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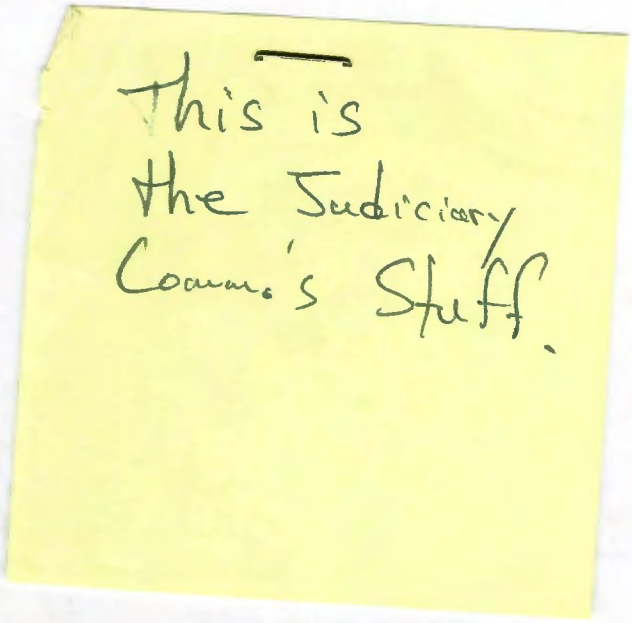
This is
the Judiciary
Comm.'s Stuff.

The Individual, the State, and the First Amendment
Univ. of Michigan - 1977 or 1978

The Individual, the State, and the First Amendment

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What you are to be offered over the three days of these lectures, it seems entirely safe to predict, are strongly contrasting views of the First Amendment, its proper office, and its fortunes during the era of the Burger Court.

Realized too late the error of using the — Burger Court in this area for the CJ is usually opposed to these developments I will consider important, and which I also oppose. →

Much that is of technical interest to First Amendment aficionados has occurred in the past ten years, but the title I have chosen - The Individual, the State, and the First Amendment - is intended to indicate that I mean to talk about matters of more basic interest that are at stake in this body of law, as they are in our politics and in our culture generally. It is not surprising that the contest between views of the proper relationship between the individual and the society should come to the fore in First Amendment cases. That amendment is pivotal; it both reflects the current balance of opposing philosophies and, in turn, strongly influences the movement of that balance.

Harry Kalven was entirely correct in saying that free speech is so close to the heart of our democratic organization that if we lack an appropriate theory of the First Amendment, we really do not understand the society in which we live. On the evidence at hand, perhaps we do not. And perhaps that is dangerous.

This afternoon I want to make three related points. The first is that the First Amendment increasingly displays a characteristic that has vexed and troubled its jurisprudence ever since it became a subject of judicial interpretation during World War I. There is no adequate theory of what the amendment is about, no theory of its content or of its limits.

Precisely because our theory is inadequate, today, when the law of the First Amendment seems to many commentators quite robust, there exists a real possibility of danger to free speech and the free press. Because so many people do not know how to think about the First Amendment, they welcome the dangers as progress and reform.

Finally, the Court's work in this area seems both a reflection and a contributor to very disquieting intellectual, moral, and social trends. Those trends seem to me obviously undesirable in themselves, symptoms of malaise, and they are, perhaps, ultimately threatening to freedom over wider spheres than those of special concern to the First Amendment.

The trend of the case law has been away from concern with the core value of the First Amendment. There is what one may be tempted to call the eccentric discovery in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. and Bates v. State Bar of Arizona that the Amendment protects commercial advertising. It is tempting to think such developments are merely reflections of a more general trend in which the Constitution becomes diffuse and trivialized at the hands of an activist judiciary. But that is not the sole force at work, because even as it conquers new domains, the First Amendment seems

simultaneously to have gone soft at its center.

That center or core value I, along with a number of others, identify as the protection of democratic political speech, speech which informs and guides the political process essential to a republican form of government. Without this form of speech, vital and uninhibited, all other freedoms are endangered. With it, other freedoms at least have their chance in the competition of ideas. No other variety of speech serves that function or can claim that unique relationship to constitutional processes.

The case law has moved away from this central subject of concern in two ways. The first, which began well before the era of the Burger Court, is the law's extraordinary and, in my view, unjustified tenderness, indeed solicitude, for the wellbeing and vigor of subversive advocacy. The other, and this is the work of the current Court, is the law's all too casual acceptance of federal regulation of democratic political speech. It is arguable that the most important First Amendment case in our history was the Court's 1976 decision in Buckley v. Valeo, and it was there that the Amendment suddenly went soft at its center.

The Court continues to display softness of another sort with respect to what may be called issues of morality and civility. Pornography and obscene speech can hardly be thought to lie at the center of the First Amendment's concerns. Indeed, to the degree the Amendment is about the health of a republican form of government, to that degree pornography and obscene speech run counter to its values.

The First Amendment does not enforce virtue, but the Court should not use it to frustrate legitimate and, I would argue, essential efforts of communities to prevent deep erosion of moral standards, to safeguard the aesthetic environment, and to set minimal standards for the civility of public discourse. The Court has to some degree improved the law relating to pornography left it by the Warren Court, though not sufficiently. But it has made a shambles of the law of obscene public speech. And it has done so explicitly on grounds of moral relativism.

These are not negligible matters. Any healthy society needs a view of itself as a political and moral community. Our own traditional view is under attack from many quarters, and it does not help, in fact it hurts badly, that the Justices, whom Eugene Rostow once called "inevitably teachers in a vital national seminar" should have chosen to teach the lesson that our attempts to define ourselves politically and morally through law is suspect, and probably pernicious.

But perhaps it is not entirely surprising that things have come to this pass. If it is vulgar to suppose that the Supreme Court follows the election returns, the lack of adequate legal theory as an anchor makes it inevitable that the Court should follow the Zeitgeist. Its tendency is to reflect in constitutional decisions the major cultural currents of the era, and that is particularly likely to be true with respect to the First Amendment, which is intimately related to activities that register cultural and intellectual shifts first and most explicitly. This in turn means that the Court is likely to be

particularly responsive to intellectual class tastes, tastes not fully shared by, often resisted by, other elements of the society. The subject of the relationship between the Court and the intellectual class deserves a lecture of its own. But today I can merely state my belief that in recent decades the Court has become highly responsive to that class and tends, disproportionately, to codify its attitudes in the Constitution. In that way, the Court comes to throw the powerful moral weight of the Constitution onto one side of disagreements about philosophies, values, and tastes that should be settled by unhindered democratic debate and choice.

The thesis that the Court is writing into the First Amendment a current social trend in one segment of the society seems consistent with what we observe. The law increasingly protects the individual's desire for self-expression and gives progressively less importance to the social forms and institutions that hold us together and make us a community. Correspondingly, the spirit of our age is an almost obsessive or narcissistic concern with the self. Commentators describe it variously. Tom Wolfe describes The Me Decade. Robert Nisbet, looking at the other side, writes of The Twilight of Authority. The barren, individualistic hedonism of what has been called, apparently seriously, the Playboy philosophy has become a powerful, perhaps an irresistible, force. Its power is such that many intellectuals who dislike moral relativism in the private sphere and who reject it as a standard for themselves, their families, and their colleagues, seem quick to adopt it as the only defensible public policy and even as a constitutional mandate.

There is an irony in this. The passion for individual autonomy at no matter what cost to other values extends only a little way. Increasingly, and without constitutional objection, we deny individual freedom in activities that may be called economic, and we do so blithely, without requiring any real showing that either the individual or the society is benefitted. On the other hand, increasingly, and with constitutional support, we demand individual freedom in activities that implicate morality, and we do so blithely despite a certainty that both the individual and the society will be harmed. Irving Kristol summed up the decadence this implies in his observation that we have reached the stage where a young girl has a constitutional right to perform in an X-rated movie, provided she is paid the minimum wage.

The political-cultural reflection of this trend is the growth of what Lionel Trilling has called "the adversary culture," a culture which among intellectuals, he notes has not merely an adversary but a subversive intention. It assumes that society is always Philistine and repressive and that an adversary posture toward society is good for its own sake. This strand of belief will be seen very strongly in First Amendment law, though it is most explicit in the opinions of Justice Douglas. A preference for unrest and dissent is there plainly stated.

Our civilization has always stressed the individual but never before have we regarded his right to follow his own line of development or deterioration as so sancrosanct as we do now. The right to free expression of the self is powerfully at work throughout First Amendment

law, in the political speech cases as in the obscenity cases. Both in the society and in the law we see a corresponding distrust of government; distrust of private centers of power; disdain for what may be called conventional or bourgeois values; moral relativism; tenderness, if not fascination, with radical, violent politics; weariness with traditional democratic politics; and, generally, an inversion of First Amendment values. These seem to me the characteristics of a body of law and a society in considerable trouble.

I do not want to overstate the matter. The trends I have described are strongly resisted by other strains of thought and feeling. The outcome is very much in doubt. What is troublesome is that the Court, by misunderstanding a crucial part of the Constitution, has put the First Amendment largely on the wrong side of the struggle.

If it were correct to say that the Court necessarily follows the spirit of the age, there would be little worth talking about. But the Court does not merely passively register trends; it assists powerfully in strengthening or countering them. It has will, motion, and intelligence of its own. It is an active agent in our culture as in our polity, and its intellectual and moral weight has influence both obvious and subtle throughout our lives. That is why it is worth talking about.

I begin with a brief suggestion of what I believe to be the major premise of an appropriate theory of the First Amendment. Then I will trace the implications of that theory in three important and active fields of First Amendment law: the freedom of the press; pornography and obscene speech; and political speech.

First Amendment Theory

It is now clear, thanks to the excellent historical researches of Leonard Levy and Walter Berns, that the Framers of the First Amendment had not thought through what they meant by freedom of speech and of the press. Neither the text nor the legislative history of the amendment tells us much of value today.

The Framers were not libertarian. We have had, of necessity, to invent a rather more liberal First Amendment than the one they intended. The reason is clear. The Constitution provides for a republican form of government, which is meaningless unless citizens are free to discuss and to write about political men and issues. Freedom of political speech follows directly from the structure and functions of the government the Framers created. This is the form of constitutional construction employed by Chief Justice Marshall in McCulloch v. Maryland, used by James Madison in arguing against the Sedition Law on First Amendment grounds, and made fully articulate by my colleague, Charles Black. We should have had to arrive at the judicial protection of political speech even if there were no First Amendment.

Commonly, there is something around a core, and political speech would have little sustenance without a large degree of protection for the transmission of news and information relevant to the political process. But there is no occasion, on this rationale, to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political

attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation.

That is at least the beginning of a theoretical structure for the law, at once filling out the First Amendment and confining its scope. I will be bold enough to suggest that any version of the First Amendment not built on the political speech core, and confined by, if not to, it, will either prove intellectually incoherent or leave judges free to legislate as they will, both mortal sins in the law.

We turn now to three subjects of current interest.

Freedom of the Press

Discussion of press freedom is obligatory because the press has made it so. Not a week goes by without thunderings from the journalistic corps that their freedoms are under assault. Articles appear at regular intervals with titles like "The Judicial War on the Press" or "Judges on the Rampage."

This is somewhat curious since it seems plain that the press has done quite well before the Burger Court. In Pentagon Papers the press was permitted to publish state secrets it knew to have been taken from the government without authorization. In Miami Herald Publishing Co. v. Tornillo the Court struck down a right-of-reply statute that had significant scholarly support. In Cox Broadcasting Corp. v. Cohn a

statute prohibiting publication of a rape victim's name was held invalid. In Landmark Communication v. Virginia the State was held disabled from punishing publication of material wrongfully divulged to it about a secret inquiry into alleged judicial misconduct.

In some of those cases, it is possible to believe, the press won more than perhaps it ought to have, though not many journalists are heard to express qualms. Surely, however, Pentagon Papers need not have been stampeded through to decision without either Court or counsel having time to learn what was at stake. The New York Times which had delayed publication for three months was able to convince the Court that its claims were so urgent, once it was ready to go, that the judicial process could not be given time to operate, even on an expedited basis. And one may doubt that press freedom requires permission to publish a rape victim's name or to publish the details of an investigation which the State may lawfully keep secret. These cases are instances of extreme deference to the press that is by no means essential or even important to its role.

The press has achieved special status in other ways. A newspaper was free to publish on its front page that an American submarine had succeeded in tapping an undersea Soviet military cable. The submarine had to be recalled and the tap permanently discontinued. Had an ordinary citizen communicated that information directly to the Soviets, he would have been subject to severe penalties.

As a result of the Federal Election Campaign Act, the press has rights of political speech that you and I do not. If we join to buy

an advertisement in the New York Times supporting a candidate for federal office, we are subject to severe limitations and may not speak repeatedly, but the journalists on the paper, its columnists and editorialists, may publish as much political advocacy as they wish.

Yet when the press advances and loses some novel claim it responds with an outcry that would lead the uninitiated to suppose it was being systematically stripped of centuries-old rights. The fact is press freedom is not merely alive but robust, and if there is a tiny black cloud on the horizon, its presence is due not to an insensitive judiciary but rather to the rhetoric, the mood, and the tactics of the press as it addresses a society with valid interests that compete at the margins of press freedom.

What the press has only partially attained, and has come close to obtaining completely, is the recognition of a status under the First Amendment accorded to no one else. It is the possibility that the press will harm itself by succeeding in its demands that troubles those of us who think freedom of the press indispensable to democracy.

The press has narrowly and perhaps not permanently, lost its claim to special exemption from the legal process granted few others: immunity from grand jury subpoena in Branzburg v. Hayes; exemption from subpoena to produce documents in camera upon demand of the defendant in a criminal trial in Farber; freedom from search warrants in Zurcher v. Stanford Daily News; and now pending in the Supreme Court is a claim in the libel action of Herbert v. Lando of freedom from inquiry into editorial decisions during pretrial discovery.

