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The Francis Boyer Lectures on Public Policy

TRADITION AND MORALITY IN CONSTITUTIONAL LAW

Robert H. Bork

American Enterprise Institute for Public Policy Research

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l lecture. Judge Bork describes in this Boyer lecture the
harply divergent ideas that are struggling for dominance
hin the legal culture," and thereby reminds us of the
portance of the belief that is at the core of AEI's public
icy research—the belief that the competition of ideas is
damental to a free society.

Bill Baroody Jr.

WILLIAM J. BARODY, JR.
President
American Enterprise Institute

TRADITION AND MORALITY IN CONSTITUTIONAL LAW

When a judge undertakes to speak in public about any subject that might be of more interest than the law of incorporeal hereditaments he embarks upon a perilous enterprise. There is always, as I have learned with some pain, someone who will write a story finding it sensational that a judge should say anything. There is some sort of notion that judges have no general ideas about law or, if they do, that, like pornography, ideas are shameful and ought not to be displayed in public to shock the squeamish. For that reason, I come before you, metaphorically at least, clad in a plain brown wrapper.

One common style of speech on occasions such as this is that which paints a bleak picture, identifies even bleaker trends, and then ends on a note of strong and, from the evidence presented, wholly unwarranted optimism. I hope to avoid both extremes while talking about sharply divergent ideas that are struggling for dominance within the legal culture. While I think it serious and potentially of crisis proportions, I speak less to thrill you with the prospect of doom—which is always good fun—than to suggest to you that law is an arena of ideas that is too often ignored by

ntellectuals interested in public policy. Though it was not lways so, legal thought has become something of an intel-ctual enclave. Too few people are aware of the trends there nd the importance of those trends for public policy.

It is said that, at a dinner given in his honor, the nglish jurist Baron Parke was asked what gave him the reatest pleasure in the law. He answered that his greatest by was to write a "strong opinion." Asked what that might e, the baron said, "It is an opinion in which, by reasoning ith strictly legal concepts, I arrive at a result no layman ould conceivably have anticipated."

That was an age of formalism in the law. We have ome a long way since then. The law and its acolytes have nce become steadily more ideological and more explicit bout that fact. That is not necessarily a bad thing: there are eologies suitable, indeed indispensable, for judges, just as ere are ideologies that are subversive of the very idea of e rule of law. It is the sharp recent growth in the latter that worrisome for the future.

We are entering, I believe, a period in which our legal lture and constitutional law may be transformed, with en more power accruing to judges than is presently the se. There are two reasons for that. One is that constitu-nal law has very little theory of its own and hence is most pathologically lacking in immune defenses against intellectual fevers of the larger society as well as against disorders generated by its own internal organs.

The second is that the institutions of the law, in rticular the schools, are becoming increasingly converted an ideology of the Constitution that demands just such an infusion of extraconstitutional moral and political notions. A not untypical example of the first is the entry into the law of the first amendment of the old, and incorrect, view that the only kinds of harm that a community is entitled to suppress are physical and economic injuries. Moral harms are not to be counted because to do so would interfere with the autonomy of the individual. That is an indefensible definition of what people are entitled to regard as harms.

The result of discounting moral harm is the privatization of morality, which requires the law of the community to practice moral relativism. It is thought that individuals are entitled to their moral beliefs but may not gather as a community to express those moral beliefs in law. Once an idea of that sort takes hold in the intellectual world, it is very likely to find lodgment in constitutional theory and then in constitutional law. The walls of the law have proved excessively permeable to intellectual osmosis. Out of prudence, I will give but one example of the many that might be cited.

A state attempted to apply its obscenity statute to a public display of an obscene word. The Supreme Court majority struck down the conviction on the grounds that regulation is a slippery slope and that moral relativism is a constitutional command. The opinion 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 of tort law is inherently boundless, for how is one to distinguish the 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 the law does not flinch from such judgments except when, as in the case of morals, it seriously doubts the community's right to define harms. Moral relativism was even more explicit in the major-

ity opinion, however, for the Court observed, apparently thinking the observation decisive: "One man's vulgarity is another's lyric." On that ground, it is difficult to see how law on any subject can be permitted to exist.

But the Court immediately went further, reducing the whole question to one of private preference, saying: "We think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Thus, the community's moral and aesthetic judgments are reduced to questions of style and those are then said to be privatized by the Constitution. It testifies all the more clearly to the power of ideas floating in the general culture to alter the Constitution that this opinion was written by a justice generally regarded as moderate to conservative in his constitutional views.

George Orwell reminded us long ago about the power of language to corrupt thought and the consequent baleful effects upon politics. The same deterioration is certainly possible in morality. But I am not concerned about the constitutional protection cast about an obscene word. Of more concern is the constitutionalizing of the notion that moral harm is not harm legislators are entitled to consider. As Lord Devlin said, "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, and more valuable, freedoms

are lost than those we thought we were protecting.

I do not know the origin of the notion that moral harms are not properly legally cognizable harms, but it has certainly been given powerful impetus in our culture by John Stuart Mill's book *On Liberty.* Mill, however, was a man of two minds and, as Gertrude Himmelfarb has demonstrated, Mill himself usually knew better than this. Miss Himmelfarb traces the intellectual themes of *On Liberty* to Mill's wife. It would be ironic, to put it no higher, if we owed major features of modern American constitutional doctrine to Harriet Taylor Mill, who was not, as best I can remember, one of the framers at Philadelphia.

It is unlikely, of course, that a general constitutional doctrine of the impermissibility of legislating moral standards will ever be framed. So the development I have cited, though troubling, is really only an instance of a yet more worrisome phenomenon, and that is the capacity of ideas that originate outside the Constitution to influence judges, usually without their being aware of it, so that those ideas are elevated to constitutional doctrine. We have seen that repeatedly in our history. If one may complain today that the Constitution did not adopt John Stuart Mill's *On Liberty,* it was only a few judicial generations ago, when economic laissez faire somehow got into the Constitution, that Justice Holmes wrote in dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics."

Why should this be so? Why should constitutional law constantly be catching colds from the intellectual fevers of the general society?

The fact is that the law has little intellectual or structural resistance to outside influences, influences that should properly remain outside. The striking, and peculiar, fact about a field of study so old and so intensively cultivated by

men and women of first-rate intelligence is that the law possesses very little theory about itself. I once heard George Stigler remark with some astonishment: "You lawyers have nothing of your own. You borrow from the social sciences, but you have no discipline, no core, of your own." And, a few scattered insights here and there aside, he was right. This theoretical emptiness at its center makes law, particularly constitutional law, unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the winds of intellectual or moral fashion, which it then validates as the commands of our most basic compact.

This weakness in the law's intellectual structure may be exploited by new theories of moral relativism and egalitarianism now the dominant mode of constitutional thinking in a number of leading law schools. The attack of these theories upon older assumptions has been described by one Harvard law professor as a "battle of cultures," and so it is. It is fair to think, then, that the outcome of this confused battle may strongly affect the constitutional law of the future and hence the way in which we are governed.

The constitutional ideologies growing in the law schools display three worrisome characteristics. They are increasingly abstract and philosophical; they are sometimes nihilistic; they always lack what law requires, democratic legitimacy. These tendencies are new, much stronger now than they were even ten years ago, and certainly nothing like them appeared in our past.

