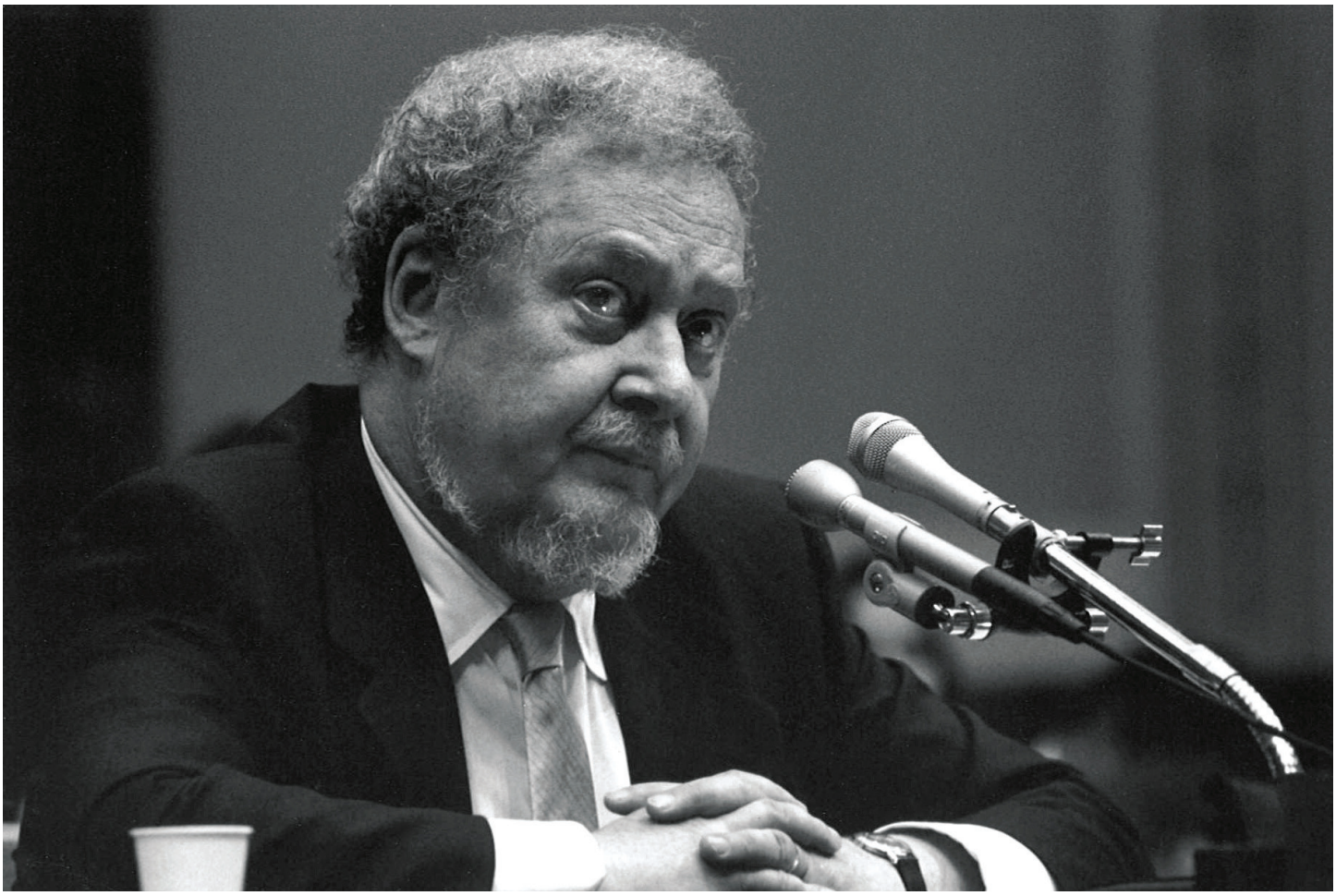
SOLICITOR GENERAL OF THE UNITED STATES:
Triggerman for Richard Nixon in the "Saturday Night Massacre"

Robert Bork first gained public prominence when he took leave from Yale Law School to serve as Solicitor General of the United States under President Richard Nixon. From that position, Bork was catapulted to dubious national fame when he became the trigger-man for Nixon's "Saturday Night Massacre" of Watergate Special Prosecutor Archibald Cox, who proved too diligent in the discovery process by demanding Nixon's secret taped recordings of his Oval Office conversations. When Nixon ordered both Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus to fire Cox, they refused and resigned rather than carry out Nixon's order. Only when Nixon made his way down to the level of Solicitor General Robert Bork did he find a willing accomplice and, apparently, a kindred spirit. Bork became the Acting Attorney General and promptly fired Archibald Cox. At the time Bork insisted that he was acting simply to stabilize the Justice Department, but he later cited Archibald Cox's association with "Nixon's despised and feared political enemy, Senator Edward Kennedy"[3] and the Kennedy family as a convoluted justification for this naked assault on independent law enforcement, which led to passage of the Independent Counsel Statute.