The basis of the press position is necessarily that the press clause of the First Amendment gives greater freedom than the speech clause, a proposition that is textually and historically dubious, to say the least. This claim is dubious as well because it requires legislative and judicial definition of who is or may be "the press." But legal definition of "the press" is, in effect, governmental licensing that enlists the First Amendment in support of the very system it was supposed to prevent.

Should the press succeed in gaining the full scope of the special status it seeks, the rhetoric will be heard that with privilege comes responsibility. Historically, such rhetoric has been effective, and it is likely to be all the more so in an egalitarian age. Special responsibility will mean some form of content control. The example of federal regulation of the electronic media is ready at hand, it is by no means certain that the First Amendment anomaly of a free print media and a regulated electronic media will either persist or ultimately be resolved in favor of freedom for both. Instead of claiming special exemption and privilege, leaving itself isolated and so vulnerable, the print media might do better to join the attack on federal regulation of the electronic media and to resist governmental limits on political speech such as those upheld in Buckley v. Valeo. Freedom is safer when shared than when possessed exclusively. It is better to have allies than, at best, envious and resentful bystanders.

Yet the press enters this phase of its struggles with an adversarial spirit that runs the risk of converting potential allies into antagonists. Much of the press explicitly claims for itself the position

of an institutional adversary to other institutions, including government, and, through government, to many of society's legitimate concerns. This has been made as a formal, legal argument by CBS in the libel suit brought against it, Barry Lando, and Mike Wallace by Colonel Herbert, who claims that he was defamed by "60 Minutes." Although New York Times v. Sullivan, long regarded as a great press victory, makes malice or reckless disregard of truth the relevant issue, CBS claims that plaintiff's discovery into its editorial judgments to determine these things violates the First Amendment. The brief argues that the Constitution established a contest between press and government in the same sense that the Marquis of Queensbury established boxing: the natural antagonism was always there, only the rules were lacking. It follows, since no one has special privileges in a fair fight, that because the press may not as of right demand disclosure of its internal affairs by government, government may not demand disclosure of the internal affairs of the press. "Government," moreover, is defined to include the judiciary, so that courts may not order the press to submit to discovery about editorial decisions. Perhaps it may prove unwise of the press to tell the judiciary, whose protection it seeks, that the judiciary, too, is its natural enemy.

The adversarial posture has other dangers. It tends to legitimate government assaults on the press. When Spiro Agnew launched his polemic, Eugene McCarthy remarked, "I agree with every word he says, but I deny his right to say it." There is something in McCarthy's

position, but there would be nothing in it if the press is accepted in the role it seeks as an adversary for all seasons.

The press, then, has fared very well in the Burger Court. The dangers to it are shadowy and remote, but such as there are arise more from its own tactics and demands than from any other source.

Pornography and Obscene Speech

Not many years ago we would have thought a scene in which the Justices of the Supreme Court of the United States donned their robes and gathered in solemn conclave to ponder and subsequently to write learned opinions about photographs of human genitalia or the propriety of barracksroom curses at a P.T.A. meeting belonged in the theater of the absurd. If we retain any sense of the incongruous, we will conclude that it still belongs there.

The Court has been drawn into this stultifying endeavor on false premises: the notion that the First Amendment protects individual autonomy as such, or the notion that finding an idea buried in it redeems the pornography or the obscenity. Neither of these notions withstands analysis.

Almost unlimited personal autonomy is defended in this area by the shopworn slogan that the individual should be free to do as he sees fit so long as he does no harm to others. The formula is meaningless. It derives, so far as I know, from John Stuart Mill's On Liberty, which purchased a spurious air of philosophic certainty by an arbitrary and indefensible definition of what people are entitled to

call harm. This strain of liberalism holds that only physical or material injury is entitled to be noticed by the law. Thus, for example, the Court tends to assume that it is not a problem if willing adults indulge a taste for pornography in a theater whose outside advertising does not offend the "squeamish." The assumption is wrong. The consequences of such "private" indulgence may have public consequences far more unpleasant than industrial pollution. The attitudes, tastes, and moral values inculcated do not stay behind in the theater.

A change in moral environment -- in social attitudes toward sex, marriage, duties toward children, and the like -- may as surely be felt as a harm as the possibility of physical violence. The Court has never explained why what the public feels to be a harm may not be counted as one.

The notion that expression must be protected if, in addition to pornography or obscenity, it contains an idea is equally unsupportable. The idea may be expressed in innumerable other ways. Just as the First Amendment has been held to allow restrictions as to time, place, and manner, it hardly seems dangerous to say that ideas may be expressed in many ways, but not in a context of the obscene.

The modern Court makes very little effort to grapple with the problem. It assumes that inhibitions on pornography or obscene speech are dangerous to freedom generally and so must be kept to an absolute minimum. It seems not to remember that for better than a century and

a half this Republic did suppress just such material, either through law or through moral censure so severe as to have the effect of law, and that that suppression never remotely threatened liberty generally.

When the Burger Court, by only a five-to-four vote, allowed some minimal control of pornography in Miller v. California, there was an enormous outcry about censorship. But, in truth, the Court did not put political speech or serious speech of any kind in danger. You will recall that the trier of fact was required to find each of three things before pornography could be banned or its purveyors punished: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Yet even that test appears to have made it impossible for communities to control the torrent of pornography which earlier decisions had loosed upon them. Perhaps that is because there is always a professor around, and a judge to believe him (which reminds one rather of P.T. Barnum's dictum), that the purest pornography is actually a profound parable about the decline of capitalism. Or perhaps it is because a flood of pornography does change moral and aesthetic standards; we become habituated to an environment which we originally wished to avoid. Perhaps there is no way back, but the Court ought not to prevent us from trying to find one.

The Court has proved even less able to cope with the problem of obscene speech. Cohen v. California threw First Amendment protection around a man who wore into a courthouse a jacket bearing words which suggested that the reader perform an act of extreme anatomical implausibility with the Selective Service system. Rosenfield v. New Jersey, Lewis v. New Orleans, and Brown v. Oklahoma involved the rude suggestion of incestuous relationships (in words popular in universities a few years back) by, respectively, a man addressing a school board, a woman addressing police officers arresting her son, and a man talking about policemen at a meeting in a university chapel. In all cases the language was not casual but intentionally assaultive. Rosenfield and Brown were remanded for reconsideration in the light, if you can call it that, of Cohen v. California, while Lewis was remanded for consideration of overbreadth in the statute, and, when the case returned to the Court, it was disposed of on overbreadth grounds.

The Court has articulated no better grounds for these decisions than the dangers of the slippery slope and moral relativism as a constitutional command. Justice Harlan, writing for the majority in Cohen, expressed both ideas. He said "the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" One might as well say that the negligence standard is inherently boundless, for how is one to distinguish the utterly reckless driver from the safe one. The answer in both cases is by the common sense of the community. Almost all judgments in the law

are ones of degree and there is no warrant in that fact to prevent communities from exercising any control whatever over what may be said or written in public. Harlan's other remark was a classic: "one man's vulgarity," he said, "is another's lyric." On that ground, it is impossible to see how law on any subject can be allowed to exist.

These cases might better have been decided the other way on the ground of public offensiveness alone. That offensiveness had nothing to do with the ideas expressed, if any ideas can be said to have been expressed at all. But there are other, perhaps weightier reasons, why the Court should not interfere in community efforts to control such language. If the First Amendment relates to the health of our political processes, then, far from protecting such speech, it offers additional reason for its suppression.

That claim is probably unconventional, so I will say a word or two about it. George Orwell noted the connection between politics and language. They interact and each affects the quality of the other. He wrote of meaningless language as reducing the speaker and the listener's awareness and said "this reduced state of consciousness, if not indispensable, is at any rate favorable to political conformity." The effect is not one way: "But if thought corrupts language, language can also corrupt thought." And he said, writing in 1946, "one ought to recognize that the present political chaos is connected with the decay of language, and that one can probably bring about some improvement by starting at the verbal end." Orwell was talking about ugly,

inaccurate, and slovenly language that impeded thought, not about anything remotely resembling the obscenities that have since debased public discourse. This language the Supreme Court dealt with in these cases, is not merely the language of inaccurate or slovenly thought. It is also the language of mindless assault. Alexander Bickel reminded us that "There is such a thing as verbal violence, a kind of cursing, assaultive speech that amounts to almost physical aggression, bullying that is no less punishing because it is simulated." He also said that "a marketplace without rules of civil discourse is no marketplace of ideas, but a bullring." Use of such language reduces or eliminates meaning, and there is no reason whatever for the First Amendment to protect it.

Political Speech

In assessing the work of the Burger Court one must, in fairness, make allowances for the legal tradition it inherited. To appreciate the inadequacy of that tradition it is instructive to reread the old cases and to see the poverty of the arguments with which both majority and dissenters sustained their positions. This would probably be generally conceded as to the majority opinions in cases like Abrams, Gitlow, and Whitney, but in fact the superiority of the famous dissents by Justices Holmes and Brandeis is almost entirely rhetorical. Holmes' position lapses into severe internal contradition, while Brandeis' dissents are less arguments than assertions.

But these dissents gave direction to, and may be said to have shaped, the modern law of the First Amendment, including its strange

solicitude for subversive speech. The crux of the Holmes-Brandeis position was that advocacy of the forcible overthrow of the government or of law violation could not be punished by law unless there could be shown a clear and present danger of success or imminent, serious harm. There is some doubt even about the proviso for Holmes could bring himself to write in Gitlow, and Brandeis joined him, that, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

The statement defies explanation. This in a case where the defendant proposed violent action by a minority in order to institute dictatorship? What of the Holmes-Brandeis argument in Abrams for competition in the marketplace of ideas? Is the only meaning of free speech that men may use it to rally enough force to put an end to the marketplace? Why are the "dominant forces of the community" who enacted the New York criminal anarchy law under which Gitlow was convicted not to have their way? There is a terrifying frivolity in Holmes' statement. It argues that, according to the fundamental law of our nation, the theory of Marxist dictatorship imposed by force is at least as legitimate as the idea of a republican form of government. That political relativism was certainly foreign to the Founders' thought, and ought to remain foreign to ours.

The Holmes-Brandeis position held that virtually the only harm caused by speech that society can protect itself against is the pros-

pect of imminent violence. After much wavering, through such cases as Dennis and Yates, that reading was imposed upon the First Amendment in the last year of the Warren Court in Brandenburg v. Ohio. Brandenburg's conviction could have been reversed on other grounds, but the Court seized the occasion to announce the rule, rather disingenuously attributed to Dennis and other cases, that "the constitutional guarantees of free speech and press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The Burger Court adhered to this rule in Hess v. Indiana, freeing a student who had been involved in an antiwar demonstration that blocked a public street. When the sheriff and his deputies cleared the street, Hess was heard to say in a loud voice to the crowd, "We'll take the (expletive) street again (or later)." The Court said, "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time," and that was insufficient under Brandenburg.

Hess and Brandenburg are fundamentally wrong interpretations of the First Amendment. Speech advocating the forcible destruction of democratic government or the frustration of such government through law violation has no value in a system whose basic premise is democratic rule. Speech of that nature, moreover, poses obvious dangers. If it is allowed to proliferate and social or political crisis comes

once more to the nation, so that there really is a likelihood of imminent lawless action, it will be too late for law. Aside from that possibility, it is well known that such speech has been and is used to recruit persons for underground activity, including espionage, and for terrorist activity. More dangerous is the lesson that our form of government is not inherently superior to any other. Like pornography, it is held to be a matter of taste. A nation which comes to believe nothing about its fundamental principles of organization is unlikely to show determination in defending them. It is unlikely to display high political morale or cohesiveness. It may not have a very high chance of survival either.

If what I am saying seems odd to you, out of step with the intellectual tradition in which you have been reared, it is probably because you have been raised to think Mill's On Liberty a self-evident body of truth. Gertrude Himmelfarb's brilliant book shows that Mill himself usually knew better. She quotes him on one of his better days.

> In all political societies which have had a durable existence, there has been some fixed point; something which men should agree in holding sacred; which it might or might not be lawful to contest in theory, but which no one could either fear or hope to see shaken in practice; which, in short (except perhaps during some temporary crisis), was in the common

> estimation placed above discussion. And the necessity of this may easily be made evident. A state never is, nor, until mankind are vastly improved, can hope to be, for any long time exempt from internal dissension; for there neither is nor has ever been any state of society in which collisions did not occur between the immediate interests and passions of powerful sections of the people. What, then, enables society to weather these storms, and pass through turbulent times without any permanent weakening of the ties which hold it together? Precisely this--that however important the interests about which men fall out, the conflict does not affect the fundamental principles of the system of social union which happen to exist; nor threaten large portions of the community with the subversion of that on which they have built their calculations, and with which their hopes and aims have become identified. But when the questioning of these fundamental principles is (not an occasional disease, but) the habitual condition of the body politic; and when all the violent animosities are called forth, which spring naturally from such a situation, the state is virtually in a position of civil war; and can never long remain free from it in act and fact.

Alexander Bickel made a similar point in questioning the validity of the Holmes-Brandeis marketplace metaphor for the competition of all

ideas and suggesting that there must be some limit to what we are willing to have discussed. Bickel wrote: "If in the long run the belief, let us say, in genocide is destined to be accepted by the dominant forces of the community, the only meaning of free speech is that it should be given its chance and have its way. Do we believe that? Do we accept it?" Bickel went on to ask "whether the best test of the idea of proletarian dictatorship, or segregation, or genocide is really the marketplace, whether our experience has not taught us that even such ideas can get themselves accepted there . . ." To engage in the debate is to legitimate the idea, and, as Bickel remarked, "Where nothing is unspeakable, nothing is undoable." Since then we have had the proposed Nazi march in Skokie, the ACLU's defense of it, and a remarkable assumption by the media and the legal order that Nazi ideology is constitutionally indistinguishable from republican belief. The fundamental issue raised by Skokie is not the affront to the Jewish citizens there, though that is serious enough; it is whether a creed of that sort ought to be allowed to find voice anywhere in America.