Up to a few years ago most professors of constitutional law would probably have agreed with Joseph Story's dictum in 1833: "Upon subjects of government, it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common-sense of the people, and never was designed for trials of logical skill or visionary speculation." But listen to how Nathan Glazer today perceives the lawyer's task, no doubt because of the professors he knows: "As a political philosopher or a lawyer, I would try to find basic principles of justice that can be defended and argued against all other principles. As a sociologist, I look at the concrete consequences, for concrete societies."

Glazer's perception of what more and more lawyers are doing is entirely accurate. That reality is disturbing. Academic lawyers are not going to solve the age-old problems of political and moral philosophy any time soon, but the articulated premise of their abstract enterprise is that judges may properly reason to constitutional decisions in that way. But judges have no mandate to govern in the name of contractarian or utilitarian or what-have-you philosophy rather than according to the historical Constitution. Judges of this generation, and much more, of the next generation, are being educated to engage in really heroic adventures in policy making.

This abstract, universalistic style of legal thought has a number of dangers. For one thing, it teaches disrespect for the actual institutions of the American polity. These institutions are designed to achieve compromise, to slow change, to dilute absolutisms. They embody wholesome inconsistencies. They are designed, in short, to do things that abstract generalizations about the just society tend to bring into contempt.

More than this, the attempt to define individual liberties by abstract reasoning, though intended to broaden liberties, is actually likely to make them more vulnerable.

Our constitutional liberties arose out of historical experience and out of political, moral, and religious sentiment. They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only abstractions of moral philosophy. The difference in approach parallels the difference between the American and the French revolutions, and the outcome for liberty was much less happy under the regime of "the rights of man."

It is perhaps not surprising that abstract, philosophical approaches to law often produce constitutional nihilism. Some of the legal philosophers have begun to see that there is no overarching theory that can satisfy the criteria that are required. It may be, as Hayek suggested, that nihilism naturally results from sudden disillusion when high expectations about the powers of abstract reasoning collapse. The theorists, unable to settle for practical wisdom, must have a single theoretical construct or nothing. In any event, one of the leading scholars has announced, in a widely admired article, that all normative constitutional theories, including the theory that judges must only interpret the law, are necessarily incoherent. The apparently necessary conclusion—that judicial review is, in that case, illegitimate—is never drawn. Instead, it is proposed that judges simply enforce

good values, or rather the values that seem to the professor good. The desire for results appears to be stronger than the respect for legitimacy, and, when theory fails, the desire to use judicial power remains.

This brings into the open the fundamental antipathy to democracy to be seen in much of the new legal scholarship. The original Constitution was devoted primarily to the mechanisms of democratic choice. Constitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice. Though the arguments are, as you might suspect, cast in terms of expanding individual freedom, that is not their result. One of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality. As Chesterton put it, "What is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people." The makers of our Constitution thought so too, for they provided wide powers to representative assemblies and ruled only a few subjects off limits by the Constitution.

The new legal view disagrees both with the historical Constitution and with the majority of living Americans about where the balance between individual freedom and social order lies.

Leading legal academics are increasingly absorbed with what they call "legal theory." That would be welcome, if it were real, but what is generally meant is not theory about the sources of law, or its capacities and limits, or the prerequisites for its vitality, but rather the endless exploration of abstract philosophical principles. One would suppose that we can decide nothing unless we first settle the ultimate questions of the basis of political obligation, the merits of contractarianism, rule or act utilitarianism, the nature of the

just society, and the like. Not surprisingly, the politics of the professors becomes the command of the Constitution. As Richard John Neuhaus puts it, "the theorists' quest for universality becomes simply the parochialism of a few intellectuals," and he notes "the limitations of theories of justice that cannot sustain a democratic consensus regarding the legitimacy of law."

Sometimes I am reminded of developments in another, perhaps parallel, field. I recall one evening listening to a rather traditional theologian bemoan the intellectual fads that were sweeping his field. Since I had a very unsophisticated view of theology, I remarked with some surprise that his church seemed to have remarkably little doctrine capable of resisting these trends. He was offended and said there had always been tradition. Both of our fields purport to rest upon sacred texts, and it seemed odd that in both the main bulwark against heresy should be only tradition. Law is certainly like that. We never elaborated much of a theory—as distinguished from mere attitudes—about the behavior proper to constitutional judges. As Alexander Bickel observed, all we ever had was a tradition, and in the last thirty years that has been shattered.

Now we need theory, theory that relates the framers' values to today's world. That is not an impossible task by any means, but it is a good deal more complex than slogans such as "strict construction" or "judicial restraint" might lead you to think. It is necessary to establish the proposition that the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed. It is true that a willful judge can often clothe his legislation in sophistical argument and the misuse of history. But hypocrisy has its value. General acceptance of correct theory can force the judge to hypocrisy and, to that extent, curb his freedom. The theorists of moral abstraction are devoted precisely to removing the judge's guilt at legislating and so removing the necessity for hypocrisy. Worse still, they would free the intellectually honest judge from constraints he would otherwise recognize and honor.

It is well to be clear about the role moral discourse should play in law. Neuhaus is entirely correct in saying

> whatever else law may be, it is a human enterprise in response to human behavior, and human behavior is stubbornly entangled with beliefs about right and wrong. Law that is recognized as legitimate is therefore related to—even organically related to, if you will—the larger universe of moral discourse that helps shape human behavior. In short, if law is not also a moral enterprise, it is without legitimacy or binding force.

To that excellent statement I would add only that it is crucial to bear in mind what kind of law, and which legal institutions, we are talking about. In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

Bickel Professorship

On April 27, 1979, Robert H. Bork was inaugurated as the first Alexander M. Bickel Professor of Public Law. This professorship was created in memory of the late Sterling Professor of Law, a member of the faculty from 1956 to 1974. Following are Dean Wellington's introductory remarks preceding Professor Bork's Inaugural Address.

Introduction of Robert H. Bork

Harry H. Wellington

Alexander Bickel wrote *The Least Dangerous Branch* in the late nineteen fifties and early sixties when constitutional scholarship was—as every so often it is—concerned rather more with itself than with the Supreme Court of the United States. Besides working a major change in American society, the school desegregation case had forced students of the Court back to the fundamental questions of constitutional law: the justification for and scope of judicial review.

When scholarship turns to judicial review it is apt to turn quickly to prior scholarship, for Marshall's opinion in *Marbury v. Madison* raises more questions than it begins to answer. Shortly before Alex published, Judge Learned Hand had recorded his dissent to Marshall's opinion. Professor Herbert Wechsler had filed a concurrence rejecting the negativism of Hand and affirming the concept of the principled decision, and Professor Charles Black had written an affirmation of judicial review that today stands as the most compelling theoretical justification for the later work of the Warren Court.

Alex joined Wechsler in finding unpersuasive Hand's arguments against judicial review. For Alex, as for Charles Black, a functional analysis of American government was the most significant reason for subscribing to judicial review. The two diverged, however, on its scope. Bickel found Black's position dangerous: it gave the sovereign prerogative to the Court *where* the Court could not use it well. And he found fault with Wechsler, whose insistence upon neutral principles would force the Court to use its power *when* it could not use it well.

Recognizing that the Court is a court of law and accepting the thesis that when a court reaches the merits of a case it must decide in accordance with neutral principles, Alex wrote of the passive virtues, of the techniques for not deciding, when a decision would be improvident for the nation. His was a search for the flexibility necessary to make the enterprise work. Timing is important and so too is the dialogue between the Court and the more democratic institutions of government.