PROFESSOR AT YALE LAW SCHOOL:
Argues For Weakened Antitrust Law And Calls Legal Desegregation Of Motels And Lunch Counters "A Principle Of Unsurpassed Ugliness"

After leaving his post as Solicitor General, Bork returned to Yale Law School, where he wrote his most influential academic work, *The Antitrust Paradox*. The book turned the field of antitrust law sharply to the right by redefining the meaning of "consumer welfare" to include the welfare of business entities. It argued that judges facing antitrust cases should ease up on practices like vertical agreements and price discrimination and show a much friendlier attitude to corporate mergers. The theory had tremendous impact on the courts. Critics of Bork's approach have shown that the Bork-inspired changes in antitrust law distorted the field's original purposes, undermined governmental enforcement against predatory and monopolistic business practices, and caused perverse economic and social effects.[4]

Outside of antitrust law, Bork's most infamous contribution to legal discourse during this period came in an article he wrote in 1963 for *The New Republic* called "Civil Rights—A Challenge,"[5] in which he rejected desegregation by law as a violation of the "freedom" of business owners to associate only with the people they choose to. The natural right not to associate with others in



commerce, Bork argued, should not be overridden in the interests of civil rights, social justice or, most significantly, the interests of the "moral order"—the very concept that Bork would routinely come to use in arguments for overriding basic rights like the freedom of speech and the right to privacy.

While at his Supreme Court confirmation hearings two decades later, Bork came to disavow some of these sentiments. He had in fact replaced most of his original libertarian mindset with a series of new and contradictory intellectual passions over the decades, all of them tailored carefully to fit the conservative fashions of the day before being discarded. In 1991, Professor James Boyle wrote an excellent and stinging analysis of the zigzagging intellectual "odyssey" that Bork followed over his career, showing how the anti-desegregation libertarian came successively to hold numerous colliding theories of law and policy, each time with equal absolute fervor and disdain for its rivals, including those he used to champion.

"He has been a libertarian, a proponent of judicial restraint, a believer in judicial activism to enforce natural rights, and a subscriber to Wechsler's theory of neutral principles," Boyle observed, noting that Judge Bork then came to embrace "the economic analysis of law, social conservatism, and the philosophy of original intent," and ultimately settled on the philosophy of original understanding.[6] However, all of these legal theories have been supplanted by a merger of corporate ideology with censorious religious conservatism, the organizing principles of his politics today. Like Romney himself, a notorious flip-flopper who always eventually lands on the right-wing side of issues, Bork's career has been marked by comical reversals on major issues like segregation and abortion, and a hard-driving rightward trajectory.

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JUDGE ON THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:
Putting Corporations First And Individual Rights Last

Although Bork's name had been floated in conservative legal circles as a potential judge for years, it wasn't until the end of 1981 that he was nominated for a seat on the federal bench.

Bork was confirmed to the D.C. Circuit Court of Appeals on February 8, 1982. On the bench, Bork turned his authoritarian instincts into a voting record that nearly always favored government when it was challenged by public interest groups, workers or citizens but favored business corporations whenever they challenged the government. If the *New Yorker* magazine drew a map of Judge Bork's vision of America, corporations would loom large and vast over the country, the government would be standing beneath them as a military and police force to control the rabble, and citizens would appear as barely visible specks on the bottom of the land.

In August 1987, during his Supreme Court confirmation fight, the Public Citizen Litigation Group published an exhaustive and devastating report on Judge Bork's judicial record.[7] The authors could find no "consistent application of judicial restraint or any other judicial philosophy" in Bork's work on the Court.[8] Rather, by focusing on split decisions, where judicial ideology is made most plain, Public Citizen found that "one can predict [Bork's] vote with almost complete accuracy simply by identifying the parties in the case."[9] When the government litigated against a business corporation, Judge Bork voted for the business interest 100% of the time. But when government was challenged by workers, environmentalists and consumers, Bork voted nearly 100% of the time for the government.

In the crucial field of administrative law, for example, "Judge Bork adhered to an extreme form of judicial restraint if the case was brought by public interest organizations. His vote favored the executive in every one of the seven split decisions in which public interest organizations challenged regulations issued by federal agencies."[10] In these cases, Judge Bork defended, for example, Reagan administration rules relating to the environment, the regulation of carcinogenic colors in food, drugs and cosmetics, the regulation of companies with television and radio licenses, and privacy rules in family planning clinics. Similarly, in the six split decisions relating to civil rights and civil liberties where the government was a party, Judge Bork "voted against the individual every time."[11] In one of these cases, *Dronenburg v. Zech*,[12] Judge Bork wrote a 1984 opinion upholding the Navy's discharge of a sailor for being gay and used the opportunity to attack the Supreme Court's entire line of authority, beginning with *Griswold v. Connecticut*, which articulated a constitutional right to privacy in matters relating to sex and procreation.

Yet, in the eight split decisions where a business interest challenged the government, Judge Bork voted straight down the line for business every time.[13]

BORK'S SUPREME COURT NOMINATION:
Extremism Exposed And Defeated

On July 1, 1987, President Ronald Reagan nominated Bork to the Supreme Court, setting off a profound national debate about the meaning of the Constitution and the role of the Justice. Is the Constitution the expansive charter of the freedoms and liberties of the people, as Justices like William Brennan and Thurgood Marshall argued, or is it a straitjacket on democratic freedom designed primarily to protect those with power, privilege, wealth and property? Bork's performance was not reassuring. In his most reflective moment at his confirmation hearings, he told the Senate Judiciary Committee that he wanted to serve on the

Court because it offered him an "intellectual feast," but most Americans rapidly came to the conclusion that, if Bork were seated at the table, they were themselves going to appear somewhere on the menu.