Let me turn now to the other side of First Amendment weakness in our time, the willingness to let government regulate ordinary political speech and thus influence the outcomes of democratic processes. The 1976 decision in Buckley v. Valeo upheld portions of the Federal Election Campaign Act limiting individual contributions to political candidates to $1,000 per candidate per election and $25,000 overall in an election,

requiring reporting and disclosure of individual political expenditures, and establishing the Federal Election Commission. The Court struck down limits on campaign expenditures by candidates and by individuals supporting candidates but not coordinating their activities in any way with the candidate.

Many people see the statute as merely an anti-corruption measure. In fact, it goes far beyond anything required to limit corruption. Its real effect, and in major part its intention, is to limit and distort political speech. The hard fact of modern politics is that without money there is no speech. Money is to speech today as a raised platform was to speech during the Lincoln-Douglas debates: without it the candidate is heard by only a tiny fraction of the potential audience. Money is crucially important to those without the advantages of incumbency, particularly to new and unknown movements. Contrary to common belief, Eugene McCarthy's 1968 New Hampshire primary campaign, which helped persuade Lyndon Johnson not to stand for reelection, was extremely expensive. McCarthy spent $12 per vote he received ($18 adjusted for inflation), and would have been unable to mount that campaign under today's law. He could have made the expenditure; he could not have raised the money with the contribution limits.

The Court held that expenditure was speech but that contributions were not entitled to the same First Amendment protection. Two aspects of the latter holding require comment. The first is the unpersuasiveness of the reasoning that contribution limits do not significantly

impinge upon First Amendment concerns. The second is the nature and the magnitude of the governmental interests allowed to override the speech interests.

The Court's per curiam opinion said of expenditure limits, which it found unconstitutional, that "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the number of issues discussed, the depth of their exploration, and the size of the audience reached." But limits on contributions are limits on expenditures. Yet the Court also said, "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."

This is to view contributions as speech only because they are symbolic. If that were the only sense in which a contribution is speech, a limit of $1 would be constitutional. But that is not the sense in which contributions are speech. The symbolic function is often totally absent, as when a contributor wants to preserve anonymity because his support, if known to his associates, would be unpopular. The important function of the contribution is to increase speech that the contributor agrees with, speech that is more persuasive than his

own voice could ever be, speech by a political leader or one in the process of becoming a political leader in a way the contributor can never be or does not wish to be. It was wrong of the Court, therefore, to denigrate this function with the irrelevant remark that "the transformation of contributions into political debate involves speech by someone other than the contributor." It might as well be said that a restriction on an owner's ability to rent his auditorium for political debate is of slight First Amendment interest because it involves speech by someone else. The contribution limit directly inhibits the contributor's ability to have his political opinions expressed forcefully by a candidate who will be heard in the forum where it counts most. It also inhibits the efforts of candidates to make themselves heard by requiring that more time and money be spent raising money. There is no escaping it--the contribution limits are direct limitations upon the amount and effectiveness of political speech.

Let us look at the other side, the governmental interests which were said to be weighty enough to permit this limitation on speech. Though other interests were urged, the Court found the Act's primary purpose sufficient to sustain it--to limit corruption and the appearance of corruption resulting from large individual financial contributions. Those are very strange reasons. The limit of $1,000 now worth $600 or $700 because of inflation, is impossibly severe. In a presidential election, for example, it is impossible to imagine that anything could be bought for a hundred times that sum. It is much too low a figure even for elections for Senate and House seats.

The threat of the actuality of corruption could have been met entirely by a disclosure requirement, and the threshold for disclosure should be much higher, at levels where it is at least reasonable to think that influence might be bought and sold.

Even odder is the Court's argument that even if contributions over $1,000 do not in fact lead to corruption, they may be forbidden because to some of the public there may be an appearance of corruption. That rationale is reminiscent of the heckler's veto. The First Amendment should never give way to that kind of pressure, and here the pressure was largely imaginary. The Court engaged in a preemptive sacrifice of political speech to avoid the possibility that some would think there was corruption. Both the precedent and the Court's casual acceptance of insufficient reasons to constrict democratic processes are deeply worrisome.

The statute and the decision have shifted political power in America toward those with leisure to engage in political activity, toward labor unions who have both manpower to offer and are permitted unlimited political activity in circumstances that make them far more effective than corporate activity, toward journalists and those with free access to the media, toward candidates with great personal wealth, and toward incumbents who have thoughtfully provided themselves with political resources at government expense. Many of these shifts were intended by the groups favored.

One of the more ominous aspects of the decision is that it leaves in place a federal agency empowered to regulate the details of political speech and also a highly complex statutory and regulatory framework. The Federal Election Commission is heavily influenced in its regulations and rulings by Congress, which has reserved to itself the power to veto

regulations by resolution of either House. Observers of the Commission's work report that it is particularly repressive with respect to independent political expenditures. Although the Supreme Court said that independent expenditures could not constitutionally be limited, the Commission has ruled that if two people join to purchase a newspaper or television advertisement, they become a political committee, their expenditures are viewed as contributions to the committee, and they may not spend more than $1,000 apiece.

My colleague, Ralph Winter, who instituted the challenge to the Act, points out another troublesome aspect. The statute and regulations now constitute so complex and technical a body of law that First Amendment concerns are distinctly vulnerable to apparently technical amendments whose real-world effects are not understood outside a very narrow circle. There is no general public awareness of the danger, very few lawyers and Congressman understand it, even though seemingly technical amendments can determine the outcome of elections and alter the balance of political forces in the nation.

These are the reasons I think Buckley v. Valeo may have been the most important First Amendment case in our history. It is not reassuring to realize that the Amendment fared so poorly and that a power mechanism is left in place to do further damage.

* * * * *

I have not this afternoon intended to portray an impending cataclysm. Trends do not run forever in the same direction. But I have tried to suggest that the Supreme Court is making of the First Amendment something it should not--in matters of moral consensus, a dissolving agent--in matters of political cohesion and vigor, a force for lowered esprit and less democracy. Nothing in the text, the history, or the theory of the

Amendment requires these unhappy trends. The Court--and we--would do well to recall the words of Lord Devlin: "What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives."

A society that ceases to be a community increases the danger that weariness with turmoil and relativism may bring about an order in which many more freedoms are lost than those we thought we were protecting. A proper theory of the First Amendment makes it a bulwark of rather than a threat to a community of ideas.

Jewish Daily

Friday, July 17, 1987

Some Jewish Concerns Over Robert Bork

ROSALIE ZALIS
Jewish Daily Director National Politics

LOS ANGELES—The nomination of Federal Judge Robert Bork to be an Associate Justice of the U.S. Supreme Court has caused concern and anxiety within a large segment of the Jewish community Bork's background suggests that, if confirmed, he could tip the court balance on a wide range of issues, including abortion, school prayer, affirmative action and the death penalty.

Several Jewish groups have already announced their opposition.

• **THE AMERICAN** Jewish Congress said it will oppose the appointment because of Bork's stand on such issues as privacy, free speech, civil rights and church-state separation.

Theodore Mann, president of the Congress, said that President Reagan has made "an explicitly ideological decision" in nominating Judge Bork. He said it would be a mistake for the Senate to limit its deliberations to matters of ethics and technical competence. "The Senate," he added, "has an obligation to chart the nominee's probable course on Constitutional law and to determine whether it is wise for the country to adopt that course."

• **THE NATIONAL** Council of Jewish Women (NCJW) and B'nai Brith Women have also gone public. Irma Gertler, President of BBW, called Bork "a foe of women's rights as well as the separation of

(Continued to page 7)

ROBERT BORK

church and state."

Explained Gertler, "Bork has spoken out against abortion rights and laws against sexual harassment of women, and his position on public funding of religious schools threatens the separation of church and state." NCJW National President Lenore Feldman agreed and issued a press release that read, in part, "The NCJW is deeply concerned because of Bork's public positions on critical issues affecting minorities, women and the constitutional rights of all minorities. We think the Supreme Court requires a balanced rather than an extremist view of our society; therefore Judge Bork is a poor candidate for a seat on the highest court of the land."

While other major Jewish organizations like the Anti-Defamation League and The American Jewish Committee have declined to make statements at this time, they have indicated that the matter is being studied. David Lehrer, ADL Counsel of the Western States, told *The Jewish Daily,* "In general we would be deferential to the prerogatives of the President in making such an appointment but we are waiting to see what unfolds."

And The American Union of Hebrew Congregations has already scheduled a series of meetings to consider the nomination.

In a telephone interview, Albert Chernin, Executive Director of the National Jewish Community Relations Advisory Council (NJCRAC) told *The Jewish Daily* that his group (which serves as an umbrella for ADL, The Committee, The Congress and a host of other national Jewish organizations) was carefully evaluating the appointment in hopes of taking a definitive position by September.

Senate Democrats have reached a tentative agreement to start confirmation hearings Sept. 15, and hearings on the controversial nomination are expected to last several weeks making it unlikely the high court will start its 1987 term on Oct. 5 with a full complement of nine justices.

Chernin said that under the chairmanship of Dan Shapiro, a former Dean of New York University School of Law, an initial meeting involving executive board members and representatives of several member organizations has already been held. "We are concerned about how Bork's appointment will affect the balance of the Supreme Court in deciding issues impacting particularly on the Bill of Rights and specifically on the First Amendment," stated Chernin, "and so we will do a comprehensive and careful evaluation of his background, legal opinions, speeches and articles."

Bork is known as a prolific writer, and the Library of Congress has been assigned to compile all of Bork's opinions, articles and lectures.

Chernin is especially concerned because of the longevity of such an appointment. "Unlike a Cabinet appointee who serves for four to eight years at the pleasure of the President, such an appointment is for a lifetime and must, therefore, be scrupulously screened, and for this reason the U.S. Senate must have a co-equal function with the President in advising and consenting to the nomination," he said. Chernin acknolwedged that NJCRAC's position would also be influenced by other non-Jewish national organizations like the ACLU and People for the American Way.

Meanwhile Jewish groups are not standing alone as Bork's nomination gathers a backlash of other opposition. The media has jumped on Bork for characterizing them as "heavily left liberal" with "egalitarian and permissive values." The National Association for the Advancement of Colored People and The National Education Association announced they would fight it, and liberal lobbying groups also sprang into action. Senator Joseph Biden, the Judiciary Committee Chairman and a candidate for the Democratic Presidential nomination, reportedly promised to lead the battle against Bork in the Senate. He has been joined by other liberal lawmakers including Senator Edward M. Kennedy (D-Mass.) who said, "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids. . . ."

Liberal Jewish leaders have expressed similar concerns that the broadening of constitutional liberties during the last 30 years, due in large measure to Supreme Court decisions, could be reversed to the detriment of America's Jewish minority. And as a reflexive reaction, they tend to be distrustful of a nominee who has been embraced by political conservatives including the Christian Right.

Not all Jewish groups agree. Agudath Israel of America, a politically astute and activist group which represents the right wing of the American Orthodox Jewish community, expects to support Bork. David Zwiebel, Director of its office of Government Affairs, told *The Jewish Daily,* "We are positively inclined to the nomination."

He said, "While we are still researching his opinions, everything suggests that we will support Bork . . . His intellectual and legal ability make him more than eminently qualified and he is a conservative in an era when conservatism would be beneficial to our community."

Zwiebel noted that Agudath Israel agreed with Bork on most issues including abortion and affirmative action. He also questioned the validity of the charge that Bork supported government aid to private schools. "While we agree with that principle, we have so far found nothing to indicate his position one way or another and we wonder how that perception came to be."

Would Bork necessarily shift the balance of the Supreme Court which is now viewed as evenly divided on issues of concern to the Jewish establishment? Can there be an accurate prediction of a justice's voting record when elevated to the Supreme Court? Chernin answers both questions affirmatively. He acknowledges exceptions like Justice Blackmun who, when tapped by former President Richard Nixon, was expected to be a "Gold Dust Twin" of co-appointee Warren Burger, and who turned out to be a consistent defender of the Bill of Right. But he explained the difference: "Blackmun was a practicing lawyer accustomed to considering cases on an individual basis. Bork is an academician whose approach tends to be more rigid and ideological. Bork has already asserted his positions and his philosophy for the public record."

Bork: Liberal Jews Have Doubts

Sen. Paul Simon (D-Ill.), a presidential nominee, agreed, saying, "The Court should not be a pendulum that swings back and forth depending on the ideology of the President."

However, others disagree that Bork's rulings can or should be predicted. An editorial in the prestigious *Baltimore Sun* read:

"What the Senate should determine is whether Judge Bork is suited by temperament, legal scholarship and experience to sit on the nation's highest tribunal. To attempt to anticipate his future opinions is a fool's errand. . . . The Senate ought to give Judge Bork a fair and judicious hearing, especially in light of the significance of his appointment. Its final decision will reflect as heavily on the Senate as on the nominee."

Yet another legal analyst stated: "From the harsh rhetoric from his opponents, one would think that Bork wants to turn the court into a right-wing legislation—that he is a conservative activist in the same way Justice William Brennan is a liberal one. Such activists do exist. Bork is not one of them.

His opponents say Bork favors "compulsory pregnancy"—implying tht he would order states to outlaw abortion. But he opposed the 1981 Human Life Bill in Congress that would have had that effect. He also criticized the Supreme Court's 1973 decision upholding abortion for the same reason—that it went beyond the Constitution. That view is shared by many scholars on both left and right, including Watergate prosecutor Archibald Cox.

If Bork were truly a "reactionary," the Senate would not have voted unanimously to confirm his 1982 nomination to the nation's second most powerful court. The Supreme Court would not have upheld every one of the 100-odd majority opinions he has since written. Sen. Joseph Biden, D-Del., would not have said last year that if Bork were nominated to the high court "I'd have to vote for him" even if liberal groups "tear me apart."

No essential issue has changed since, and the liberals cannot win an honest debate against judicial restraint. They are reduced to playing politics and portraying Bork as a menace."

arrive - 12
leave - 5:30

Chicago panel

Carter Wardlaw on how much time

Remarks - 20 minutes apiece - give & take - questions from the floor

Extraterritorial reach of AT - act of ~~state~~

Otherwise, hard to see how they hurt — except uncertainty, which exists everywhere — abroad, other companies may be able to do things we cannot.