What the Court holds, he maintained (following Lincoln), is not final in any important national sense until it is accepted by the political institutions and politicians over whom the people exercise control. We can profit from judicial review in a democracy, Alex believed, so long as we understand the limits of decisional law and have a Court composed of practical lawyer-scholars rather than wise philosopher-kings.

The Least Dangerous Branch was the first of several books (and there were many articles) in the main and high tradition of American legal scholarship. The corpus that is Bickel's presents a distinctive view of constitutional law. Make no mistake about it, no one can work in the field without taking account of this view, not even a beginning is possible, not a toe in the water.

It is plain to me that if one can say this about an academic's work, and also (as in Alex's case) that he was a superb teacher, one has given a full answer to the question that those thinking about law teaching for themselves should ask: What will satisfy me about what I have done professionally when it is over?

Of course, this magnificent achievement alone could never have satisfied Alex professionally. And, of course, there was much, much more in the way of professional accomplishments. Alex was the finest legal journalist of his day. There are hundreds of his pieces in the *New Republic*, signed, unsigned, long, short, trivial, and profound. For eighteen or so years he helped us to understand the day-to-day legal and political activity of our country. He wrote regularly for *Commentary*. There, he was generally more reflective and comprehensive. There, he wrote for the layman about the law with a degree of sophistication and clarity that no one I know has surpassed. It should be noted that Alex's article on Burke in the *New Republic* is perhaps the best short account of that great man's thought and that his First Amendment article in *Commentary* is among the truly important recent discussions of free expression.

Alex practiced his profession in the courts, writing briefs and arguing cases. His successful defense of the *New York Times* in the *Pentagon Papers* case is the best known example. He advised Congressmen and Presidents, drafted legislation, campaigned for Bobby Kennedy, helped write rules for the Democratic party, gave opinions to a press that had him on the phone for hours every week, and with it all he practiced still another learned and distinct profession. Alex was an historian, who did orig-

inal research over a period of fifteen years on the Holmes Devise History of the Supreme Court. When he died in November, 1974, he had virtually completed writing the first of his two volumes. Much of the research on the second book was finished and its general shape fixed in his mind.

Alex spent his fiftieth year dying. That year was of a piece with his professional life. Even as few of us can manage to have a career like his, so too, few of us will be able to manage his courage. Nor was there self-pity. Alex respected too much what he had accomplished for any of that. He has shown us what it means to live grandly in the law and he has taught us how to die. No one who knew him will forget him or be quite the same ever again.

And so this School—his school—determined to perpetuate his memory in the grandest way a school can—with the Alexander M. Bickel Professorship. His friends, his students, the communications industry, responded magnificently.

Last fall the funding of the professorship was assured. And last January, President Giamatti named Robert H. Bork to the Chair.

Professor Bork was perhaps Alex's closest friend during the several years before Alex died. They talked together. They walked together. They taught together. And how they disagreed and agreed and disagreed in a course on constitutional theory; in a seminar on freedom of expression.

Bob Bork has practiced law privately in New York and Chicago; publicly—as the Solicitor General of the United States—in Washington; and academically, in the fields of antitrust and constitutional law at Yale.

He is the author of *The Antitrust Paradox* and numerous articles in his fields of interest. These days his special interest is the law and the philosophy of the First Amendment's guarantees of free speech and a free press. He has developed a new and important course in this area. His Cooley Lecture of last February at the University of Michigan is a powerful statement of the relationship between free expression and successful government.

Bob Bork is an excellent lawyer, an excellent scholar and a brilliant writer and lecturer. His insights shape our vision. Today he speaks to us of Alex's legacy.

Robert H. Bork,
Alexander M. Bickel
Professor of Public Law

The Legacy of Alexander M. Bickel

Robert H. Bork

It is four and one-half years since Alex Bickel died and, while a number of his friends are here, it is something of a shock to realize that there are many in this room who did not know him, who cannot summon up the memory of that rather small, carefully-tailored, almost dapper, figure; who cannot recall the flow of words, the expressive face, the wit and gaiety, the passionate engagement with ideas; who never experienced the sense of being more fully aware and alive that the beginning of a conversation with him always brought.

That is sad, because it means that part of Alex Bickel's legacy—the part that required immediate acquaintance and can live only in memory—is already in the course of extinction.

But there is much more to the legacy than that, a part that will be with the law and with us for a long time to come. At his memorial service, within days of his death, I began by saying: "Alex Bickel's gifts were so great and so many that we would have envied him if we had not loved him. For years we knew that he was an extraordinary man. But the warm haze of personal friendship and the diversions of colleagueship obscured at first what gradually became clear—that he can be called, without hesitation or embarrassment, a great man."

That may be thought the natural and forgiveable exaggeration of a friend shaken by a loss greater than he had ever before experienced, but I think not, and the mere fact of this chair in his name should persuade you otherwise. Consider how unusual it is for a university to so memorialize one of its own

professors, how rare it is that a number of willing donors should so quickly come forward to endow the chair. But consider how extraordinary it is that all of this should be done, without a doubt as to its rightness, to honor a man whom fate allowed a scholarly career of only half the normal length.

That alone should suggest something of the admiration and love that Alex commanded, something of his intellectual drive, his scholarly vigor, his concentrated genius.

We have long since talked out our grief over Alex's death. It is time now to begin discussing his legacy. That is a topic that cannot be adequately covered today, much less exhausted, but it is important to begin. In part, it is important because of the difficulty in knowing what greatness in the law consists of. We are a court-centered profession, but we remember the names of very few judges or advocates. The experience of teaching the opinions of the judges conventionally thought of as great often has the unfortunate effect of diminishing their memories. The lasting fame of the advocate may be suggested by the name of the man who had more Supreme Court arguments—317—than any other lawyer in our history: Walter Jones. Such men may have been among the greats of their times but they practice a plastic art and when they die their legacy is little more than a name.

There is, nevertheless, a real sense in which the legacy of Alex in person, the man of memory, will remain when no living person can say he or she knew him. He has altered the intellectual life of the law by his impact upon others in conversation and example. No one could become engaged with him without seeing law and the world differently, without coming to admire erudition worn lightly and the habit of giving shibboleths and absolutes no quarter, without experiencing a shift in his understanding of what is important and what is not. To cite a personal instance, it is doubtful that I would have returned to the academic world without Alex's example and without our discussions about it. I and others think in certain ways because of things he said that he did not write. Many have had their lives changed by Alex. It is why I said at his memorial service, "there will always be a difference in the things we choose to do and the way we do them because we knew Alex Bickel." Because that impact is unknowable does not make it any the less real or effective in shaping the law.

Alex had two other qualities that may be essential to greatness in a lawyer but are not the thing itself. If Holmes was even partially right in thinking that there may be "no true measure of men except the total of human energy which they embody," Alex qualified. He read, pondered, discussed, and wrote continually. In the half a career he was given, he wrote nine books, enough articles for a freelance journalist, taught courses, wrote briefs, testified before congressional committees, argued cases—the list of activities seems endless. Part of his genius was composed of driving energy focussed by a powerful self-discipline.

Again, if Holmes was right in saying that "as life is action and passion, it is required of a man that he share the passion and action of his time at peril of being judged not to have lived," Alex lived fully. He wrote and spoke continually of public events and issues, he counseled those involved, he cared greatly about the trends of his time and helped affect them. Though a scholar, he was fully engaged. His scholarship guided his public action, and his public action enriched his scholarship. There was with Alex no sharp break between the life of ideas and the life of affairs, which is why he was a most principled and thoughtful man of affairs and a most practical and broad man of ideas. That may be why he liked the tension he found in Edmund Burke. Alex wrote, "Our problem has been, and is most acutely now, the tyrannical tendency of ideas and the suicidal emptiness of politics without ideas . . ." Alex lived in that tension, and made it fruitful.