Bork's opposition to reproductive freedom as a constitutional principle, his skepticism about modern civil rights law, his blithe constitutional acceptance of poll taxes and literacy tests, his reflexively pro-corporate, anti-worker and anti-environmentalist stances, his historical U-turns and dodgy answers all inspired a huge popular mobilization against him. Ultimately, his nomination was defeated with a strong, bipartisan vote of 58-42, with six Republicans voting no and two Democrats voting yes. (Lest one reach the conclusion that the Senate would have rejected anyone nominated to the Court by President Reagan, the body ultimately confirmed, by a vote of 97-0, the deeply conservative Anthony Kennedy, who later came to author the Court's devastating *Citizens United* decision.)

ROBERT BORK TODAY:

Public Scold And Right-Wing Polemicist

Not long after the defeat of his Supreme Court nomination, Bork resigned from the bench not to flee public life but rather to advocate his views "more extensively and more freely than is possible in my present position."[14] He went first to become the John M. Olin Scholar in Legal Studies at the American Enterprise Institute, joining other conservative intellectuals to do rhetorical battle on behalf of large corporations and the Religious Right against liberalism and the Democratic Party. Today, he has a similar posting as a Distinguished Fellow at the Hudson Institute and also serves as a professor at the ultra-conservative Ave Maria School of Law and a Visiting Fellow at the Hoover Institution.

As a full-time ideologue, Bork has not disappointed his legions of fans on the Right. He has struck the martyr's pose of a lonely "originalist" defending the true constitutional text against rampaging loosey-goosey Supreme Court Justices, like Justice Anthony Kennedy (the Reagan nominee who took the Supreme Court seat that slipped away from him), former Justice Sandra Day O'Connor (the Reagan nominee who betrayed the Republican Party by weakening *Roe v. Wade* rather than overruling it outright) and the late Justice William Brennan (the Eisenhower nominee who became a great civil libertarian justice and therefore a favorite Bork whipping post) – all Justices nominated to the Court by Republican presidents who apparently fell under the spell of left-wing political correctness and Bork's reviled "New Class."

In a profusion of repetitive books, articles, op-eds and speeches, Bork offers the antidote to this radical spell with lectures about the importance of hewing to constitutional original understanding, jeremiads about the moral collapse of America, and bitter attacks on the Democratic Party, which he insists invented "the politics of personal destruction."[15] He rails against liberal judicial activism, affirmative action, rock-and-roll, rap music, unions, libertarian constitutional theories he once espoused, "the vulgarization of the elites in contemporary American society" and "moral chaos, relativism . . . extreme notions of autonomy . . . the anything-goes mentality."[16] In Bork's world, everyone who does not embrace his specific conclusions about the "original understanding" of the Constitution and his conservative political morality is obviously hell-bent on pasting his or her own deviant values onto the text of the Constitution – and ruining our culture, to boot.[17]

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THE ROMNEY-BORK AGENDA FOR THE COURTS:
Power Over Justice

Since Bork is not only a legal theorist but now apparently the savior of the culture[18] and a political force in the Republican Party, he writes on practically everything, leaving us with an extensive record of his views on a wide range of issues. Moreover, his work as a judge, a law professor, Solicitor General, and a conservative organizer and intellectual today shows us precisely what his agenda is. Better than almost any other lawyer in America, Robert Bork unifies the corporate-conservative agenda with right-wing cultural politics, the two commanding impulses of the Republican Party.