Not a rationalized body of law

Cases after WW II

See Brewster's new edition

Overlapping AT laws in Europe

Impact w/in US which is also int'l comp — brings in all of AT law

Does AT have any impact on anything? How do you know? AT compared to what - alt policies or no policy? - Merger policy - does it impede efficient structure.

Speech
Chicago World Trade Conference

NOMINATIONS OF JOSEPH T. SNEED TO BE DEPUTY ATTORNEY GENERAL AND ROBERT H. BORK TO BE SOLICITOR GENERAL

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

NOMINATIONS OF JOSEPH T. SNEED, OF NORTH CAROLINA, TO BE DEPUTY ATTORNEY GENERAL AND ROBERT H. BORK, OF CONNECTICUT, TO BE SOLICITOR GENERAL

JANUARY 17, 1973

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Senator TUNNEY. You would have advised the court against it [illegible]——

Mr. BORK. I would have—it is a little hard to speak without putting it in a constitutional context. If it were that kind of an important case I would see the Solicitor General would confer with other members of the Justice Department about it. In that kind of conference I would have advised against urging a "one man, one vote" position. I would also have wished, whether my advice were accepted or not, to explain to the court that there were the following options, kinds of roads the court might take, and try to explain to the best of my ability what I considered to be the benefits or costs or detriments to each such option.

Senator TUNNEY. And that despite the fact that the Attorney General requested you to argue in favor of "one man, one vote?"

Mr. BORK. I think I would say to the Attorney General at that time, "I will do so." I also would advise that we explain to the court, since we have an obligation to the court that a private litigant does not always have, that we explain to the court what some of the problems with that approach may be and what alternative approaches there might be.

Senator TUNNEY. Well, if a "one man, one vote" case should arise while you are the Solicitor General, would you file an amicus brief attempting to limit the doctrine of "one man, one vote" as enunciated by the court?

Mr. BORK. I have not made any decision about it, Senator, in fact to [illegible] not even thought about it. I do not think it is likely to come up because the court has on its docket this term reapportionment cases from all over the country, and I think it is a good guess that they intend to review that entire field. Whether they will confirm "one man, one vote" or move to some other position, I do not know.

Senator TUNNEY. Do you think that you could sign a brief that was inconsistent with your personal views?

Mr. BORK. I think I can, Senator, and I know that I have.

Senator TUNNEY. I have other questions but I do not want to take the time if there are others who have questions.

Senator HRUSKA. Go ahead.

Senator TUNNEY. In an August 1963 New Republic article you opposed the enactment of the then proposed Interstate Public Accommodations Act. In a subsequent letter, you stated:

> The proposed legislation, which would coerce one man to associate with another on the ground that his personal preferences are not respectable, represents such an extraordinary incursion into individual freedom, and opens up so many possibilities of governmental coercion on similar principles, that it ought to fall within the area where law is regarded as improper.

In light of this statement of your beliefs, I would like to ask you a few questions about enforcement of the Civil Rights Act.

Mr. BORK. Senator, may I——

Senator TUNNEY. Yes.

Mr. BORK. I should say that I no longer agree with that article and I have some other articles that I no longer agree with. That happens to be one of them. The reason I do not agree with that article, it seems to me I was on the wrong tack altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and

I do not see any problem with the statute, and were that to be proposed today I would support it.

Senator MATHIAS. Would the Senator from California yield for just a moment in the light of his previous generous offer.

Senator TUNNEY. Yes.

Senator MATHIAS. I, unfortunately, have to leave the committee in a few minutes and I have just two or three very brief questions.

Let me say, first of all, that I was considerably encouraged and pleased by the colloquy between you and Senator Hart in which you stated your conviction, which is a conviction I share, that the Congress is still the repository of the power to decide the issue of war and peace. It is an important statement on your part and one that I welcome and applaud.

You said that this was just a general constitutional conviction on your part, not one that you had thought out in its tactical aspects and how it would be implemented. I would like to offer one possible means of implementing it, one that I certainly hope we will never resort to, one that I hope that the lubricant of goodwill that has kept the Government working for so long will prevent us from ever resorting to, but it is the simple act of one Chamber of the Congress, either the House or the Senate, failing to concur in an appropriation bill to supply the funds to continue hostilities.

It would seem to me, and I would like to ask you what your attitude would be, that this would simply be the end of it, if either the House or Senate did not approve an appropriation bill or did not act on it one way or the other.

Mr. BORK. Senator, I must say I really have not studied this aspect of the question at all. What we have, what the Senator had there, is that I was a discussant on a panel, and the panel was about the Cambodian incursion, and I was merely suggesting the range of powers that I thought the Constitution suggested were appropriate to the President, on the one hand, and the Congress, on the other, and I am afraid that is about as far into that field I have gone. Ultimately, I think, war or peace is for the Congress. I have not really thought about how, in varying situations, the Congress makes its will known if it wishes to.

Senator MATHIAS. I feel that as you enter the field you are on the right path and I walk with you.

I have only one other question to ask and it is are you currently of counsel in any active litigation?

Mr. BORK. I am currently an attorney for two plaintiffs in antitrust cases in New Haven. I intend, if confirmed, to wind up my participation in those cases altogether very shortly.

Senator MATHIAS. Either to resign as counselor or——

Mr. BORK. In fact, I have filed a motion in one case to withdraw as counsel. The judge asked that I stay in for a while longer, and I thought it was proper to do so until confirmation or something of that sort occurred, because it is a case I started and had been the prime mover in it.

Senator MATHIAS. It would seem to me that it might be helpful to you for your protection as well as being of help to the committee to give us some official notice of the title of those cases, not at this point, but to supply it for the committee at some point.

al Appellees at 11–16. Appellees reason that the appellant's action is essentially one for damages; specifically, back pay against the government. The Claims Court, appellees allege, has exclusive jurisdiction over such actions where, as here, the amount is in excess of $10,000. In the alternative, appellees claim, appellant may waive the damages to the extent they exceed $10,000 and bring the suit in the district where Dronenburg resides, the Northern District of California. Brief for Federal Appellees at 15.

This circuit has held in a case remarkably similar to this one that the federal courts have jurisdiction to determine the legality and constitutionality of a military discharge. *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 859 (D.C.Cir.1978). Matlovich, like the appellant here, challenged the Air Force's decision to discharge him based upon his homosexual activities. In vacating and remanding the determination to the district court, this court relied upon the "power and the duty [of the federal courts] to inquire whether a military discharge was properly issued under the Constitution, statutes, and regulations." 591 F.2d at 859, *citing Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958); *Van Bourg v. Nitze*, 388 F.2d 557, 563 (D.C.Cir.1967); *Hodges v. Callaway*, 499 F.2d 417, 423 (5th Cir.1974). We are bound by that prior determination and therefore are not free to refuse to hear this case on jurisdictional grounds.

We are further bound by another decision of this court holding that "the United States and its officers ... are [not] insulated from suit for injunctive relief by the doctrine of sovereign immunity." *Schnapper v. Foley*, 667 F.2d 102, 107 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982). *See also Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C.Cir.1981). In *Schnapper*, the complainants alleged that certain officials of the Administrative Office of the United States Courts and the Register of Copyrights violated, among other things, various provisions of the Constitution, the old Copyright Acts, 17 U.S.C. § 105 (1976) and 17 U.S.C. § 8 (1970), and portions of the Communications and Public Broadcasting Acts. 667 F.2d at 106. The complaint sought injunctive and declaratory relief, as does the complaint here.[2] In finding that the District Court for the District of Columbia did in fact have jurisdiction, the court held that 5 U.S.C. § 702 was intended to waive the sovereign immunity of the United States in suits for injunctive relief. That section provides, in part, that

> [a]n action in a court of the United States seeking relief other that [sic] money damages and stating a claim that an agency or an employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief thereon denied on the ground that it is against the United States ....

5 U.S.C. § 702 (1982). In discussing the legislative history of this section, the court said:

> The legislative history of this provision could not be more lucid. It states that this language was intended "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a federal official ...." S.Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976).

Schnapper, 667 F.2d at 108. The court also noted that the Senate Report had expressly stated that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *Id.*, *quoting* S.Rep. No. 996, 94th Cong., 2d Sess. 7–8 (1976). The *Schnapper* court concluded by stating its belief that "section 702 retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief." *Id.* Because no such statute has been pointed to by the appellees here, we are bound to take jurisdiction over this case.[3]

2. In his amended complaint, appellant eliminated any damages claim. Reply Brief of Appellant at 6 n. 6. Specifically, appellant seeks to have this court enjoin the Navy from discharging him and order his reinstatement. Complaint at 12, J.A. at 12.

III.

Appellant advances two constitutional arguments, a right of privacy and a right to equal protection of the laws. Resolution of the second argument is to some extent dependent upon that of the first. Whether the appellant's asserted constitutional right to privacy is based upon fundamental human rights, substantive due process, the ninth amendment or emanations from the Bill of Rights, if no such right exists, then appellant's right to equal protection is not infringed unless the Navy's policy is not rationally related to a permissible end. *Kelley v. Johnson*, 425 U.S. 238, 247–49, 96 S.Ct. 1440, 1445–47, 47 L.Ed.2d 708 (1976). We think neither right has been violated by the Navy.

A.

According to appellant, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and the cases that came after it, such as *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), have "developed a right of privacy of constitutional dimension." Appellant's Opening Brief on Appeal at 14–15. Appellant finds in these cases "a thread of principle" that the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her own body" except by the least restrictive means available and in the presence of a compelling state interest. *Id.* at 15. Given this principle, he urges, private consensual homosexual activity must be held to fall within the zone of constitutionally protected privacy. *Id.*

[2, 3] Whatever thread of principle may be discerned in the right-of-privacy cases, we do not think it is the one discerned by appellant. Certainly the Supreme Court has never defined the right so broadly as to encompass homosexual conduct. Various opinions have expressly disclaimed any such sweep, *see, e.g., Poe v. Ullman*, 367 U.S. 497, 553, 81 S.Ct. 1752, 1782, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting from a decision that the controversy was not yet justiciable and expressing views on the merits later substantially adopted in *Griswold*.) More to the point, the Court in *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), summarily affirmed a district court judgment, 403 F.Supp. 1199 (E.D.Va.1975), upholding a Virginia statute making it a criminal offense to engage in private consensual homosexual conduct. The district court in *Doe* had found that the right to privacy did *not* extend to private

3. We note that there has been some disagreement on the question whether 5 U.S.C. § 702 (1982) does in fact waive sovereign immunity in suits under 28 U.S.C. § 1331 (1982). The Second Circuit first held, as an alternative ground for a correct decision, that the 1976 amendments to § 702 "did not remove the defense of sovereign immunity in actions under [28 U.S.C.] § 1331." *Estate of Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir.1978). Later, however, another of that circuit's panels, one which included within it the author of the opinion in *Watson*, disagreed with that determination. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 724 (2d Cir.1983), as have the Third, Fifth, Sixth and Ninth Circuits. *Jaffee v. United States*, 592 F.2d 712, 718–19 (3d Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir.1980), *rev'd on other grounds*, 456 U.S. 728, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982); *Watson v. Director, Dept. of Treasury*, 672 F.2d 590, 591–92 (6th Cir.1982) (per curiam); *Beller v. Middendorf*, 632 F.2d 788, 796–97 (9th Cir.), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1980). *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 346 (2d ed. Supp.1981) ("Since the Administrative Procedure Act does not itself confer jurisdiction [the determination in *Watson*] would mean, would it not, that the amendments had no effect on immunity at all?")

homosexual conduct because the latter bears no relation to marriage, procreation, or family life. 403 F.Supp. at 1200. The Supreme Court's summary disposition of a case constitutes a vote on the merits; as such, it is binding on lower federal courts. *See Hicks v. Miranda*, 422 U.S. 332, 343–45, 95 S.Ct. 2281, 2288–90, 45 L.Ed.2d 223 (1975); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247, 79 S.Ct. 978, 978, 3 L.Ed.2d 1200 (1959). *Cf. Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n. 3 (2d Cir.1967). If a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context. That the military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society has repeatedly been made clear by the Supreme Court. *See, e.g., Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

It is urged upon us, however, that *Doe v. Commonwealth's Attorney* cannot be taken as an authoritative decision by the Supreme Court. The case should be viewed, it is said, as an affirmance based not on the constitutionality of the statute but rather upon plaintiffs' lack of standing. Plaintiffs were homosexuals who had not been threatened with prosecution under the statute. Indeed, those plaintiffs may have lacked standing, but the majority of the three-judge district court placed its decision squarely on the constitutionality of the statute, and the Supreme Court's summary affirmance gives no indication that the Court proceeded upon any other rationale. It would have been easy enough to affirm summarily giving a lack of standing as the reason. Under these circumstances, we doubt that a court of appeals ought to distinguish a Supreme Court precedent on the speculation that the Court might possibly have had something else in mind.

But even should we agree that *Doe v. Commonwealth's Attorney* is somewhat ambiguous precedent, we would not extend the right of privacy created by the Supreme Court to cover appellant's conduct here. An examination of the cases cited by appellant shows that they contain little guidance for lower courts. The right of privacy first achieved constitutional stature in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The *Griswold* Court began by noting that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484, 85 S.Ct. at 1681. The cases cited in support of that unexceptional proposition demonstrated, for example, that a state could not force disclosure of the NAACP's membership lists because of the chilling effect upon the members' first amendment rights of assembly and political advocacy. The "penumbra" was no more than a perception that it is sometimes necessary to protect actions or associations not guaranteed by the Constitution in order to protect an activity that is. The penumbral right has no life of its own as a right independent of its relationship to a first amendment freedom. Where that relationship does not exist, the penumbral right evaporates. The Court referred to the first amendment's penumbra as a protection of "privacy," noted that other amendments created "zones of privacy," and concluded that there was a general right of privacy that lay outside the "zones" or "penumbras" of particular amendments. *Id.* It was not explained how areas not lying within any "penumbra" or "zone of privacy" became part of a more general "right of privacy," but clearly that is what the Court intended. The right of a husband and wife to use contraceptives, which the challenged Connecticut statute prohibited, was held to be guaranteed by this general right, though not by any individual amendment, penumbra, or zone. The *Griswold* opinion stressed the sanctity of marriage. It did not indicate what other activities might be protected by the new right of privacy and did not provide any guidance for reasoning about future claims laid under that right.