This brings us closer to his central legacy, which is, of course, intellectual. It took me a long time, many [illegible] together, [illegible] precisely what the legacy is. Even now I am sure I cannot state it adequately.

Any effort to summarize Alex Bickel's intellectual legacy must fall short, because the effort involves two kinds of distortion. In the first place, his thought was complex, rich, and valuable as much for the prolific and often profound insights he scattered in the course of an argument as for the conclusions he reached and supported. Bickel was not a systematizer. Indeed, his lesson was the danger and the ultimate impossibility of systems. A statement of the major features of his thought thus, more than in the case of most scholars, misses much of his genius.

Secondly, his thought was in continual evolution. He regarded every book, every article, as an experiment, not a final statement. He was always, moreover, open to argument, and his thinking changed in response to it, as well as to his own experience and second thoughts. Positions that he took in his early writings were frequently expanded, modified, or qualified, explicitly or implicitly, in his later work.

as well as in his teaching and conversation. This does not mean that his approach was not consistent over time. It was. But because he was not frozen into a system, because he believed in the central importance of circumstance, the limited range of principles, the complexity of reality, he learned and evolved. It is impossible to give a snapshot of his philosophy. It was moving, deepening, to the end of his life.

I have said enough of the difficulties of summing up Bickel's intellectual legacy. Now, having assured you of the futility of the attempt, I will undertake it.

I should say at the outset that, though Alex Bickel has no greater admirer, I will occasionally disagree with him. It would be no compliment to the memory of an intellectually honest and alive man to treat his work as a shrine. Alex is not a monument; he is a living intellectual force and he must be dealt with in those terms. That is what he would have demanded.

Political morality and governance were the central subject of all of Alex's thought and writing, and central to that, or at least the beginning point for that, was the role of the federal judiciary, most particularly the role of the Supreme Court of the United States.

The problem, of course, the problem with which all constitutional lawyers must grapple, is the legitimacy of judicial review—the power of the Court to set aside and nullify the choices of elected representatives—and the proper scope of that power. The problem is created by the fact that our political ethos has been, and largely remains, majoritarian, but the Court is countermajoritarian, not democratic, not elected, and not representative, yet purporting to have the final say in our governance. The problem becomes acute when the Court undertakes to impose principles that are not fairly to be found in the Constitution. These are currently called trans-textual principles, a concept the least of whose difficulties is that it requires careful pronunciation.

Bickel addressed that problem repeatedly, and, if I do not think he achieved an entirely successful resolution of it, his effort was a triumph in many ways. He stated the problem with a clarity that has not been achieved elsewhere. In the course of his argument he provided a series of dazzling insights that are a major and lasting contribution to our understanding of a variety of legal doctrines. This may be viewed as his technical legacy, and that alone is sufficient to ensure his place in legal thought. But the significant thing is that Alex's scholarship, while it was magnificent about technical law, was never merely technical. He enlarged our understanding by relating what seems to be law only a lawyer could love to much larger themes, the role of courts in a democracy or the egalitarian trend of western political thought. The essence of his genius, or the aspect that most impressed me, was his ability to see connections between ideas that everyone else thought separate and discrete.

It is to be said, moreover, that Alex laid down the lines of the arguments that defenders of a Court that assumes broad extra constitutional powers find it wise to adopt today. But we must not be misled by that. Alex was no friend of what has become known as judicial activism or imperialism. He relied upon a tradition of restraint and modesty to curb the judicial appetite for power. Many of those who adopt his other arguments today leave that element out and thus welcome far more judicial activism than Bickel thought we ought to tolerate.

Consistently with what he later called the Whig political tradition, Bickel placed steady and heavy weight upon the importance of political democracy, and, at the outset, rejected a common line of defense of an activist Court. This defense proceeds by arguing that our majoritarian processes are in reality not very majoritarian, that we are governed by evanescent coalitions of minorities, so that the antidemocratic aspects of judicial rule are not that important.

It remains true, nevertheless," he said, "that only those minorities rule which can command the votes of a majority of individuals in the legislature who can command a vote of a majority of individuals in the electorate. . . . [N]othing can finally deprecate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."

He justified judicial review on the ground that courts could introduce into our political processes something of great value that the legislature and the executive could not: the formulation and application of enduring principles. Judges are uniquely fitted for this function, he wrote, because they "have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."

(We need not pause to remember what we know of the ways of scholars when collectively engaged in governance of institutions smaller and simpler than the United States

The mix of judicial principle and democratic expediency were important, for, as Bickel said, "No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden."

The Court must, therefore, live in a constant tension between the equally legitimate demands of principle and of expediency. And it is here, on this subject, that Bickel's technical work is most subtle, most exciting, and most provocative. The Court can maintain itself in this tension, avoiding both ruinous confrontation with the political branches and abdication in their favor, by techniques of not deciding cases, techniques he called "the passive virtues." He analogized the Court's position to Lincoln's. Lincoln knew that slavery was wrong, that it must ultimately be ended, but he also wanted the Union preserved, and so, while he refused to attack the institution head on, he also refused to accept principles or compromises that ratified it. So the Court, according to Bickel, can temporize, as Lincoln had, by masterful use of doctrines such as standing, ripeness, political question, and, of course, the power to deny certiorari, until the time came to announce the principle to which it has been helping to lead us.

A problem arises here. If the Court is leading us toward a principle that it honestly believes located in the Constitution, these techniques are entirely legitimate. But if it is leading us toward something else, toward principles that do not in some real sense come out of the Constitution, the problem of legitimate authority has not been solved. I think Alex, at least in his early writing, meant both things. *Brown v. Board of Education* could, of course, be said to come out of the Constitution. The Court could legitimately work toward a flat rule of non-discrimination without announcing it until the society could be brought to accept it. Judicial abolition of the death penalty, on the other hand, a penalty whose legitimacy the document explicitly assumes, cannot be reconciled with the Constitution. In 1962, at least, Bickel thought both decisions proper ones for the Court to work toward. And there I disagree.

He tried to tame the anti-democratic thrust of this position with a series of qualifications. The Justices of the Court are not to derive principles from their own sympathies or politics: rather they are to discover and enforce the "fundamental presuppositions of our society" from the "evolving morality of our tradition." Moreover, they must not anticipate that evolution too much, but must declare as supreme law only that which "will—in time, but a rather immediate foreseeable future—gain general assent."

This is a modest, pragmatic role, and the process is further saved from being hopelessly countermajoritarian because the Court is not ultimately allpowerful. "The Supreme Courts law . . . ," Bickel said, "could not in our system prevail—not merely in the very long run, but within the decade—if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only."

It is a powerful argument delivered with great erudition and persuasiveness, and I am fortified in my conclusion that it does not ultimately persuade by the fact that in later work Bickel seemed to concede its limitations.

The argument leaves it unclear why democratic institutions must accept from the Court, even provisionally, more principle of different kinds of principle than the democratic process generates—including in that the principles that have been placed in the Constitution itself by super-majorities.

No reason appears why the Court should lead the society at all, certainly not to the point where it is safe to announce as law that which society will come to accept. We may want much that we would not freely choose simply because the Court tells us it is, in truth, to be found in the basic document of our nation, or because there are strong political constituencies that support the outcome, though they could not attain it democratically themselves, or because we have few ways to fight back that would not damage the Court in ways we do not wish. Its vulnerability is the Court's protection and hence a source of its power.