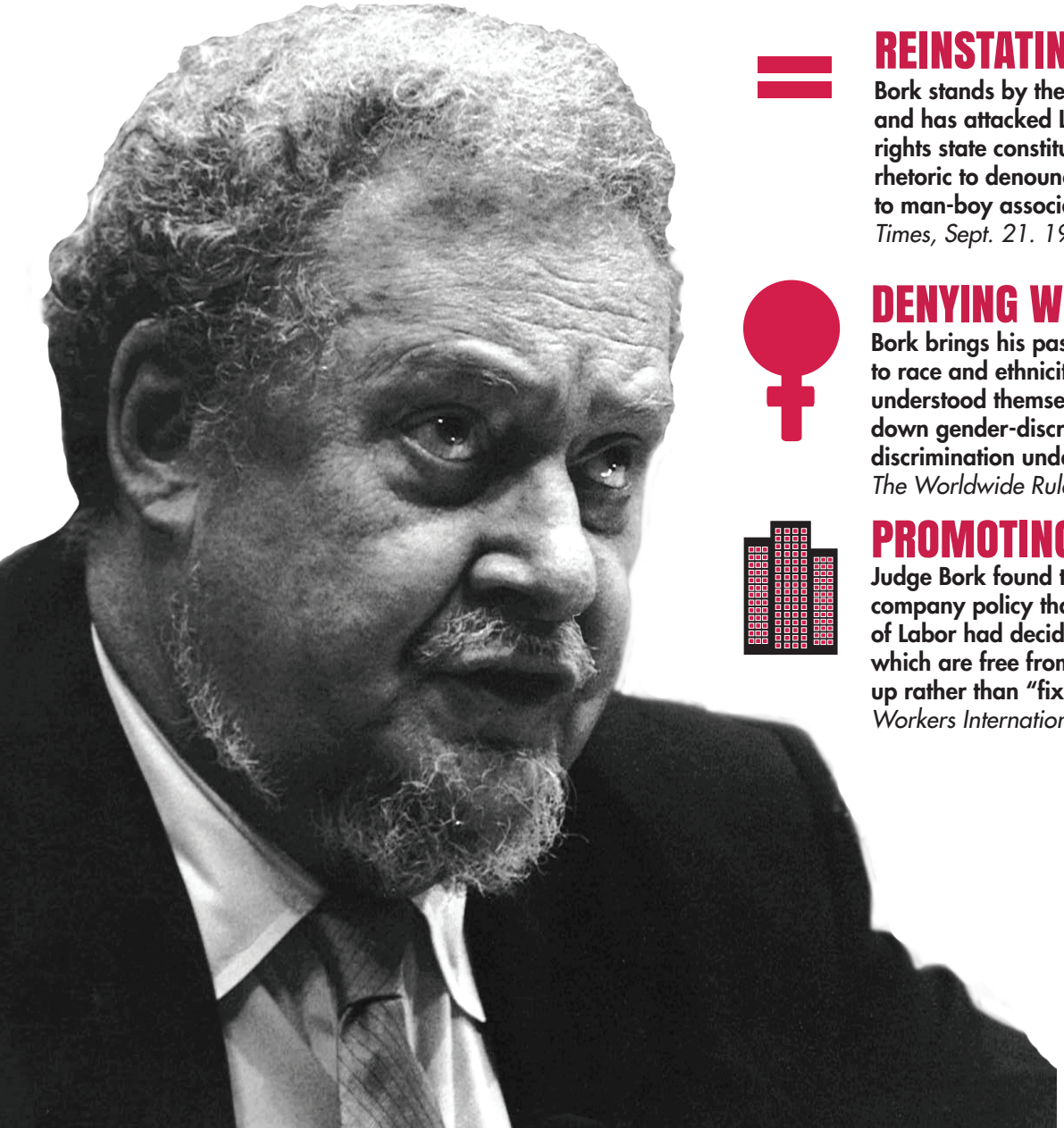
CHOOSING CORPORATE POWER OVER THE RIGHTS OF THE PEOPLE

As a judge, Bork regularly took the side of business interests against government regulators trying to hold them accountable, but the side of government when it was challenged by workers, environmentalists and consumers pressing for more corporate accountability. Indeed, a characteristic business-oriented opinion by Bork became a crucial point of discussion in his Supreme

ROMNEY AND BORK: J

SHREDDING INDIVIDUAL RIGHTS

In a famous article he wrote in 1971, Bork argued that the First Amendment protects only political speech, not art, literature, movies and so on. He has reluctantly "abandoned" this position but "only on grounds of practicality, not any difficulty with the underlying principle. The practical difficulty lies in distinguishing political speech from other varieties." Nonetheless, he has continued to aggressively promote censorship to deal with what he has called the "rot and decadence" of American society.
Robert H. Bork, A Time to Speak: Selected Writings and Arguments (2008) 219.



ATTACKING CIVIL RIGHTS

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The Worldwide Rule of Judges, 2003, 330

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LIMITING BIRTH CONTROL

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LAWS

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WISH HE WERE ALREADY THE SUPREME COURT."