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), struck down a state antimiscegenation statute because it constituted an invidious racial classification violative of the equal protection clause of the fourteenth amendment and because it deprived appellants of liberty without due process of law in violation of the same amendment. The equal protection ruling followed from prior cases and the historical purpose of the clause. It is not entirely clear whether the due process analysis broke new ground. The Court spoke of a right of marriage but emphasized heavily the racial discrimination worked by this statute, a point central to the equal protection holding. In its brief analysis of the due process holding, the Court said only:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 [62 S.Ct. 1110, 1113, 86 L.Ed. 1655] (1942). *See also Maynard v. Hill*, 125 U.S. 190 [8 S.Ct. 723, 31 L.Ed. 654] (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

388 U.S. at 11–12, 87 S.Ct. at 1824. There is in this passage no mode of analysis that suggests an answer to the present case, certainly none that favors appellant.

Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), invalidated under the equal protection clause of the fourteenth amendment a Massachusetts law prohibiting the distribution of contraceptives. The law in question provided that married persons could obtain contraceptives to prevent pregnancy on prescription only, single persons could not obtain contraceptives at all in order to prevent pregnancy, and married and single persons could obtain contraceptives from anyone to prevent the spread of disease. *Id.* at 442, 92 S.Ct. at 1032. The Court reasoned that there was no "ground of difference that rationally explains the different treatment accorded married and unmarried persons" under the statute. *Id.* at 447, 92 S.Ct. at 1035. The Court demonstrated that the purpose of the statute could not rationally be to deter fornication or to safeguard health. The opinion then came to the aspect presumably of most interest here: could the statute be sustained simply as a prohibition on contraception? The Court explicitly declined to decide whether such a law would conflict with "fundamental human rights" and offered instead this line of reasoning:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453, 92 S.Ct. at 1038 (emphasis in original). In order to apply *Eisenstadt* to a future case not involving the same personal decision a court would have to know whether the challenged governmental regulation was "unwarranted" and whether the regulation was of a matter "so fundamentally affecting a person as the decision

whether to bear or beget a child." *Eisenstadt* itself does not provide any criteria by which either of those decisions can be made.

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), severely limited the states' power to regulate abortions in the name of the right of privacy. The pivotal legal discussion was as follows:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 [11 S.Ct. 1000, 1001, 35 L.Ed. 734] (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 [89 S.Ct. 1243, 1247, 22 L.Ed.2d 542] (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8–9 [88 S.Ct. 1868, 1872–1873, 20 L.Ed.2d 889] (1968), *Katz v. United States*, 389 U.S. 347, 350 [88 S.Ct. 507, 510, 19 L.Ed.2d 576] (1967), *Boyd v. United States*, 116 U.S. 616 [6 S.Ct. 524, 29 L.Ed. 746] (1886), *see Olmstead v. United States*, 277 U.S. 438, 478 [48 S.Ct. 564, 572, 72 L.Ed. 944] (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484–485 [85 S.Ct. at 1681–1682]; in the Ninth Amendment, *id.*, at 486 [85 S.Ct. at 1682] (Goldberg J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer v. Nebraska*, 262 U.S. 390, 399 [43 S.Ct. 625, 626, 67 L.Ed. 1042] (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed. 288] (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 [87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010] (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541–542 [62 S.Ct. 1110, 1113–1114, 86 L.Ed. 1655] (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453–454 [92 S.Ct. at 1038–1039]; *id.*, at 460, 463–465 [92 S.Ct. at 1041, 1043–1044] (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 [64 S.Ct. 438, 442, 88 L.Ed. 645] (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 [45 S.Ct. 571, 573, 69 L.Ed. 1070] (1925), *Meyer v. Nebraska*, *supra*.
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

410 U.S. at 152–53, 93 S.Ct. at 726–27. The Court nevertheless refused to accept the argument that the right to abort is absolute.

> The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. *The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions.* The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 [25 S.Ct. 358, 49 L.Ed. 643] (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 [47 S.Ct. 584, 71 L.Ed. 1000] (1927) (sterilization).

Id. at 153–54, 93 S.Ct. at 727 (emphasis added). Thus, though the Court gave an illustrative list of privacy rights, it also denied that the right was as broad as the right to do as one pleases with one's body. Aside from listing prior holdings, the Court provided no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy.

Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), held unconstitutional yet another regulation of access to contraceptives on grounds of privacy. The New York statute required that distribution of contraceptives to persons over sixteen be only by a licensed pharmacist. That provision was held unconstitutional because no compelling state interest was perceived that could overcome "the teaching of *Griswold* . . . that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Id.* at 687, 97 S.Ct. at 2017. A compelling state interest was required "not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*." *Id.* at 688–89, 97 S.Ct. at 2018. Limiting distribution to licensed pharmacists significantly burdened that right. *Id.* at 689, 97 S.Ct. at 2018.[4]

These cases, and the suggestion that we apply them to protect homosexual conduct in the Navy, pose a peculiar jurisprudential problem. When the Supreme Court decides cases under a specific provision or amendment to the Constitution it explicates the meaning and suggests the contours of a value already stated in the document or implied by the Constitution's structure and history. The lower court judge finds in the Supreme Court's reasoning about those legal materials, as well as in the materials themselves, guidance for applying the provision or amendment to a new situation. But when the Court creates new rights, as some Justices who have engaged in the process state that they have done, *see, e.g.*, *Doe v. Bolton*, 410 U.S. 179, 221–22, 93 S.Ct. 739, 762–63, 35 L.Ed.2d 201 (1973) (White, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 167–68, 93 S.Ct. 705, 733–34, 35 L.Ed.2d 147 (1973) (Stewart, J., concurring), lower courts have none of these materials available and can look only to what the Supreme Court has stated to be the principle involved.

In this group of cases, and in those cited in the quoted language from the Court's opinions, we do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be

4. The Court also struck down a provision of the law forbidding distribution of contraceptives to those less than 16 years old, but there was no majority rationale for this result and it would not advance our inquiry to discuss the various opinions offered.

said that none of these covers a right to homosexual conduct.

The question then becomes whether there is a more general principle that explains these cases and is capable of extrapolation to new claims not previously decided by the Supreme Court. It is true that the principle appellant advances would explain all of these cases, but then so would many other, less sweeping principles. The most the Court has said on that topic is that only rights that are "fundamental" or "implicit in the concept of ordered liberty" are included in the right of privacy. These formulations are not particularly helpful to us, however, because they are less prescriptions of a mode of reasoning than they are conclusions about particular rights enunciated. We would find it impossible to conclude that a right to homosexual conduct is "fundamental" or "implicit in the concept of ordered liberty" unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw.

In dealing with a topic like this, in which we are asked to protect from regulation a form of behavior never before protected, and indeed traditionally condemned, we do well to bear in mind the concerns expressed by Justice White, dissenting in *Moore v. City of East Cleveland*, 431 U.S. 494, 544, 97 S.Ct. 1932, 1958-59, 52 L.Ed.2d 531 (1977):

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Whatever its application to the Supreme Court, we think this admonition should be taken very seriously by inferior federal courts. No doubt there is "ample precedent for the creation of new constitutional rights," but, as Justice White said, the creation of such rights "comes nearest to illegitimacy" when judges make "law having little or no cognizable roots in the language or even the design of the Constitution." If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights,[5] we think it certain that lower courts should not do so. We have no guidance from the Constitution or, as we have shown with respect to the case at hand, from articulated Supreme Court principle. If courts of appeals should, in such circumstances, begin to create new rights freely, the volume of decisions would mean that many would evade Supreme Court review, a great body of judge-made law would grow up, and we would have "pre-empt[ed] for [ourselves] another part of the governance of the country without express constitutional authority." If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.

Turning from the decided cases, which we do not think provide even an ambiguous warrant for the constitutional right he seeks, appellant offers arguments based upon a constitutional theory. Though that theory is obviously untenable, it is so often heard that it is worth stating briefly why we reject it.

Appellant denies that morality can ever be the basis for legislation or, more specifically, for a naval regulation, and asserts two reasons why that is so. The first argument is: "if the military can defend its blanket exclusion of homosexuals on the ground that they are offensive to the majority or to the military's view of what is socially acceptable, then no rights are safe from encroachment and no minority is protected against discrimination." Appellant's Opening Brief on Appeal at 11-12. Passing the inaccurate characterization of the Navy's position here, it deserves to be said that this argument is completely frivolous. The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities. If a court refuses to create a new constitutional right to protect homosexual conduct, the court does not thereby destroy established constitutional rights that are solidly based in constitutional text and history.

Appellant goes further, however, and contends that the existence of moral disap[illegible] [illegible] [illegible] [illegible] cult to understand how an adult's election of a partner to share sexual intimacy is not immune from burden by the state as an element of constitutionally protected privacy. That the particular choice of partner may be repugnant to the majority argues for its vigilant protection—not its vulnerability to sanction." Appellant's Opening Brief on Appeal at 13. This theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government. When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason. We stress, because the possibility of being misunderstood is so great, that this deference to democratic choice does not apply where the Constitution removes the choice from majorities. Appellant's theory would, in fact, destroy the basis for much of the most valued legislation our society has. It would, for example, render legislation about civil rights, worker safety, the preservation of the environment, and much more, unconstitutional. In each of these areas, legislative majorities have made moral choices contrary to the desires of minorities. It is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality.[6] For these reasons appellant's argument will not withstand examination.

[4] We conclude, therefore, that we can find no constitutional right to engage in homosexual conduct and that, as judges, we have no warrant to create one. We

5. It may be only candid to say at this point that the author of this opinion, when in academic life, expressed the view that no court should create new constitutional rights, that is, rights must be fairly derived by standard modes of legal interpretation from the text, structure, and history of the Constitution. Or, as it has been aptly put, "the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground." J. Ely, *Democracy and Distrust* 2 (1980). These views are, however, completely irrelevant to the function of a circuit judge. The Supreme Court has decided that it may create new constitutional rights and, as judges of constitutionally inferior courts, we are bound absolutely by that determination. The only questions open for us are whether the Supreme Court has created a right which, fairly defined, covers the case before us or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide.

6. At oral argument, appellant's counsel was pressed by the court concerning his proposition that the naval regulations may not permissibly be founded in moral judgments. Asked whether moral abhorrence could never be a basis for a regulation, counsel replied that it could not. Asked then about the propriety of prohibiting bestiality, counsel replied that that could be prohibited but on the ground of cruelty to animals. The objection to cruelty to animals is, of course, an objection on grounds of morality.

need ask, therefore; only whether the Navy's policy is rationally related to a permissible end. *See Kelley v. Johnson*, 425 U.S. 238, 247–49, 96 S.Ct. 1440, 1445–47, 47 L.Ed.2d 708 (1976). We have said that legislation may implement morality. So viewed, this regulation bears a rational relationship to a permissible end. It may be argued, however, that a naval regulation, unlike the act of a legislature, must be rationally related not to morality for its own sake but to some further end which the Navy is entitled to pursue because of the Navy's assigned function. We need not decide that question because, if such a connection is required, this regulation is plainly a rational means of advancing a legitimate, indeed a crucial, interest common to all our armed forces. To ask the question is to answer it. The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate. This very case illustrates dangers of the sort the Navy is entitled to consider: a 27-year-old petty officer had repeated sexual relations with a 19-year-old seaman recruit. The latter then chose to break off the relationship. Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the even handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among 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.

The Navy's policy requiring discharge of those who engage in homosexual conduct serves legitimate state interests which include the maintenance of "discipline, good order and morale[,] mutual trust and confidence among service members, insur[ing] the integrity of the system of rank and command, recruit[ing] and retain[ing] members of the naval service and . . . prevent[ing] breaches of security." SEC/NAV 1900.9D (Mar. 12, 1981); J.A. at 219. We believe that the policy requiring discharge for homosexual conduct is a rational means of achieving these legitimate interests. *See Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir.), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1980). The unique needs of the military, "a specialized society separate from civilian society," *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974), justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission.

Affirmed.

John F. HARMON, Appellant,

v.

BALTIMORE & OHIO RAILROAD.

No. 83-1532.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 13, 1984.

Decided Aug. 17, 1984.

Railroad employee, who received benefits under the Longshoremen's and Harbor Workers' Compensation Act for injuries he sustained while repairing a hopper, or funnel, through which coal passed as it moved from railroad cars to the holds of barges and ships at railroad's coal pier, brought suit against the railroad under the Federal Employers' Liability Act. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., 560 F.Supp. 914, entered summary judgment in favor of railroad, and employee appealed. The Court of Appeals, Mikva, Circuit Judge, held that Longshoremen's and Harbor Workers' Compensation Act provided exclusive coverage for employee, precluding coverage for employee under the Federal Employers' Liability Act.

Affirmed.

1. Workers' Compensation ⇐262

An employee is covered by the Longshoremen's and Harbor Workers' Compensation Act only if he or she meets both the situs and status tests. Longshoremen's and Harbor Workers' Compensation Act §§ 2(3), 3(a), as amended, 33 U.S.C.A. §§ 902(3), 903(a).

2. Workers' Compensation ⇐262

Simple distinction between "traditional railroading tasks" and "traditional maritime tasks" is not the sole inquiry to be made in determining a railroad employee's status under the Longshoremen's and Harbor Workers' Compensation Act; declining to follow *Conti v. Norfolk & Western Ry. Co.*, 566 F.2d 890. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), as amended, 33 U.S.C.A. § 902(3).