One may doubt as well that there are "fundamental presuppositions of our society" that are not already located in the Constitution but must be placed there by the Court. These presuppositions are likely, in practice, to turn out to be the highly debatable political positions of the intellectual classes. What kind of a "fundamental presupposition of our society" is it that cannot command a legislative majority?

The Court has, in fact, turned out to be final in many more instances than Bickel thought it should. Effective political opposition has not been mustered to its most unpopular

assertions of final authority. And the Court has adopted sweeping principles of precisely the kind he warned against. By the time he delivered the Holmes Lectures he knew that no "rigorous general accord between judicial supremacy and democratic theory" had been achieved: he said he had "come to doubt in many instances the Court's capacity to develop 'durable principles,' and to doubt, therefore, that judicial supremacy can work and is tolerable in broad areas of social policy," and to ask that it confine itself, for the most part, to narrow, interstitial lawmaking.

Those today who repeat his arguments for judicial power to enforce principles not located in the Constitution tend to be what he was not, apologists for an activist Court. They forget that he counted on a judicial tradition of modesty, intellectual coherence, the morality of process, to make judicial supremacy tolerable. These traits have often been lacking on the Court and Alex felt they may have been damaged beyond repair by the Warren Court. We have never had a rigorous theory of judicial restraint: for a time we had a tradition: now that is almost gone.

Lest there be any doubt where Alex's sympathies lay, just what he did not mean to justify or encourage, it should be remembered that he, a man not given to rhetorical excess or easy excitements, described the Warren Court as comparable to other defiances of the law in the name of moral righteousness. In an article entitled "Watergate and the Legal Order," he said:

"The assault upon the legal order by moral imperatives wasn't only or perhaps even the most effectively an assault from the outside. It came as well from within, in the Supreme Court headed for fifteen years by Earl Warren. When a lawyer stood before him arguing his side of a case on the basis of some legal doctrine or other, or making a procedural point, or contending that the Constitution allocated competence over a given issue to another branch of government than the Supreme Court or to the states rather than the federal government, the chief justice would shake him off by saying, "Yes, yes, yes, but is it [whatever the case exemplified about law or about the society], is it *right*? Is it *good*? More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities?"

This, or something like it, though the political thrust may vary, is what a Court, encouraged to believe it is more than a court, or perhaps less—a collection of philosophers empowered to find and apply the best in America's moral tradition—this is what such a Court will ultimately come to. Alex recognized it for what it was instantly, and he knew that it was deeply, profoundly wrong. "It is," he wrote, "the premise of our legal order that its own complicated arrangements, although subject to evolutionary change, are more important than any momentary objective." There spoke the Whig-conservative and a man, if I may say so, who was deeply and profoundly right.

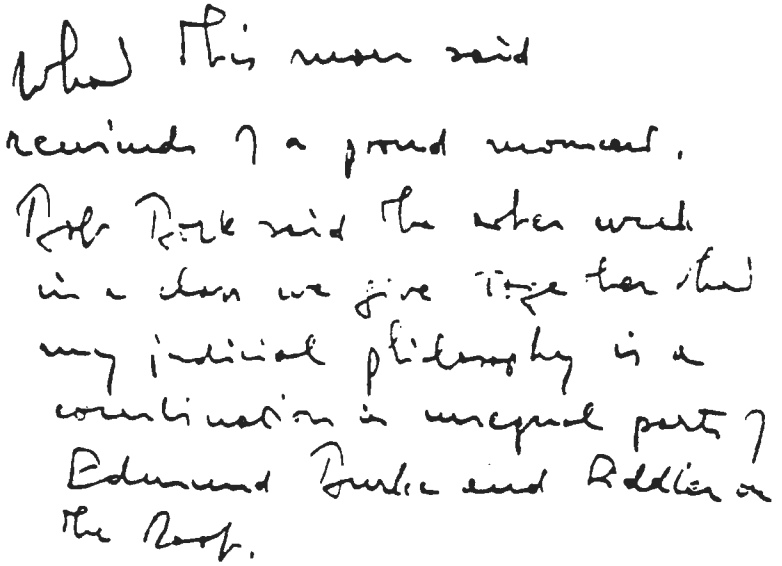
This sense of values carried over into his political thought. Alex Bickel came to regard himself as a conservative and I will suggest to you that he was always conservative in a very real sense even when his political positions and affiliations were liberal-left. The point is important, for much of what is most distinctive and valuable about his work derives from the cast of mind I describe.

It is necessary to be careful about a word like "conservative" because it stirs associations and connotations, many of which are wholly foreign to Alex's thought. Shortly before his illness he tried to locate himself. He wrote of two diverging traditions, one liberal and the other conservative which complete for control of the democratic process and the direction of our judicial policy.

"One of these, the contractarian tradition . . . long ago captured, and substantially retains possession of, the label liberal . . . The other tradition can, for lack of a better term, be called Whig in the English eighteenth-century sense. "It is," wrote Bickel, "usually called conservative, and I would associate it chiefly with Edmund Burke. This is my own model."

He specified the characteristic of Whig-conservative thought. It assesses human nature as it is seen to be. It begins not with theoretical rights but with a real society, whose values evolve but must, at any given moment, be taken as given. "The task of government 'within the limits set by culture, by time- and place-bound conditions] is to make a peaceable, good, and improving society." "The Whig model," he said, "obviously is flexible, pragmatic, slow-moving, highly political. It partakes, in substantial measure, of the relativism that pervades Justice Oliver Wendell Holmes' theory of the First Amendment, although not to its ultimate logical exaggeration. Without carrying matters to a logical extreme, indeed without pretense to intellectual valor, and without sanguine spirit, the Whig model rests on mature skepticism."

This undated note was passed to Irving Kristol at a conference: "What this man said reminds me of a proud moment. Bob Bork said the other week in a class we give together that my judicial philosophy is a combination in unequal parts of Edmund Burke and Fidler on the Roof."



This approach, this habit of mind, which Bickel calls conservative, is apparent in him from first to last, from the time when his political views can only be called liberal to the time when they can appropriately be called conservative. There is a distinction between a conservative process of thought and the location on the spectrum of one's substantive views, and the question whether one tends to produce the other is too complex and too far from my subject to be pursued.

But, to use Bickel's terminology, he thought, and I agree with him, that the Whig-conservative way of thinking is essential to good politics, hence to good law, hence to good lawyers, hence to good law schools. If one were to look for a model of such thought, it is to be found, for example, in *The Federalist Papers*. If one were to look for the antithesis of it, it would be in much of the highly abstract, philosophic writing and thinking now enjoying something of a vogue in some major law schools.

Here, I think, we are close to the central legacy of Alex Bickel. He left us an example, in print and in person, of what it is not merely to be a great lawyer, nor again merely to be a great constitutional lawyer, but to be a great constitutionalist. He taught us to see the marvelous complexity of our law and our society and their innumerable relations. He taught us how to engage in reform and change, how to decide what to keep and what to discard.

That is one reason he tended to be hostile to structural reform such as one man-one vote, the abolition of the electoral college, and all tinkerings with structural features of government. "The institutions of a secular, democratic government," he wrote, "do not generally advertise themselves as mysteries. But they are. What they do, how they do it, or why it is necessary to do what they do is not always outwardly apparent. Their actual operation must be assessed often in sheer wonder, before they are tinkered with, lest great expectations be not only defeated, but mocked by the achievement of their antithesis."