-MITT ROMNEY

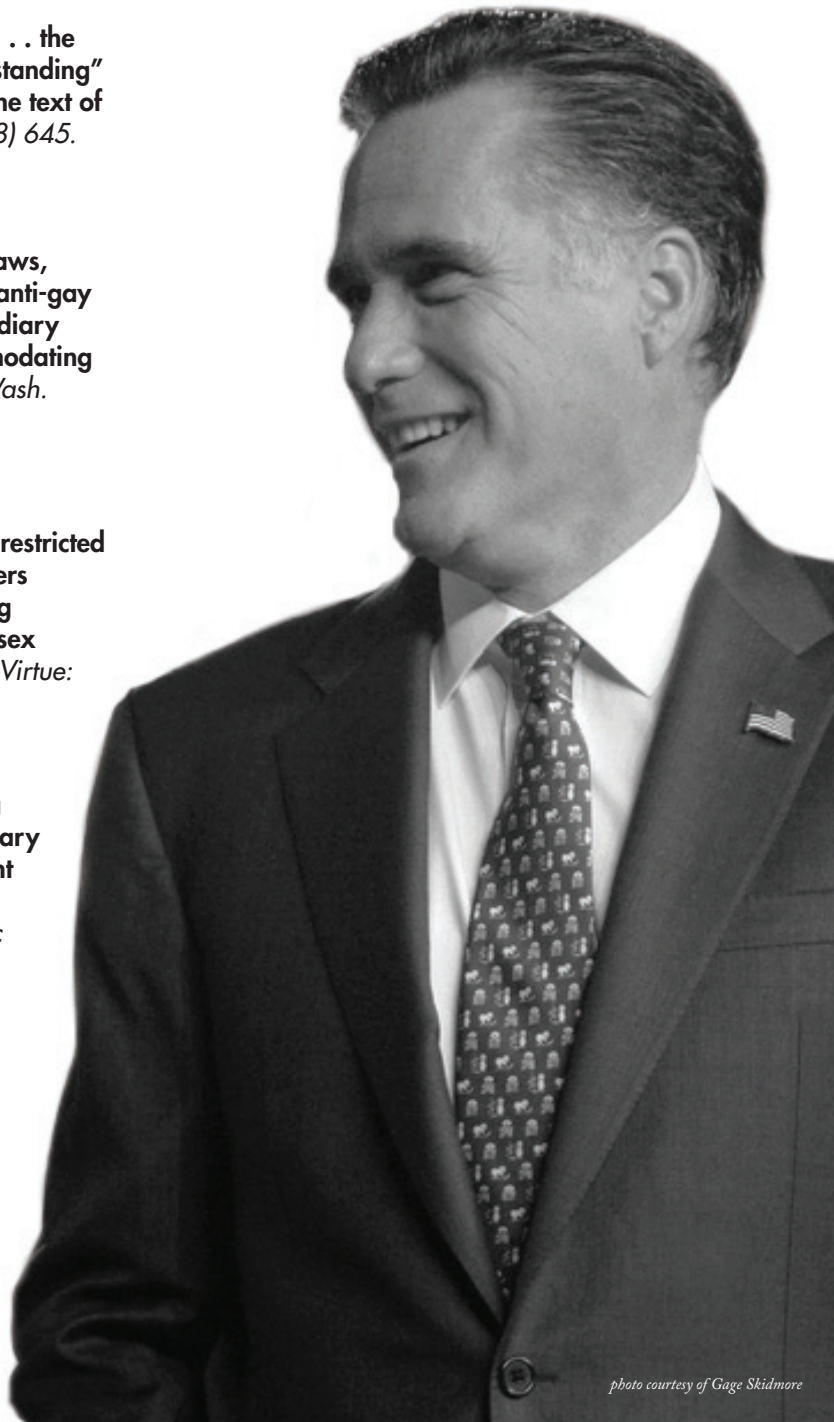

photo courtesy of Gage Skidmore

Court confirmation hearings. In a 1984 case called *Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co.*,[19] Judge Bork found that the Occupational Safety and Health Act did not protect women at work in a manufacturing plant from a company policy that forced them to be sterilized— or else lose their jobs— because of high levels of lead in the air. The Secretary of Labor had decided that the Act's requirement that employers must provide workers "employment and a place of employment which are free from recognized hazards" meant that American Cyanamid had to "fix the workplace" through industrial clean-up rather than "fix the employees" by sterilizing or removing all women workers of child-bearing age. But Judge Bork strongly disagreed. He wrote an opinion for his colleagues apparently endorsing the view that other clean-up measures were not necessary or possible and that the sterilization policy was, in any event, a "realistic and clearly lawful" way to prevent harm to the women's fetuses. Because the company's "fetus protection policy" took place by virtue of sterilization in a hospital, outside of the physical workplace,the plain terms of the Act simply did not apply, according to Judge Bork. Thus, as Public Citizen put it, "an employer may require its female workers to be sterilized in order to reduce employer liability for harm to the potential children."[20]

OPPOSING EVERY MAJOR ADVANCE IN THE SUPREME COURT FOR VOTING RIGHTS FOR AFRICAN-AMERICANS AND THE POOR

As Republican legislators in 34 states push legislation requiring voters to show photo identification in the 2012 elections, Bork is the right man for the job of getting these restrictive new practices upheld. He has a long, disgraceful record on voting rights, opposing the fundamental constitutional principle of "one person, one vote" as an anti-democratic fiction and defending the constitutionality of the poll tax and literacy test in state elections.[21] With Robert Bork and Mitt Romney choosing judges, we can expect more federal judges who want to turn the clock back on political democracy.

REJECTING REPRODUCTIVE FREEDOM UNDER THE CONSTITUTION

Like Governor Romney, Bork is adamant that *Roe v. Wade* (1973) be overturned and states be given the power to prosecute women and doctors who violate state criminal abortion laws. As Bork promises in one of his books, "Attempts to overturn *Roe* will continue as long as the Court adheres to it. And, just so long as the decision remains, the Court will be perceived, correctly, as political and will continue to be the target of demonstrations, marches, television advertisements, mass mailings, and the like. *Roe*, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned. The Court's integrity requires that."[22] Bork, as Romney's judicial advisor, will be pushing for an anti-choice litmus test to save the Court's "integrity." Clearly he will find a receptive audience for that view in Governor Romney. Beyond abortion, Bork denounces the Supreme Court's protection of a constitutional right to privacy in decision-making with respect to birth control in *Griswold v. Connecticut* and *Eisenstaedt v. Baird*.[23] He does not think this right exists in the Constitution and calls the Ninth Amendment—which states that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" — an "inkblot" without meaning. But the whole purpose of the Ninth Amendment was precisely to prevent authoritarians in government from claiming that people lack rights because they were not explicitly identified in the Constitution.