3. Workers' Compensation ⇐262

Longshoremen's and Harbor Worker's Compensation Act provided exclusive coverage for railroad employee injured while repairing a hopper, or funnel, through which coal passed as it moved from railroad cars to the holds of barges and ships at railroad's coal pier, precluding coverage for employee's injuries under the Federal Employers' Liability Act. Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 2(3), 3(a), as amended, 33 U.S.C.A. §§ 901 et seq., 902(3), 903(a); Federal Employers Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 82-03093).

J. Michael Farrell, Washington, D.C., of the Bar of the District of Columbia Court of Appeals, pro hac vice by special leave of the Court, with whom Kurt C. Rommel, Washington, D.C., was on the brief, for appellant.

George F. Pappas, Baltimore, Md., of the Bar of the Court of Appeals for Maryland pro hac vice by special leave of the Court, with whom Walter J. Smith, Jr., Washington, D.C., was on the brief, for appellee.

Before WRIGHT, MIKVA and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

A recurring problem in workers' compensation laws has been the coverage of maritime workers. Commencing in 1917, when the Supreme Court held that under certain circumstances states could not constitutionally provide compensation to injured maritime workers, *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), Congress, the courts, and the states have struggled to carve out rational areas for state and federal laws. The original "*Jensen* line", named after that 1917 case, held that the states could not cover longshoremen injured seaward of the water's edge. In 1927, after several unsuccessful attempts to extend state compensation remedies to injured maritime workers, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* (1982), to provide coverage for such precluded longshoremen and others similarly situated. That statute, significantly amended in 1972, has been intersected by other federal compensation laws. We here address the application of the LHWCA, as amended in 1972, to the facts in this case and the interface, if any, between that Act and the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* (1982).

John Harmon, appellant, was employed by the Baltimore and Ohio Railroad Company (B & O) at its coal pier in Baltimore. He was injured while repairing a hopper, or funnel, through which coal passes as it

among various right-wing groups as "drifting" (a statement we have disposed of in the context of another allegation earlier, *see* page 1572, *supra*), asserted that Carto "organized and promoted the Joint Council for Repatriation. What he meant by 'repatriation' was the forced deportation of all blacks to Africa." The published sources relied upon by defendants support the assertion that Carto created this organization, and that its purpose was to "send[ ] American blacks back to Africa." They do not establish, however, that the proposal envisioned "forced deportation"—in fact, to the contrary, one of them asserted that Carto (overtly at least) only sought "voluntary" repatriation. While the latter detail reduces not at all the repugnant racism of the scheme, it is possible to be a racist without being guilty of the quite separate fault of advocating the forced deportation of United States citizens. It is the distinction between the actions of White Citizen Councils, during the worst days of the civil rights struggle, in subsidizing bus fares for blacks willing to emigrate from the South, and the action of groups such as the Ku Klux Klan in driving blacks out by physical force. As far as racism is concerned, there is no distinction between the two, but the latter contains an additional and quite distinct repugnancy. Since the published sources referred to by the defendants not only do not establish this point but to the contrary assert that Carto's scheme was formally for "voluntary" repatriation, we think it is a jury question whether this allegation, if false, was made with actual malice.

[15] We find that a jury could reasonably conclude that defamatory statements based wholly on the *True* article were made with actual malice. That article was the subject of a prior defamation action which was settled to Carto's satisfaction, a fact likely known to Bermant's editors, if not Bermant. Whether the particular statements relied on were false and whether the appellees were actually aware of that falsity are matters for a jury to determine. Allegation 19, the illustration suggesting that Carto emulated Hitler, and allegation 29, that Carto joined the singing of "Hitler's 'Horst Wessel Lied'" and delivered a speech in an attempt to emulate Hitler's style and charisma, were based solely on the *True* article. There is no other evidence that Carto emulates Hitler in appearance or in action, allegations the jury could find to be defamatory.

[16] We turn next to the five allegations based solely upon the conversation with Robert Eringer:

13. Statement that Carto "conducts his business by way of conference calls from a public telephone," which arguably suggests criminality;
14. Claim that in 1968 a Carto front organization "used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York" (since Liddy was later convicted of felony in connection with political activities, the allegation could be considered defamatory);
17. Illustration showing Carto secretly observing prospective employees through a one-way mirror;
23. One-way mirror allegation, in text;
27. Claim that a lead story in an issue of *The Spotlight* was a total hoax.

We find that a jury could reasonably conclude that Bermant made these allegations with a disregard for their truth or falsity that constituted actual malice. For one thing, there is only Bermant's word for the fact that Eringer ever said anything that supports the statements. The same was true for the statements, discussed earlier, attributed to Bartell and Suall—but as we noted, *see* pages 1576–1577, *supra*, those individuals were present at known locations in this country and could have been deposed by the plaintiffs, whereas the mysterious Mr. Eringer was thought to be somewhere in England. Moreover, Bermant's dealings with Eringer display a much lesser degree of care, despite the scurrilous allegations for which he is the sole source. Bermant not only did not inquire how Eringer came to know these details of Carto's operations; he never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone. Anderson admits that he did not care whether Eringer was reliable. These actions came close to the hypothetical case of actual malice the Supreme Court described in *St. Amant*: a story "based wholly on an unverified anonymous telephone call." 390 U.S. at 732, 88 S.Ct. at 1326. Eringer was identified by name, but he was in all other respects unknown to the appellees. These allegations, which defendants claim were based solely on Eringer's assertions, should have gone to the jury.

. . . . . .

We affirm the District Court's grant of summary judgment as to all claims of defamation except those addressed in Part V of this opinion. As to the latter, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

James L. DRONENBURG, Appellant,

v.

Vice Admiral Lando ZECH, Chief of Naval Personnel, et al.

No. 82-2304.

United States Court of Appeals, District of Columbia Circuit.

Nov. 15, 1984.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 81-00933). Oliver Gasch, Judge.

Stephen V. Bomse, Leonard Graff and Calvin Steinmetz, Washington, D.C., were on the suggestion for rehearing en banc filed by appellant.

Charles Lister and Margaret R. Alexander, Washington, D.C., were on the supporting petition for amicus curiae the American Civil Liberties Union of the National Capital Area.

Abby R. Rubenfeld, Evan Wolfson, Sarah Wunsch and Anne E. Simon, New York City, were on the joint brief of amicus curiae LAMBDA Legal Defense and Education Fund, Inc., et al., in support of the suggestion for rehearing en banc.

Before ROBINSON, Chief Judge, WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges.

ORDER

On Appellant's Suggestion for Rehearing *En Banc*

PER CURIAM

The Suggestion for Rehearing *en banc* of Appellant, and the briefs *amici curiae* in support thereof, have been circulated to the full Court and a majority of the judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that the aforesaid Suggestion for rehearing *en banc* is denied.

Opinion dissenting from denial of suggestion to hear case *en banc* filed by Chief Judge SPOTTSWOOD W. ROBINSON, III, and Circuit Judges WALD, MIKVA and HARRY T. EDWARDS.

Statements of Circuit Judges GINSBURG and STARR are attached. Also attached is a statement of Circuit Judge BORK, joined by Circuit Judge SCALIA.

SPOTTSWOOD W. ROBINSON, III, Chief Judge; WALD, MIKVA and HARRY T. EDWARDS, Circuit Judges, dissenting from denial of suggestion to hear case en banc:

We would vote to vacate the decision of the panel and to rehear the matter before the court *en banc*. This is a case of extreme importance in both a practical and a jurisprudential sense. For reasons discussed below, we do not think that *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *aff'g mem.* 403 F.Supp. 1199 (E.D.Va.1975), is controlling precedent here. Moreover, we are deeply troubled by the use of the panel's decision to air a revisionist view of constitutional jurisprudence.

The panel's extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court. The *ratio decidendi* of the panel decision is fairly well stated in the last paragraph of the opinion. Jurists are free to state their personal views in a variety of forums, but the opinions of this court are not proper occasions to throw down gauntlets to the Supreme Court.

We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint. Regardless whether it is the proper role of lower federal courts to "create new constitutional rights," *Dronenburg v. Zech*, 741 F.2d 1388, at 1396 (D.C. Cir.1984), surely it is not their function to conduct a general spring cleaning of constitutional law. Judicial restraint begins at home.

We object most strongly, however, not to what the panel opinion does, but to what it fails to do. No matter what else the opinions of an intermediate court may properly include, certainly they must still apply federal law as articulated by the Supreme Court, and they must apply it in good faith. The decisions of that Court make clear that the constitutional right of privacy, whatever its genesis, is by now firmly established. An intermediate judge may regret its presence, but he or she must apply it diligently. The panel opinion simply does not do so. Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine those decisions to their facts. Such an approach to "interpretation" is as clear an abdication of judicial responsibility as would be a decision upholding all privacy claims the Supreme Court had not expressly rejected.

We find completely unconvincing the suggestion that *Doe v. Commonwealth's Attorney* controls this case. In *Doe*, the Supreme Court affirmed without opinion a three-judge district court's dismissal of a pre-enforcement constitutional challenge to a state criminal statute. Dronenburg, by contrast, challenges the constitutionality of his discharge pursuant to a military regulation not expressly authorized by statute. To hold Dronenburg's claims hostage to a one-word summary affirmance disregards the well-established principle that such a disposition by the Supreme Court decides the issue between the parties on the narrowest possible grounds. *See Mandel v. Bradley*, 432 U.S. 173, 176–77, 97 S.Ct. 2238, 2240–41, 53 L.Ed.2d 199 (1977) (per curiam); *Fusari v. Steinberg*, 419 U.S. 379, 391–92, 95 S.Ct. 533, 540–41, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring). Moreover, the Court has clearly indicated that the *Doe* issue remains open. *See Carey v. Population Services International*, 431 U.S. 678, 688 n. 5, 694 n. 17, 97 S.Ct. 2010, 2018 n. 5, 2021 n. 17, 52 L.Ed.2d 675 (1977) ("[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."); *New York v. Uplinger*, — U.S. —, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984) (dismissing certiorari as improvidently granted).

Even were we convinced by Judge Ginsburg's well-intentioned attempt to justify the panel decision as a simple application of *Doe*, we would still vote to vacate the opinion. The opinion purports to speak for the court throughout the text, and we cannot indulge its twelve-page attack on the right of privacy as a harmless exposition of a personal viewpoint. *Cf. Dronenburg*, at 1396 n. 5.

In its eagerness to address larger issues, the panel fails even to apply seriously the basic requirement that the challenged regulation be "rationally related to a permissible end." There may be a rational basis for the Navy's policy of discharging all homosexuals, but the panel opinion plainly does not describe it. The dangers hypothesized by the panel provide patently inadequate justification for a ban on homosexuality in a Navy that includes personnel of both sexes and places no parallel ban on all types of heterosexual conduct. In effect, the Navy presumes that any homosexual conduct constitutes cause for discharge, but it treats problems arising from heterosexual relations on a case-by-case basis giving fair regard to the surrounding circumstances. This disparity in treatment calls for serious equal protection analysis.

We intimate no view as to whether the constitutional right of privacy encompasses a right to engage in homosexual conduct, whether military regulations warrant a relaxed standard of review, or whether the Navy policy challenged in this case is ultimately sustainable. What we do maintain is that the panel failed to resolve *any* of these compelling issues in a satisfactory manner. Because we believe that the panel substituted its own doctrinal preferences for the constitutional principles established by the Supreme Court, we would vacate the decision of the panel and hear the case anew.

GINSBURG, Circuit Judge:

In challenging his discharge for engaging in homosexual acts in a Navy barracks, appellant argued that the conduct in question falls within the zone of constitutionally protected privacy. The panel held that, either because of the binding effect of the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *summarily aff'g* 403 F.Supp. 1199 (E.D.Va.1975), or on the basis of principles set forth in other Supreme Court decisions, the Navy's determination could not be overturned. I agree with the first basis of that holding. *See Hicks v. Miranda*, 422 U.S. 332, 344–45, 95 S.Ct. 2281, 2289–90, 45 L.Ed.2d 223 (1975).

It is true that, in its discussion of the alternative basis, the panel opinion airs a good deal more than disposition of the appeal required.[1] Appellant and amici, in suggesting rehearing en banc, state grave concern that the panel opinion's "broad scope" creates correspondingly broad law for the circuit and, in so doing, sweeps away prior landmark holdings and divergent analyses.

The concern is unwarranted. No single panel is licensed to upset prior panel rul-

1. The dissenting opinion bends "judicial restraint" out of shape in suggesting that it is improper for lower federal courts ever to propose "spring cleaning" in the Supreme Court. In my view, lower court judges are not obliged to cede to the law reviews exclusive responsibility for indicating a need for, and proposing the direction of, "further enlightenment from Higher Authority." *See United States v. Marzano*, 664 F.2d 860, 881 (2d Cir.1981) (Oakes, J., concurring). It is a view on which I have several times acted. *See, e.g., Morse v. Barry*, 718 F.2d 1151, 1162–63 (D.C.Cir.1983) (concurrence questioning consistency of *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), with prior precedent on the concept of liberty sheltered by due process); *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 953–55 (D.C.Cir.1982) (concurrence questioning cogency of Supreme Court precedent on "zone of interests" test for determining standing to sue); *see also American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 49 (D.C.Cir.1983) (Wald, J.) (citing, *inter alia*, *Cooper & Brass*); *United States v. Ross*, 655 F.2d 1159, 1193–94 (D.C.Cir.1981) (Wilkey, J., dissenting) (questioning seamlessness of web woven by *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and its precursors), *rev'd*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

ings, landmark or commonplace, or to impose its own philosophy on "the court." The panel in this case, I am confident, had no design to speak broadly and definitively *for the circuit*. I read the opinion's extended remarks on constitutional interpretation as a commentarial exposition of the opinion writer's viewpoint, a personal statement that does not carry or purport to carry the approbation of "the court."

Because I am of the view that the Supreme Court's disposition in *Doe* controls our judgment in this case, and that the panel has not tied the court to more than that, I vote against rehearing the case en banc.

Statement of Circuit Judge BORK, joined by Circuit Judge SCALIA.