Before he died he began to worry that revulsion to the complex events summed up in the word "Watergate" would lead to a wave of reform that could do enormous damage to political institutions. He was right to worry. The Federal Election Campaign Act, the spread of presidential primaries, the involvement of the judiciary in foreign intelligence, the diminution of the Presidency, already a weak office, and many other "reforms" have been accomplished with a light-headedness that amounts almost to frivolity. They will have and are having totally unanticipated and undesirable results. The same willingness to tinker with structure in order to achieve minor or even symbolic ends accounts for the movements to amend the Constitution. Thus, ERA, the amendment to give the District of Columbia the status of a state in Congress, and the movement to abolish the electoral college all rest on inadequate constitutional thought.

Alex's insight flowed from his organic view of society. The nostrums of ignorant physicians have unintended and potentially disas-

trous consequences. It is no accident that one of Alex's favorite savings was, "Unless it is necessary to change, it is necessary not to change." He often spoke for reform but only after thinking long, and thinking a second and a third time. He left us far more sophisticated about, and respectful of, established ways and institutions than he found us.

But he did more than that. He taught us again a style, an angle of attack, a temper and mode of thought which is, I believe, essential to the health of representative government and its institutions.

Alex contrasted his own mode of thought with that of the social contractarians. In truth, the contrast may be more properly with thinkers who love systems and transcendental principles. He had the greatest aversion to them, and not merely because he thought, in my view rightly, that they were impossible to construct logically, but also because he thought them ultimately inhuman and therefore pernicious. The ultimate principles will never be found by the legal philosophers because they do not exist, and the attempt to frame them must necessarily become so abstract that much which is valuable and human is left out.

This might be all right if system-building were only an academic exercise. But it never is, and particularly not when it is engaged in by lawyers. It is meant to guide decision, which means that real men and women must be bent or trimmed to fit the abstractions, not the other way around. The morality of comprehensive systems tends to be manipulative and destructive because it must reduce life to its own terms or admit intellectual error, which, to a person who has committed everything to a speculative enterprise, is to admit ultimate failure. That is something intellectuals rarely do.

This habit of thought infects the courts and encourages them to think that law is unimportant. Alex was content with what he called "principles in the middle distance," principles that incorporate the values we have now, which are of limited range, which will change over time, which collide with and contradict one another and which must be adjusted, compromised, and refined in their application, and all this must be done in the full knowledge that the result is impermanent and all is to be done again. To know that and nevertheless to devote one's life and full energies to the task is intellectual and moral valor. It is to accept mortality in a way that the seekers of abstract systems do not.

Some of this is what Alex meant when, in speaking on the question "what is happening to morality today?" he answered, "It threatens to engulf us." He meant that abstractions and moral imperatives as guides to action would make life intolerable. The politics of compromise and adjustment makes everything else possible. "Without it," he wrote, "in the stark universe of imperatives, in the politics of ideal promises and inevitable betrayals, justice is not merely imperfect . . . but soon becomes injustice."

The institutions and the secular religion of the American republic are our best chance for happiness and safety. And it is precisely these that are weakened and placed in jeopardy by the habit of abstract philosophizing about the rights of men or the just society. Our institutions are built for humans, they incorporate and perpetuate compromise. They slow change, tame it, deflect and modify principles as well as popular simplicities. And in doing that they provide safety and the mechanism for a morality of process. It follows that real institutions can never be as pure as abstract philosophers demand, and their philosophy must always teach the young a lesson in derogation of institutions for that reason. That is a dangerous lesson for a republic.

Alex was appalled by the first manifestations of the abstract, philosophical style in legal scholarship. Had he lived to see its proliferation in the law schools today, he would have attacked it with a ferocity it gives me pleasure to contemplate even hypothetically.

In one of his last articles, "Watergate and the Legal Order," [illegible] Watergate [illegible] institutional imperatives and transcendental moralities. There is danger in the way we are moving. Walter Bagehot wrote:

> The characteristic danger of great nations, like the Romans and the English, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions which they have created.

It was Alex's constant attempt to understand and to make us understand the great institutions of constitutional government we have created. Whether or not we will remains to be seen. Alex's death, perhaps, makes it less likely that we will.

George F. Will wrote a column shortly after Alex died:

> Hell, Hobbes said, is truth seen too late. Republics—at least fortunate republics—can be saved from damnation by a few constitutionalists like Bickel. But threats to republics are many and constant. Great constitu-

tionalists are few and mortal. Alexander Bickel, the keenest public philosopher of our time, died of cancer late in this, his forty-ninth year.

That is the legacy of Alex Bickel, a tradition of constitutionalism that we badly need to keep alive—in the law schools, in the profession, in the courts, and in the nation. This chair is a means of perpetuating that tradition. No incumbent will ever equal Alex in range, depth, and productivity. Some incumbents, doubtless, will be in active opposition to Alex's philosophy and may disagree with his entire approach. But the chair itself, the mere fact that there will always be someone known as the Alexander M. Bickel Professor of Public Law, will always remind us and those who come after us of the man, his work, and the tradition which he followed and enriched. That is no small thing. It is a gift not only to Yale but to the law and to American political democracy. To the school, and to the donors who made this contribution to a memory and to a tradition, all of us owe a debt of profound gratitude.

Alexander M. Bickel

Note on Judge Bork's 1963 New Republic Article,
"Civil Rights--A Challenge"

In 1963 Judge Bork, then a new member of the Yale Law School faculty, wrote an article in the New Republic criticizing proposed public accommodations legislation that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior. This twenty-five year old article cannot legitimately be cited as a reason not to confirm Judge Bork.

Ten years later, at his confirmation hearings for the position of Solicitor General, Judge Bork acknowledged that his position had been wrong:

> I should say that I no longer agree with that article....It seems to me I was on the wrong track 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.

The article was not even raised during his unanimous confirmation to the D.C. Circuit ten years later, in 1982.

Judge Bork's article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument...."

THE NEW REPUBLIC August 31, 1963
v. 149

Civil Rights—A Challenge

by Robert Bork

Passions are running so high over racial discrimination that the various proposals to legislate its manifestations out of existence seem likely to become textbook examples of the maxim that great and urgent issues are rarely discussed in terms of the principles they necessarily involve. In this case, the danger is that justifiable abhorrence of racial discrimination will result in legislation by which the morals of the majority are self-righteously imposed upon a minority. That has happened before in the United States – Prohibition being the most notorious instance – but whenever it happens it is likely to be subversive of free institutions.

Instead of a discussion of the merits of legislation, of which the proposed Interstate Public Accommodations

Act outlawing discrimination in business facilities serving the public may be taken as the prototype, we are treated to debate whether it is more or less cynical to pass the law under the commerce power or the Fourteenth Amendment and whether the Supreme Court is more likely to find it constitutional one way or the other. However strange it may sound to the constitutional ear, neither the Constitution nor the Supreme Court [illegible] as a first principle. The discussion we ought to be having is of the cost in freedom that must be paid for such legislation, the morality of enforcing morals through law, and the likely consequences for law enforcement of trying to do so.

Few proponents of legislation such as the Interstate Public Accommodations Act seem willing to discuss either the cost in freedom which must accompany it or why this particular departure from freedom of the individual to choose with whom he will deal is justified. Attorney General Kennedy appears to recognize but to wish to avoid these questions, for, in speaking on behalf of the bill before a congressional committee, he went so far as to state that the law would create no precedent. That of course is nothing less than an admission that he does not care to defend the bill on general principles.