REJECTING EQUAL RIGHTS FOR WOMEN UNDER THE CONSTITUTION

Bork is a determined enemy of feminism, a political force that he considers "totalitarian" and in which, it is clear to him, "the extremists are the movement."[24] Whereas women and men all over America cheered the Supreme Court's 7-1 decision in *United States v. Virginia*, which forced the Virginia Military Institute to stop discriminating and to admit its first women cadets, Bork attacks it for producing the "feminization of the military."[25] He writes: "Radical feminism, an increasingly powerful force across the full range of American institutions, overrode the Constitution in *United States v. Virginia*."[26] This decision, for him, was no aberration: "VMI is only one example of a feminized Court transforming the Constitution."[27] This stance puts him in the bizarre position of describing arch-conservative former Chief Justice William Rehnquist, who concurred in the judgment, as a participant in the radical feminist takeover of the

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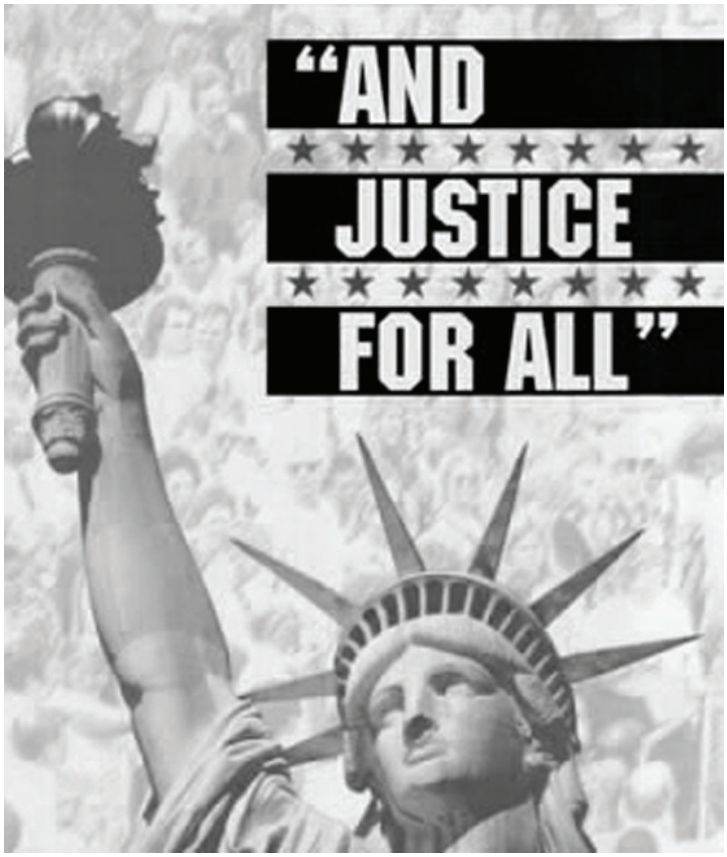

Court. Against the feminized Court, Bork brings his passionate conviction that, outside of standard "rational basis" review, "the equal protection clause should be restricted to race and ethnicity because to go further would plunge the courts into making law without guidance from anything the ratifiers understood themselves to be doing." [28] Thus, if Bork and his acolytes have their way, decades of Supreme Court decisions striking down gender-discriminatory laws under the Equal Protection Clause will be thrown into doubt as the Court comes to examine sex discrimination under the "rational basis" test, the gentlest and most relaxed kind of judicial scrutiny.

PROMOTING CENSORSHIP OF ART, LITERATURE AND MOVIES

In a famous article he wrote in 1971, Bork argued that the First Amendment protects only political speech, not art, literature, movies and so on. He has reluctantly "abandoned" this position but "only on grounds of practicality, not any difficulty with the underlying principle. The practical difficulty lies in distinguishing political speech from other varieties."[29] Nonetheless, he has continued to aggressively promote censorship to deal with what he has called the "rot and decadence" of American society. In a 1997 interview with Michael Cromartie, Bork expressed such desperation about the state of American culture that he came out in favor of a return to censorship boards in America, rejecting any nuanced treatment of materials he disfavors, saying: "I don't make any fine distinctions; I'm just advocating censorship."[30]

OPPOSING EQUAL RIGHTS FOR GAY AMERICANS

At a time when Republican partisans at a presidential debate boo a soldier for voicing support for gay rights, Robert Bork is clearly the right man for the job of trying to reverse the substantial gains that gay and lesbian Americans have made in the Supreme Court ever since he was prevented from joining it. Bork not only contends that every pro-gay rights decision the Court has ever rendered is wrong, but he seeks to amend the Constitution to enshrine his views. Dropping any pretense of supporting the traditional right of states under federalism to choose their own policies on marriage, Bork has advocated passage of a constitutional amendment that would permanently define marriage as between "one man and one woman" and prevent the states from offering gay couples equal benefits of any kind.[31] Bork stands by the discredited and overruled Supreme Court decision in *Bowers v. Hardwick*,[32] which upheld criminal sodomy laws, and has attacked *Lawrence v. Texas*,[33] the decision that overturned it. He also deplores *Romer v. Evans*,[34] which struck down an anti-gay rights state constitutional amendment that was based on nothing more than animus towards gays. Bork frequently uses incendiary rhetoric to denounce gay rights, as when he said that, if same-sex marriage passes, "I think we'll become much more accommodating to man-boy associations, polygamists and so forth."[35]