BORK, Circuit Judge:

The dissent from the court's denial of the suggestion of rehearing en banc undertakes to chide the panel for criticizing the Supreme Court's right to privacy cases and for failing to extract discernible principle from those cases for application here. In rather extravagant terms the dissent accuses the panel of such sins as attempting to "wipe away" Supreme Court decisions, of "throw[ing] down gauntlets" to that Court, and "conduct[ing] a general spring cleaning of constitutional law." While rhetorical excess may be allowed to pass, we think that underlying it in this instance are serious misunderstandings that require a response.[1]

In the first place, the dissent overlooks both what we actually did and the necessity for it. The appellant cited a series of cases—*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); and *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977)—which he claimed established a privacy right to engage in homosexual conduct. It was, therefore, essential that the panel examine those decisions to determine whether they did enunciate a principle so broad. We quoted the pivotal language in each case and concluded that no principle had been articulated that enabled us to determine whether appellant's case fell within or without that principle. In these circumstances, we thought it improper for a court of appeals to create a new constitutional right of the sort appellant sought. That much is certainly straightforward exegesis. The dissenters appear to be exercised, however, because the conclusion that we could not discover a unifying principle underlying these cases seems to them an implicit criticism of the Supreme Court's performance in this area. So it may be, but, if so, the implied assessment was inevitable. It is difficult to know how to reach the conclusion that no principle is discernible in decisions without seeming to criticize those decisions. Had our real purpose been to propose, as the dissent says, that those cases be eliminated from constitutional law, we would have engaged in a much more extensive analysis than we undertook. As it was, we said no more than we thought required by the appellant's argument.

Unless the dissent believes that we are obliged to dissemble, enunciating a unifying principle where we think none exists, then its only criticism must be with the adequacy of our analysis rather than our bona fides. That criticism, we may note, would be a good deal more persuasive if the dissent set forth (as it conspicuously did not) the unifying principle that we so obviously overlooked.

Contrary to the dissent's assertion, moreover, the panel opinion explained the rational basis for the Navy's policy with respect to overt homosexual conduct. Slip op. at 20-21. We cannot take seriously the dissent's suggestion that the Navy may be constitutionally required to treat heterosexual conduct and homosexual conduct as either morally equivalent or as posing equal dangers to the Navy's mission. Relativism in these matters may or may not be an arguable moral stance, a point that we as a court of appeals are not required to address, but moral relativism is hardly a constitutional command, nor is it, we are certain, the moral stance of a large majority of naval personnel.

Though we think that our analysis of the privacy cases was both required and accurate, we think it worth addressing the rather curious version of the duties of courts of appeals that the dissent urges. It is certainly refreshing to see "judicial restraint" advocated with such ardor, but we think the dissent misapprehends the concept. "Judicial restraint" is shorthand for the philosophy that courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance. That philosophy does not even remotely suggest that a court may not offer criticism of concepts employed by a superior court. Some very eminent jurists have done just that and have thereby contributed to the growth and rationality of legal doctrine. *See, e.g., Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir.1970) (Friendly, J.) (criticizing Supreme Court cases holding professional baseball exempt from federal antitrust laws); *United States v. Dennis*, 183 F.2d 201, 207-212 (2d Cir.1950) (L. Hand, J.), *aff'd*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) (criticizing Supreme Court's explication and application of the "clear and present danger" test, and proposing a reformulation of that test which the Court proceeded to approve, 341 U.S. at 510, 71 S.Ct. at 867); *United States v. Roth*, 237 F.2d 796, 801 (2d Cir.1956) (Frank, J., concurring) (criticizing the Supreme Court's decisions affirming the constitutionality of an obscenity statute as overlooking a variety of historical, sociological, and psychological grounds for calling the constitutionality of the statute into question). *See also* Arnold, *Judge Jerome Frank*, 24 U.Chi.L.Rev. 633, 633 (1957) ("When forced by *stare decisis* to reach what he considered an undesirable result [Judge Frank] would write a concurring opinion analyzing the problem and plainly suggesting that either the Supreme Court or Congress do something about it."). It was a unique and useful technique whereby a lower court judge could pay allegiance to precedent and at the same time encourage the processes of change.[1] None of the judges mentioned could be characterized as lacking judicial restraint.

The judicial hierarchy is not, as the dissent seems to suppose, properly modelled on the military hierarchy in which orders are not only carried out but accepted without any expression of doubt. Law is an intellectual system and courts are not required to approve uncritically any idea advanced by a constitutionally superior court. Lower court judges owe the Supreme Court obedience, not unquestioning approval. Without obedience by lower courts, the law would become chaos. Without reasoned criticism, the law would become less rational and responsive to difficulties. The fact that criticism may come from within the judicial system will often make it more valuable rather than less. We say this,

1. The dissent also objects to our reliance on the Supreme Court's summary affirmance, in *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), of a district court judgment that upheld a state statute making it a criminal offense to engage in private consensual homosexual conduct. Since the Navy's regulation in this case is if anything a less drastic restriction on the liberty of homosexuals than the statute in *Doe*, it must follow—on any conceivable rationale that could be given for *Doe*—that the regulation is constitutional. The dissent tries to evade this straightforward analysis by relying on the Court's suggestion in *Carey v. Population Services International*, 431 U.S. 678, 694 n. 17, 97 S.Ct. 2010, 2021 n. 17, 52 L.Ed.2d 675 (1977), that the *Doe* issue remains open. It is true in one sense that the issue remains open—a summary affirmance does not foreclose full consideration of the issue by the Supreme Court. That is all the language from *Carey* suggests. But it was settled in *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 S.Ct. 2281, 2289-90, 45 L.Ed.2d 223 (1975), that summary affirmances by the Supreme Court *are* fully binding on the lower federal courts, and *Carey* does not even hint otherwise. Hence *Carey* cannot justify the dissent's refusal to follow *Doe*.

Cite as 746 F.2d 1579 (1984)

however, only to clarify the question of the proper relationship between inferior and superior courts and more for its application to future cases than to this one. In the present case, as we have said, any criticism the dissent may believe it detects in the panel opinion was at most implicit and inseparable from the analysis required of us.

STARR, Circuit Judge:

It is not the province of the lower federal courts to chide the Supreme Court for decisions that, in the considered view of federal judges, may be ill-reasoned or misguided. It is our bounden duty, whatever our own views of the matter may be, to follow in good faith applicable precedent, no matter how disagreeable that precedent might be.

But in my judgment, the panel in its opinion for the court has simply not strayed from this elementary judicial obligation. To the contrary, the panel's moving beyond *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), to examine more broadly the Supreme Court's teachings on the right of privacy, beginning with *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), seems not only appropriate but necessary to treat dispassionately and fairly the constitutional claims advanced by Mr. Dronenburg.

And I am satisfied that the panel has rightly analyzed the applicable materials. It simply cannot seriously be maintained under existing case law that the right of privacy extends beyond such traditionally protected areas as the home or beyond traditional relationships—the relationship of husband and wife, or parents to children, or other close relationships, including decisions in matters of childbearing—or that the analytical doctrines enunciated by the Court lead to the conclusion that government may not regulate sexually intimate consensual relationships. In our federal system, governments indisputably have done so for two centuries in a variety of ways that seem to have gone, until more recent times, utterly unquestioned. While bright lines in the law of privacy are difficult for the most earnestly conscientious judges to discern, the teachings and doctrines which we thus far have to guide our way in this troubling area suggest that the result here is entirely correct—a result that can be reached without resort to a single dissenting opinion from one or more members of the Supreme Court concerned by the legitimacy of creating judge-made rights, as opposed to rights clearly and broadly enumerated at the Founding. *Goldman v. Secretary of Defense*, 739 F.2d 657 (D.C.Cir.1984) (Starr, J., dissenting from denial of suggestion to hear case *en banc*).

KEY NUMBER DIGEST

ADMINISTRATIVE LAW AND PROCEDURE

IV. POWERS AND PROCEEDINGS OF ADMINISTRATIVE AGENCIES, OFFICERS AND AGENTS.

(C) RULES AND REGULATIONS.

382. Nature and scope.

9th Cal. 1984. In determining whether rule is substantive or interpretive for purposes of the Administrative Procedure Act, substantive rules are rules which create law and are usually implementary to an existing law, incrementally impose general, extrastatutory obligations pursuant to authority properly delegated by the legislature, while interpretive rules merely clarify or explain existing law or regulations and go more to what the administrative officer thinks the statute or regulation means. 5 U.S.C.A. § 553(b), (b)(A), (d), (d)(2).—Alcaraz v. Block, 746 F.2d 593.

394. —— Notice; necessity.

9th Cal. 1984. Exceptions to Administrative Procedure Act's notice and comment provisions are narrowly construed and only reluctantly countenanced but, while agency must carefully follow notice and comment law even though self adopted in situations otherwise exempted from the Act, congressional policy for interpreting good cause extremely narrowly does not operate in those situations, although agency may not use 'good cause' to manipulate procedures to its own uses. 5 U.S.C.A. §§ 552(a)(2), 553.—Alcaraz v. Block, 746 F.2d 593.

413. —— Administrative construction.

D.C. 1984. Interpretation by the FCC of its own policies and regulations is entitled to great deference.—National Ass'n of Regulatory Utility Comm'rs v. F.C.C., 746 F.2d 1492.

Deference to administrative interpretation is even more clearly in order when construction of an administrative regulation rather than a statute is in issue.—Id.

A court must necessarily look to the administrative construction of a regulation if the meaning of the words used is in doubt.—Id.

Administrative interpretation of administrative regulation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation.—Id.

416. Effect.

9th 1984. Agencies must comply with their own regulations.—Confederated Tribes and Bands of Yakima Indian Nation v. F.E.R.C., 746 F.2d [illegible]

419. —— Retroactivity.

2d 1984. In determining whether to give retroactive effect to new rules adopted in course of agency adjudication, court must balance desirable effects of application of new rule against the possible unfairness sustained by litigant.—N.L.R.B. v. Niagara Mach. & Tool Works, 746 F.2d 143.

(D) HEARINGS AND ADJUDICATIONS

461. —— Admissibility.

C.A.9 1984. In the absence of ambiguity, Federal Energy Regulatory Commission must ascertain the meaning of a contract without resort to parol or extrinsic evidence; contract is not ambiguous merely because parties disagree on its interpretation.—Pacific Gas and Elec. Co. v. F.E.R.C., 746 F.2d 1383.

466. Depositions.

C.A.9 1984. Extent of discovery to which party to an administrative proceeding is entitled is primarily determined by particular agency; rules of civil procedure are inapplicable and Administrative Procedures Act does not provide expressly for discovery. 5 U.S.C.A. § 551 et seq.—Pacific Gas and Elec. Co. v. F.E.R.C., 746 F.2d 1383.

V. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

(A) IN GENERAL.

668. —— Persons aggrieved or affected.

C.A.7 1984. A person is aggrieved within meaning of the Administrative Procedure Act for standing purposes if he alleges that he has or will sustain some actual or threatened injury in fact resulting from challenged agency acts and the alleged injury was to an interest arguably within zone of interests protected or regulated by the statute in question. 5 U.S.C.A. § 551 et seq.—Hartigan v. Federal Home Loan Bank Bd., 746 F.2d 1300.

(B) DECISIONS AND ACTS REVIEWABLE.

701. In general.

C.A.7 1984. Under the Administrative Procedure Act, an administrative decision is immune from judicial review only if review is expressly precluded by statute or if the agency's action is committed to agency discretion by law; this exception is a narrow one and there is a presumption in favor of judicial review. 5 U.S.C.A. § 701(a).—Hartigan v. Federal Home Loan Bank Bd., 746 F.2d 1300.

The "committed to agency discretion" exception to judicial review of administrative decisions arises only when the statute is drawn in such broad terms that in a given case there is no law to apply. 5 U.S.C.A. § 701(a).—Id.

(D) SCOPE OF REVIEW IN GENERAL.

749. Presumptions.

C.A.7 1984. Under the Administrative Procedure Act, an administrative decision is immune

THE HUMAN LIFE BILL

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 158

A BILL TO PROVIDE THAT HUMAN LIFE SHALL BE DEEMED TO EXIST FROM CONCEPTION

APRIL 23, 24; MAY 20, 21; JUNE 1, 10, 12, AND 18

Serial No. J-97-16

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THE HUMAN LIFE BILL

MONDAY, JUNE 1, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Hon. John P. East (chairman of the subcommittee) presiding.

Present: Senators Baucus and Heflin.

Staff present: Jim McClellan, chief counsel; Craig Stern and Jim Sullivan, counsels.

OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. I would like to call the Subcommittee on Separation of Powers to order.

This morning, we are continuing our discussion of S. 158. We have had a series of discussions already. We had earlier sessions that dealt with the scientific and medical implications of this legislation. We had a session just prior to the recess dealing with the constitutional and statutory implications of it, and this morning we are continuing that dialog.

We have two distinguished panels this morning.

I would like to welcome my distinguished colleague, Senator Baucus, the ranking minority member of this subcommittee.

If you would like to make a statement, please go ahead.

STATEMENT OF SENATOR MAX BAUCUS

Senator BAUCUS. Thank you, Mr. Chairman.

I have no formal statement to make, except that I look forward to the additional days of hearings we have scheduled on S. 158. I think the past several days have been most instructive. We have received a great deal of useful testimony on the bill.

I am also very pleased to see that we have two very distinguished panels of individuals who will testify this morning.

It is an interesting footnote to today's hearing, according to my understanding, that this will be the first time that former Solicitor General Archibald Cox and former Solicitor General Robert Bork have been together since that infamous date a few years ago.

With that, I think we should begin the hearing. I look forward very much to the testimony.

Senator EAST. Thank you, Senator.

We would like to proceed in this way, if we might: Would the first panel please take the : place? That is the panel consisting of

Prof. Robert Bork, Prof. Robert Nagel, Prof. Archibald Cox, and Prof. Basile Uddo.

Before we commence, I would like briefly to identify these very distinguished gentlemen.