There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate. In part the willingness to overlook that loss of freedom arises from the feeling that it is irrational to choose associates on the basis of racial characteristics. Behind that judgment, however, lies an unexpressed natural-law view that some personal preferences are rational, that others are irrational, and that a majority may impose upon a minority its scale of preferences. The fact that the coerced scale of preferences is said to be rooted in a moral order does not alter the impact upon freedom. In a society that purports to value freedom as an end in itself, the simple argument from morality to law can be a dangerous non sequitur. Professor Mark DeWolf Howe, in supporting the proposed legislation, describes southern opposition to "the nation's objective" as an effort "to preserve ugly customs of a stubborn people." So it is. Of the ugliness of racial discrimination there need be no argument (though there may be some presumption in identifying one's own hotly controverted aims with the objective of the nation). But it is one thing when stubborn people express their racial antipathies in laws which prevent individuals, whether white or Negro, from dealing with those who are willing to deal with them, and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life. The principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.

Freedom is a value of very high priority and the occasions upon which it is sacrificed ought to be kept to a minimum. It is necessary that the police protect a man from assault or theft but it is a long leap from that to protection from the insult implied by the refusal of another individual to associate or deal with him. The latter involves a principle whose logical reach is difficult to limit. If it is permissible to tell a barber or a rooming house owner that he must deal with all who come to him regardless of race or religion, then it is impossible to see why a doctor, lawyer, accountant, or any other professional or business man should have the right to discriminate. Indeed, it would be unfair discrimination to leave anybody engaged in any commercial activity with that right. Nor does it seem fair or rational, given the basic premise, to confine the principle to equal treatment of Negroes as customers. Why should the law not require not merely fair hiring of Negroes in subordinate positions but the choice of partners or associates in a variety of business and professional endeavors without regard to race or creed? Though such a law might presently be unenforceable, there is no distinction in principle between it and what is proposed. It is difficult to see an end to the principle of enforcing fair treatment by private individuals. It certainly need not be confined to racial or commercial matters. The best way to demonstrate the expansiveness of the principle behind the proposed legislation is to examine the arguments which are used to justify it.

Perhaps the most common popular justification of such a law is based on a crude notion of waivers: insistence that barbers, lunch counter operators, and similar businessmen serve all comers does not infringe their freedom because they "hold themselves out to serve the public." The statement is so obviously a fiction that it scarcely survives articulation. The very reason for the proposed legislation is precisely that some individuals have made it as clear as they can that they do not hold themselves out to serve the public.

A second popular argument, usually heard in connection with laws proposed to be laid under the Fourteenth Amendment, is that the rationale which required the voiding of laws enforcing segregation also requires the prohibition of racial discrimination by business licensed by any governmental unit because "state action" is involved. The only legitimate thrust of the

state action. Characterization, however, is to enable courts to see through governmental use of private organizations to enforce an official policy of segregation. There is a fundamental difference between saying that the state cannot further racism in the primary election process, which is actually the election that matters, to the private and always Democratic Party and saying that a privately owned restaurant cannot refuse a Negro patron because a state board has examined him and certified his competence. The "state action" concept must be confined to the simple case of enforcement of policy through a dominating private agency or else it becomes possible to discern the hand of the state in every private action.

One of the shabbiest forms of "argument" is that endorsed by James Reston when he described the contest over the public accommodations bill as one between "human rights" and "property rights." Presumably no one of "liberal" views has any difficulty deciding the question when so concisely put. One wishes nonetheless that Mr. Reston would explain just who has rights with respect to property other than humans. If A demands to deal with B and B insists that for reasons sufficient to himself he wants nothing to do with A, I suppose even Reston would agree that both are claiming "human rights" and that this is in no way changed if one of the humans is colored and the other white. How does the situation change if we stipulate that they are standing on opposite sides of a barber chair and that B owns it?

A number of people seem to draw a distinction between commercial relationships and all others. They feel justified, somehow, in compelling a rooming house owner or the proprietor of a lunch counter to deal with all comers without regard to race but would not legislate acceptance of Negroes into private clubs or homes. The rationale appears to be that one relationship is highly personal and the other is just business. Under any system which allows the individual to determine his own values that distinction is unsound. It is, moreover, patently fallacious as a description of reality. The very bitterness of the resistance to the demand for enforced integration arises because owners of many places of business do in fact care a great deal about whom they serve. The real meaning of the distinction is simply that some people do not think others ought to care that much about that particular aspect of their freedom.

One of the Kennedy administration's arguments for the bill is that it is necessary to provide legal redress in order to get the demonstrators out of the streets. That cannot be taken seriously as an independent argument. If southern white racists – or northern ones, for that matter – were thronging the streets, demanding complete segregation of commercial facilities, it is to be hoped that no responsible politician would suggest passing a law to enable them to enforce their demands

in court. In this connection, it is possible to be somewhat less than enthusiastic about the part played by "moral leaders" in participating in demonstrations against private persons who discriminate in choice of their patrons. It feeds the danger of the violence which they are the first to deplore. That might nevertheless be tolerable if they were demonstrating against a law that coerced discrimination. They are actually part of a mob coercing and distributing other private individuals in the exercise of their freedom. Their moral position is about the same as Carrie Nation's when she and her followers invaded saloons.

Though the basic objection is to the law's impact upon individual liberty, it is also appropriate to question the practicality of enforcing a law which runs contrary to the customs, indeed the moral beliefs, of a large portion of the country. Of what value is a law which compels service to Negroes without close surveillance to make sure the service is on the same terms given to whites? It is not difficult to imagine many ways in which barbers, landlords, lunch counter operators, and the like can nominally comply with the law but effectively discourage Negro patrons. Must federal law enforcement agencies become in effect public utility commissions charged with the supervision of the nation's business establishments or will the law become an unenforceable symbol of hypocritical righteousness?

It is sad to have to defend the principle of freedom in this context, but the task ought not to be left to those

southern politicians who only a short while ago were defending laws that enforced racial segregation. There seem to be few who favor racial equality who also persist or are willing to give primacy to the value of freedom in that struggle. A short while back the majority of the nation's writers and intellectual leaders opposed all the manifestations of "McCarthyism" and did it correctly. It seemed the nation that the issue was not whether communism was good or evil but whether men were to be free to think and talk as they pleased. Those same issues seem to be running with the other party this time. Yet the issue is the same. It is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them. This time "stubborn people" with "ugly customs" are under attack rather than intellectuals and academicians, but that sort of personal comparison surely ought not to make the difference.

The trouble with freedom is that it will be used in ways we abhor. It then takes great self restraint to avoid sacrificing it, just this once to another end. One may agree that it is immoral to treat a man according to his race or religion and yet question whether that moral preference deserves elevation to the level of the principle of individual freedom and self-determination. If, every time an intensely-felt moral principle is involved, we spend freedom, we will run short of it.

Civil Rights—A Reply

The New Republic's commentary on civil rights over the years should make it obvious that the editors disagree emphatically with Mr. Bork's thesis. Yet his fears about the proposed legislation are shared by many Americans, including many readers of the *New Republic*, so they deserve both a forum and an answer.

In discussing the law we share Justice Holmes' preference for appeals to experience rather than logic. In the light of recent American experience Mr. Bork's argument seems to have several defects.