DEFENDING CRIMINAL PUNISHMENT FOR PEOPLE WHO ADVOCATE CIVIL DISOBEDIENCE

One of the issues that surfaced in Bork's confirmation hearing was his criticism of a landmark First Amendment decision called *Brandenburg v. Ohio*[36] that struck down Ohio's anti-syndicalism statute, which made it a crime simply to "advocate" law-breaking or violence. The Court held that the government cannot punish political advocacy unless it is "*directed to inciting and likely to incite imminent lawless action*." For Bork, this stringent standard is not nearly broad enough to suppress the dissent he wants to see criminalized. He argues that "there is no constitutional reason to protect speech advocating forcible overthrow of the government or speech advocating the violation of the law."[37] For an originalist, Bork strangely forgets that our country was conceived in a democratic revolution by people engaged in precisely these kinds of subversive speech. During his Supreme Court confirmation hearings, it was pointed out that Rev. Martin Luther King, who was arrested thirty times, could have been jailed dozens of times more simply for supporting *other* people who were participating in civil disobedience. Similarly, the ultimate victory of all the defendants in the Boston 5 case—the 1968 prosecution of Dr. Benjamin Spock, William Sloane Coffin, Marcus Raskin, Michael Ferber and Mitchell Goodman for conspiracy to "aid and abet" draft evasion during the Vietnam War—would have been decided the other way under Bork's standard. But this does not at all trouble Bork, who writes: "There is surely no reason to think it is proper to punish those who violate the law but improper to punish the person who persuades them to do so."[38] Civil disobedience movements today — like those occupying Wall Street or challenging the military-industrial complex or blocking abortion clinics — should be aware of Bork's anti-free speech views. A priest who blesses the protest of either anti-abortion protesters as they go to block an abortion clinic or anti-war protesters as they go to block an induction center could be found guilty of being an accessory to a crime if Bork gets his way. An op-ed writer who condones civil disobedience on Wall Street by the Occupy movement or at the Iranian Embassy by pro-democracy protesters would be as guilty as someone who actually trespasses or engages in disorderly conduct at a protest.

Robert Bork wrote that an employer may require its female workers to be sterilized in order to reduce employer liability for harm to the potential children.

CHAMPIONING THE DEATH PENALTY FOR JUVENILE OFFENDERS

After the Supreme Court issued its landmark 2005 decision in *Roper v. Simmons*, striking down the death penalty for juvenile offenders (those convicted of crimes committed before the age of 18) as a violation of the Eighth Amendment, Bork called the decision a "new low" for the Court.[39] Justice Kennedy, who wrote the majority opinion, noted that between 1990 (when the Court had last considered the question) and its deliberations in 2005, "only seven countries other than the United States" had executed juvenile offenders: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo and China. Each of them had since abolished the death penalty for juveniles or disavowed the practice, leaving the United States alone in permitting execution of those who were young teens when they committed capital crimes. None of this moved Bork, who found nothing "cruel or

unusual" about the practice of the state executing people for a crime they committed at a point when the state recognized that they were not even mature enough to vote.

ATTACKING THE SEPARATION OF CHURCH AND STATE

Bork routinely castigates the Court for removing religious prayers from different public school contexts, including commencement exercises and high school football games. He does not believe in the Jeffersonian "wall of separation" between church and state, but rather seems to dabble in the Clarence Thomas theory that the Establishment Clause applies only against federal establishment of an official national church, not religious impositions on citizens by state governments. Writing for the Ave Maria Law Review, the home journal for the law school where he now teaches, Bork makes no bones about his pinched understanding of the Establishment Clause: "If the various Justices take the original understanding of the Clause more seriously than their own precedents, the 'wall' will crumble," he wrote.[40] Meanwhile, Bork increasingly endorses the most extreme right-wing attacks on science and the theory of evolution, writing that "the fossil record is proving a major embarrassment to evolutionary theory" and claiming that one scientist "has shown that Darwinism cannot explain life as we know it."[41] In Bork's view, right here at home, "America is engaged in a religious war."[42]

Governor Romney has ardently embraced Robert Bork's reactionary and anti-feminist campaign against liberal democracy.

AMERICA AT THE CROSSROADS:

REHEATING THE CULTURE WAR OR ADDRESSING ECONOMIC INEQUALITY?

Although hardline conservatives suspect Governor Romney's right-wing credentials as a result of his dramatic career-long flip-flops on issues like abortion and gay rights, they have nothing to fear going forward. With this brazen appointment, Governor Romney has ardently embraced Robert Bork's reactionary and anti-feminist campaign against liberal democracy. Of course, it is hard to believe that the rest of America wants to turn back the clock to the mean politics of Robert Bork. But his polemics certainly provide a way to distract Americans from the extraordinary consolidation of corporate wealth and power that conservatives have engineered over the last several decades. Now, corporate conservatives are betting that a revived culture war will disrupt our chances of confronting the economic inequality and social injustice that are finally a defining political issue.

The deep irony is that, despite all of his preening rhetoric about original meaning, Bork's work almost completely erases any distinction between law and politics; he may as well be interpreting the Republican Party platform as the Constitution of the United States. By naming Bork as a lead advisor on the

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law and the courts, Romney has shown that his approach to the Constitution is entirely political, partisan and right-wing. The Roberts Court has already gone to great lengths to remove constraints on corporate power throughout American life, and Robert Bork proposes to make things much worse. Once again, we face a crucial political crossroads, and the American public must focus on the future of the Supreme Court and our most basic freedoms in choosing who will become our next president. Let's defend the hard work of the millions of Americans and the bipartisan group of political leaders who took a stand 25 years ago against this ideologue's effort to gut our Constitution and Bill of Rights; now it's our turn to make sure that America doesn't get Borked.[43]