Mr. Bork is currently the Alexander M. Bickel Professor of Public Law at Yale University Law School. He served as Solicitor General of the United States for 1973 until 1977 and as Acting Attorney General of the United States in 1973 and 1974. He is also an adjunct scholar at the American Enterprise Institute.

Professor Nagel is currently a visiting professor of law at Cornell University. He received his B.A. from Swarthmore College and his law degree from Yale University. He served as deputy attorney general of the State of Pennsylvania from 1972 until 1975 and as associate professor of law at the University of Colorado since 1975 and is a member of Phi Beta Kappa.

Prof. Archibald Cox is the Carl M. Loeb University Professor of Harvard Law School. He is a former Solicitor General of the United States and a former director of the Watergate Special Prosecutor Force. Professor Cox is the author of "The Role of the Supreme Court in American Government."

Prof. Basile Uddo is associate professor of law at Loyola University in New Orleans. He holds a B.A. from Loyola and received his doctor of jurisprudence degree from Tulane Law School and the LL.M. from Harvard University.

Gentlemen, we welcome you all this morning.

The way we would like to proceed, please, is to have each of you summarize his comments extemporaneously the best you can. Your written statements will be a part of the record, so we would like to encourage you to summarize them the best you can, again, consistent with making your point.

We would like for each of you to take your turn at bat, and then we would like to be able to come back and begin the discussion.

I would remind all parties concerned that we are under a time limit—until 1 o'clock, at which time we expect to adjourn. We have two panels. We would appreciate it if, in terms of statements as well as questions and answers, people would be as concise as they can, in order that we might get in as much useful discussion as possible.

I would also like to remind the spectators that, under the rules of the Senate, applause is inappropriate. We are delighted to have you here, but we would simply appreciate your restraining your enthusiasm for the testimony, whichever way you happen to lean on the matter. We are all very aware that there are rather strong differences of opinion on this issue. You do not have to be around very long to learn that.

Professor Bork, it is a pleasure to have you. If you would, please summarize your statement for us.

STATEMENT OF PROF. ROBERT BORK, YALE LAW SCHOOL, NEW HAVEN, CONN.

Mr. BORK. Thank you, Senator.

S. 158 would provide that human life would be deemed to exist from conception. The intended result is to bring 14th amendment protections of human life to bear upon unborn fetuses. The object,

as I understand it, is to return to the States the power to regulate abortions that was denied by the Supreme Court in Roe against Wade.

The bill further attempts to remove jurisdiction over abortion cases from the lower Federal courts, if not from the Supreme Court, thus insuring that litigation concerning abortion laws would reach the Supreme Court through the State courts.

It seems to me, in brief, that the bill is constitutional insofar as it deprives the lower Federal courts of jurisdiction but unconstitutional insofar as it attempts to prescribe a rule of decision for the courts under the 14th amendment.

Before coming to the question of constitutionality, I should say that if this bill were enacted and accepted as constitutional it is not at all clear what the results would ultimately be.

States might choose to allow many types of abortions simply by not banning them. Under the premises of S. 158, that would be equivalent to not having a law against some kinds of homicides.

There is at least one Supreme Court decision that suggests that that might be denial of equal protection of the law, but it is highly uncertain whether or not such an attack would succeed today if the State chose not to prohibit some kinds of abortions.

It has been said that the passage of S. 158 would not interfere with private abortions, which seems to me correct since, in such cases, there is no State action.

But it has also been said that the passage of the law would preclude Federal or State funding of abortions. That seems to me not entirely clear. The State courts and ultimately the Supreme Court would have before them under this statute a case involving the clash of two constitutional rights—that of the woman and that of the fetus.

Given the clash of two constitutional rights, it is impossible to say how the Supreme Court would adjust them, and it is entirely possible that the adjustment would produce a constitutional law of abortions very much like the law of *Roe* v. *Wade*.

I mention these matters merely to suggest that S. 158 may not be a cure-all. We do not know what it would become in the hands of the courts even if they accepted it, at least nominally, as constitutional.

I turn now to my doubts that S. 158 is constitutional. Here, I am forced to defend the Supreme Court's ultimate authority to say what the Constitution means against recent decisions of the Supreme Court.

The supporters of S. 158 argue for its constitutionality from a line of cases that seem to cede to Congress a major role in defining the substantive content of the Constitution. There is no doubt that these decisions exist—you have heard about them, and I will mention them only briefly.

In the *Lassiter* case, of course, the Court held that States were constitutionally empowered to use a nondiscriminatory literacy test for voting. Yet, in *Katzenbach* v. *Morgan*, the Court held the Court could eliminate literacy in English as a condition for voting by exercising the power granted in section 5 of the 14th amendment.

In *Oregon* v. *Mitchell*, the Court upheld Congress elimination of all literacy tests.

There are other decisions that declare a congressional power to define substantive rights guaranteed by the 13th, the 14th, and 15th amendments, by employing the power to enforce that those amendments have given to Congress.

I would conclude, therefore, that S. 158, which is an attempt by Congress, I think, to define a substantive right given by the Constitution, would be constitutional but for my conviction that each of these decisions represents a very bad and, indeed, pernicious constitutional law.

The power lodged in Congress to enforce constitutional guarantees is the power to provide criminal penalties, redress in civil damage suit, and the like, for violations of those constitutional guarantees, as they are defined by the courts.

The power to enforce is not a power to define the substantive content of the guarantees, themselves. I know of no indication that Congress was given any such power in the legislative history of these amendments and no precedent of the Supreme Court that would uphold any such power until the era of the modern activist Supreme Court.

In these respects, I agree entirely with the dissent of Justice Harlan, joined by Justice Stewart, in *Katzenbach* v *Morgan* which stated.

> When recognized State violations of Federal constitutional standards have occurred Congress is of course empowered by section 5 of the 14th amendment to take appropriate remedial measures to redress and prevent the wrongs But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the 5th power into play at all

The majority position that Congress can define the substantive content of the 14th amendment works two constitutional revolutions at once. It replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution, and it also replaces State legislatures with Congress for all matters now committed to State legislation.

A National Legislature empowered to define the meaning, for example, of involuntary servitude, privileges, and immunities, due process, equal protection, and the right to vote can void any State legislation on any subject and replace it with a Federal statute.

It is because, I think, S. 158 rests upon the principle of *Katzenbach* v. *Morgan* that I think it is unconstitutional. This places me in a somewhat uncomfortable position.

I am convinced, as I think most legal scholars are, that *Roe* v *Wade* is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority I also think that *Roe* v. *Wade* is by no means the only example of such unconstitutional behavior by the Supreme Court.

The fact is that S. 158 proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over the past 25 years.

I think the question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper

The deformation of the Constitution is not properly cured by further deformation. Only if we are prepared to say that the Court has become intolerable in a fundamental, democratic society, and

that there is no prospect for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role.

I do not think we are at that stage, but if others think we are, then we should be debating not the technicalities of S. 15s and cases such as *Katzenbach* v. *Morgan* but the question of whether we should retain, abandon, or modify the constitutional function of the courts as we have known it since *Marbury* v. *Madison*. That is a legitimate subject for inquiry, but we ought not to arrive at the answer in the narrow context of S. 15s without fully realizing what it is we are really discussing.

Thank you.

Senator EAST. Thank you, Professor Bork.

[The prepared statement of Professor Bork follows:]

PREPARED STATEMENT OF PROFESSOR ROBERT H. BORK

My name is Robert H. Bork. I am the Alexander M. Bickel Professor of Public Law at Yale University. I am pleased to testify on the constitutionality of S. 158 at the Subcommittee's invitation.

S. 158 would provide that human life shall be deemed to exist from conception. The intended result of the law is to bring fourteenth amendment protections of human life to bear upon unborn fetuses. The object, as I understand it, is to return to the states the power to regulate abortions that was denied by the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973). The bill further attempts to remove jurisdiction over abortion cases from the lower federal courts but not the Supreme Court, thus ensuring that litigation concerning abortion laws would reach the Supreme Court through the state courts.

At the outset I want to say that discussions of constitutionality are often embarrassed by the failure to note the differences, which are sometimes significant, between a prediction of what the Supreme Court will do in fact, what it would do if it followed its own precedents, and what it would do if it followed the Constitution. I will evaluate the bill primarily from the third viewpoint, discussing its validity if the Constitution itself were followed.

From that perspective, it seems to me that the bill is constitutional insofar as it deprives the lower federal courts of jurisdiction but unconsitutional insofar as it attempts to prescribe a rule of decision for the courts under the fourteenth amendment.

Before coming to that, it should be said that if S. 158 were enacted and held constitutional it is not at all clear what the results would be. States might choose to allow many types of abortions simply by not banning them. Under the premises of S. 158 that would be the equivalent of not having a law against some kinds of homicides. There is at least one, perhaps aberrational, Supreme Court decision that suggests the possibility of

an equal protection attack on such an arrangement (Skinner v. Oklahoma, 316 U.S. 535 (1942), thus requiring the states to outlaw abortions or abandon laws punishing homicide. It is highly uncertain whether or not such an attack would succed today in this context.

It has been said that passage of S. 158 would not interfere with private abortion , which seems correct since there is in such cases no state action. But it has also been said that passage of the law would preclude federal or state funding of abortions. That seems less clear. The state courts, and ultimately the Supreme Court, would have before them a case involving the clash of two constitutional rights -- that of the woman and that of the fetus. The fact that the constitutional right of the woman to an abortion is the result of judicial legislation, is, in this context, irrelevant. Given the clash of two constitutional rights, it is impossible to say how the Supreme Court would adjust them. It is entirely possible that the adjustment would produce a constitutional law of abortions very much like the law of Roe v. Wade, 410 U.S. 113 (1973).

I mention these matters merely to suggest that S. 158 may not be a cure-all. We do not know what it would become in the hands of the courts, even if they accepted it, at least nominally, as constitutional.

I turn next to my own doubts that S. 158 is constitutional. Here I am forced to defend the Supreme Court's ultimate authority to say what the Constitution means against recent decisions of the Court. The supporters of S. 158 argue for its constitutionality from a line of Supreme Court decisions that cede to Congress a major role in defining the substantive content of the Constitution. There is no doubt those decisions exist. Since you have heard about them before, I will mention them only briefly.

In Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), a unanimous Supreme Court held that states were constitutionally empowered to use a non-discriminatory literacy test for voting. Yet in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that Congress could eliminate literacy in English

as a condition for voting by exercising the power granted in Section 5 of the Fourteenth Amendment. In Oregon v. Mitchell, 400 U.S. 112 (1970), a unanimous Court upheld Congress' elimination of all literacy tests. There are other decisions that declare a congressional power to define substantive rights guaranteed by the thirteenth, fourteenth and fifteenth amendments by employing the granted power to "enforce" the provisions of those amendments. These precedents all uphold the constitutionality of S. 158. I would conclude that S. 158 is constitutional but for my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law.

The power lodged in Congress to "enforce" constitutional guarantees is the power to provide criminal penalties, redress in civil damage suits, and the like, for violations of those constitutional guarantees as they are defined by the courts. It is not a power to define the substantive content of the guarantees themselves. I know of no indication that Congress was given any such power in the legislative history of these amendments, and no precedent of the Supreme Court that would uphold any such power -- until the era of the modern, activist, liberal Supreme Court. In testimony here, you have heard cited the 1879 case of Ex parte Virginia, 100 U.S. 339 (1879); but that decision does not contemplate any such congressional power to define substance. It held that Congress could make it a federal crime to disqualify persons from jury service on account of race because the fourteenth amendment, as interpreted by the Supreme Court, prohibited such action.

In these respects, I agree entirely with the dissent of Justice Harlan, joined by Justice Stewart, in Katzenbach v. Morgan, which stated:

> When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by S5 to take appropriate remedial measures to redress and prevent the wrongs. (citation omitted) But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the S5 power into play at all. (384 U.S. at 666)

The majority position in Katzenbach v. Morgan works

two constitutional revolutions at once. It replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution. The majority position also replaces state legislatures with Congress for all matters now committed to state legislation. A national legislature empowered to define the meaning of involuntary servitude, privileges and immunities, due process, equal protection, and the right to vote, which includes all qualification of electors, can void any state legislation on any subject and replace it with a federal statute.

It is because I think S. 158 rests upon the principle of Katzenbach v. Morgan that I think it unconstitutional.

This places me in a somewhat uncomfortable position. I am convinced, as I think almost all constitutional scholars are, that Roe v. Wade is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority. I also think that Roe v. Wade is by no means the only example of such unconstitutional behavior by the Supreme Court.

The point is that S. 158 proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over twenty-five years. Without any warrant in the Constitution, the courts have required so many basic and unsettling changes in American life and government that a political response was inevitable. Though I do not think it desirable that the political response should succeed in the form this bill takes, the fact of expressed political outrage at such judicial usurpation is in many ways a healthy development in our constitutional democracy.

The judiciary have a right, indeed a duty, to require basic and unsettling changes, and to do so, despite any political clamor, when the Constitution, fairly interpreted, demands it. The trouble is that nobody believes the Constitution allows, much less demands, the decision in Roe v. Wade or in dozens of other cases of recent years. Not even those most in sympathy with the results believe that, as demonstrated by a growing body

of literature attempting to justify the courts' performance on grounds of moral philosophy rather than of legal interpretation. Such justifications will not wash. The judiciary's legitimate power to set aside the decisions and actions of elected representatives and politically responsible officials comes from the Constitution alone and is limited to a fair interpretation of the Constitution.

The question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformations. Only if we are prepared to say that the Court has become intolerable in a fundamentally democratic society and that there is no prospect whatever for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role. I do not think we are at that stage. But if others think we are, then we should be debating not the technicalities of S. 158 and cases such as Katzenbach v. Morgan, but the question of whether we should retain, abandon, or modify the constitutional function of the courts as we have known it since Marbury v. Madison, 1 Cranch 137 (1803). That is a legitimate subject for inquiry, but we ought not arrive at the answer in the narrow context of S. 158 without fully realizing what we are really discussing.