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2 Robert H. Bork, Coercing Virtue: The Worldwide Rule of Judges (2003), 77.
3 Robert H. Bork, Commentary, Against the Independent Counsel, February (1993), reprinted in Robert H. Bork, A Time to Speak: Selected Writings and Arguments 603 (2008).
4 For an excellent collection of such criticism, See How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust Law (Robert Pitofsky ed., 2008); Steven Salop, Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard, 22 Loy. Consumer L. Rev 33 (2010).
5 Robert H. Bork, Civil Rights- A Challenge, New Republic 21 (Aug. 31, 1963).
6 See James Boyle, A Process of Denial: Bork and Post-Modern Conservatism, (1991) available at http://www.law.duke.edu/boylesite/bork.htm (reappearing in altered form at James Boyle, A Process of Denial: Bork and Post-Modern Conservatism, 3 Yale J.L. & Human. 263 (1991)).
7 The Judicial Record of Judge Robert H. Bork (Public Citizen) (Public Citizen Litigation Group ed., 1987)
8 Public Citizen at 2.
9 Id.
10 Id.
11 Id. at 3.
12 Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).
13 Public Citizen at 4.
14 Associated Press, "BORK QUITS APPEALS COURT TO 'RESPOND' TO HIS CRITICS : His Defeat a Tragedy--Reagan," Los Angeles Times, January 14, 1988.
15 A Time to Speak, 390. One can only regard with amazement Bork's solemn assurance that "the politics of personal destruction are an invention of the Democratic Party," especially given his prior work with Republican President Richard Nixon, the master of the political dark arts whose tactics of personal destruction included break-ins at psychiatrists' offices, vindictive tax audits, enemies lists, spying and sabotage.
16 Robert H. Bork, A Time to Speak: Selected Writings and Arguments 390 (2008) 645.
17 In the endless diatribes that fill the pages of his books and articles, the only solace for the reader is to find passages of early Bork that debunk theories he now clings to with the zeal of a true believer. For example, Professor Boyle first unearthed this gem from a Bork article impeaching the philosophy of originalism that he now treats as his intellectual raison d'etre: "History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted and ratified the great clauses. The record is incomplete, the men involved had vague or even conflicting intentions, and no one foresaw, or could have foreseen, the disputes that changing social conditions and outlooks would bring before the court." This is a pretty decent answer to everything that Bork now espouses about original understanding being the key to unlocking the meaning of the Constitution.
18 Bork writes that, "The struggle over the Supreme Court is not just about law: it is about culture." Robert H. Bork, Their Will Be Done: How the Supreme Court Sows Moral Anarchy, July 10, 2005.
19 Oil, Chemical & Atomic Workers International Union v. American Cyanamid Company, 741 F.2d 444 (D.C. Cir. 1984).
20 Public Citizen at 23.
21 Robert H. Bork, The Tempting of America: The Political Seduction of the Law 317 (1990) (discussing letter from Robert H. Bork to President Ronald Reagan). ("I did and I do oppose the principle [of one person, one vote] as a constitutional principle"); id. at 90-93 (criticizing Harper v. Virginia Board of Elections, 383 U.S. 663 (1966))
22 Robert H. Bork, The Tempting of America, 116.
23 Robert H. Bork, The Tempting of America, 110-11.
24 Robert H. Bork, Slouching Toward Gomorrah, 201, 195.
25 Id. at 218.
26 Robert H. Bork, Coercing Virtue: The Worldwide Rule of Judges, 2003, 76.
27 Id. at 77.
28 Id. at 330.
29 Robert H. Bork, A Time to Speak: Selected Writings and Arguments (2008) 219.
30 Pornography: Private Right or Public Menace, Robert M. Baird and Stuart E. Rosenbaum, 1998, 71-72.
31 A Time to Speak, 646.
32 Bowers v. Hardwick, 478 U.S. 186 (1986).
33 Lawrence v. Texas, 539 U.S. 558 (2003).
34 Romer v. Evans, 517 U.S. 620 (1996).
35 Jennifer Harper, Bork Envisions Gay 'Marriages' Winning in Courts, The Wash. Times, Sept. 21. 1996, at A5.
36 Brandenburg v. Ohio, 395 U.S. 444 (1969).
37 333.
38 334.
39 Bork, H. Robert, "Travesty Time, Again
In its death-penalty decision, the Supreme Court hits a new low," National Review, March 23, 2005.
40 Robert H. Bork, The Judge's Role in Law and Culture, 1 Ave Maria L. Rev. 19, 25 (2003).
41 Slouching Toward Gomorrah, 294.
42 A Time to Speak, 390 ("America is engaged in a religious war: a contest about culture and the proper ways to live.").
43 America's conservatives, including Robert Bork himself, use the verb "to bork" to mean something like "to attack the views or character of a judicial nominee or public figure." We might also use it more properly to mean "to impose authoritarian values and reactionary views on an unwilling public that has already rejected them." Bork has said in interviews that he does not mind the use of his name as a verb, which is why I have taken such a liberty.

ROMNEY AND BORK: JUST TOO DANGEROUS

ATTACKING CIVIL RIGHTS

LIMITING BIRTH CONTROL

REINSTATING CRIMINAL SODOMY LAWS

DENYING WOMEN'S RIGHTS

PROMOTING CORPORATE POWER

"I WISH HE WERE ALREADY ON THE SUPREME COURT"

-MITT ROMNEY

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