First, Mr. Bork speaks about the "freedom of the individual" as if the owners of hotels, motels, restaurants and other public accommodations were today legally free to serve whomever they please. This, as everyone knows, is seldom the case. For centuries English common law obligated innkeepers to accommodate any well-behaved traveller, and his horses. Most states have today embodied this tradition in public accommodation statutes. In the North, these statutes generally require a restaurant, hotel or motel to accept all sober and orderly comers, regardless of race. In the South, Jim Crow legislation enacted at the end of the nineteenth century until recently required the owners of public establishments to segregate their facilities. The Supreme Court has now declared the Jim Crow statutes unconstitutional but even today the owner who wants to serve both Negroes and whites is likely to have difficulty exercising his newly acquired "right" in many areas. Mr. Bork would presumably deplore the whole tradition that "public accommodations" must provide public service as well as private profit. But he cannot maintain that new legislation in this field would mean a sudden increase of government intervention in private affairs. The Administration's civil rights bill would simply extend to the national level principles and practices long employed locally.

Experience also argues against Bork's equation between the distress caused by having to serve a Negro and the distress caused by refusing to serve him. Both exist, and both deserve consideration, but no amount of rhetoric about freedom can give them equal weight. Despite what Mr. Bork says, the "loss of freedom" caused by having to serve Negroes is in most cases pecuniary, not personal. If personal freedom were to be protected we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not. The fact is, however, that such people must serve whomever their employer tells them to serve, and refuse whomever he tells them to refuse. The right to segregate is, as everyone but Mr. Bork admits, a right deriving solely from title to property. It is neither more nor less sacrosanct than other economic privileges. It can be regulated in the same way that the right to build a restaurant on one's residential property is regulated.

There are, of course, some owners of public establishments who have personal contact with the clients – the much debated case of Mrs. Murphy's boarding house. Perhaps such establishments should be exempt from the proposed public accommodations law. But even here the claims of private freedom must be weighed against the claims of public convenience.

Government without principle ends in shipwreck; but government according to any single principle, to the exclusion of all other, ends in madness. Mr. Bork's principle of private liberty is important, and his distrust of public authority often justified. But to apply this principle in disregard of all others would today require the repeal of the industrial revolution. Perhaps, however, that is what Mr. Bork wants.

THE EDITORS

[illegible] Albers the Euro- [illegible] That 'autumn [illegible] an American [illegible] pursue the ec- [illegible] but simply [illegible] we Amer- [illegible] with [illegible] out some of [illegible] regard to the [illegible] The approach is [illegible] by Nature [illegible] a means to increase [illegible] perception of Nature.

In the old days when classical logic was taught as a preparation for Aristotelian philosophy there was a stock instance of the apprentice logician going home to dazzle his younger siblings with the gaming behavior of the logical paradox. More than any artist or any teacher Josef Albers has explored and come to command the analogous field of visual paradox and has used that command to teach color. The apprentices are dazzling the youngsters with the toys the master has made.

Despite its farcical reductions to a whole series of absurdities, the Bauhaus remains one of the great achievements of our time. Its greatness is affirmed not by the lakeside apartments in Chicago but by one's sudden exposure to such a mind as that of Albers. The old academic title, Doctor of Humane Letters, often misused, retains still something of the aspiration of those who devised it. In that sense Josef Albers has been a doctor of humane colors. As with many of his colleagues, we have been enriched by the disaster that brought him to us.

FRANZ GELLERT

Correspondence

Civil Rights – A Reminder

Sirs:

Your editorial reply to my article on the public accommodations bill ("Civil Rights – A Challenge," August 31) does not reveal whether you perceive in this case a principle which takes precedence over that of individual liberty, what it is, or why it should prevail. I gather that you feel strongly, but that is not enough. Until one is shown a competing principle, he may be excused his reluctance to sacrifice freedom.

A principle is required because a society which values freedom as well as democracy must face the task of defining those aspects of life in which the majority may properly coerce the individual through law and those in which it may not. Though your reply would indicate it, I find it hard to believe that you are really among those who require no license for coercion other than their own preferences (read "intense moral convictions," if you like). That would make numbers and strength of passion the sole principles of legislation. I think some better standard is both required and attainable. Its precise statement may be beyond our present capabilities, but I suggest that 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.

Your reply on the basis of "experience" also seems deficient. The historical existence of common law duties and local statutes paralleling the proposed federal law does not in any way demonstrate their wisdom or that their principle ought to be extended. Even wider of the mark is your suggestion that personal freedom is not really involved because if it were "we would need legislation allowing individual waitresses, hotel clerks and charwomen to decide whom they would serve and whom they would not." In fact, such persons have precisely that freedom. Your suggestion that they do not can only be supported by equating the individual employer, for whom the waitress need not work, with the government, which no citizen can escape. To employ such an equation is to confess inability to see the difference between a contract and a statute.

Insistence that title to property is involved in the right to discriminate with respect to its use advances the argument not one whit. One must certainly own a barber chair in order to refuse to let another man sit in it. But the discovery of something called "property" in the situation does not of itself render the desires of the titleholder inferior to those of every person lacking title. A question of personal freedom is inescapably involved and cannot be exorcised by calling it an "economic privilege" – not even if you say it three times.

Robert H. Bork
Yale Law School

Dropouts and the Draft

Sirs:

On August 17 you published a note, "Dropouts and the Draft." Let me start by analyzing some of the more dubious statements therein:

> "Unlike schools, the Army is organized on the assumption that its recruits are dimwits."

Well, I don't know how long it has been since whoever dreamed that sentence up has been subjected to Army training but as of now the Army is organized for training on the basis that its average recruit has the intellectual level of a median high school sophmore or junior. Now while those are admittedly not Olympian heights, they are somewhat

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 or——

Mr. BORK. I would have—it is a little hard to speak without putting it in an institutional context. If it were that kind of an important case I am sure 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 I had 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 minute 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.

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

Argued Sept. 29, 1983

Decided Aug. 17, 1984.

Rehearing En Banc Denied Nov. 15, 1984.

Discharged Navy petty officer brought action seeking to enjoin discharge and an order for his reinstatement. The United States District Court for the District of Columbia, Oliver Gasch, J., rendered summary judgment for the Navy, and appeal was taken. The Court of Appeals, Bork, Circuit Judge, held that: (1) District Court had subject-matter jurisdiction, and (2) Navy's policy of mandatory discharge for homosexual conduct does not violate constitutional rights to privacy or equal protection.

Affirmed.

Opinion on rehearing, D.C.Cir., 746 F.2d 1579.

1. Federal Courts ⇐181

District court had jurisdiction of action by discharged Navy petty officer challenging constitutionality of mandatory discharge for homosexual conduct. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331, U.S.C.A. Const.Amends. 1, 5, 14.

2. Courts ⇐96(3)

Supreme Court's summary disposition of a case constitutes a vote on the merits and as such is binding on lower federal courts.

3. Armed Services ⇐11, 22

The military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society.

4. Constitutional Law ⇐82(10), 242.1(3)

There is no constitutional right to engage in homosexual conduct and, hence, Navy's policy of mandatory discharge for homosexual conduct is not violative of any constitutional right to privacy or equal protection as unique needs of the military justify determination that homosexual conduct impairs its capacity to carry out its mission. U.S.C.A. Const.Amends. 1, 4, 5, 9, 14.

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

Stephen V. Bomse, San Francisco, Cal., with whom Steven M. Block, Leonard Graff, San Francisco, Cal., and Calvin Steinmetz, Washington, D.C., were on the brief, for appellant.

William G. Cole, Atty., Dept. of Justice, 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 J. Paul McGrath, Asst. Atty. Gen., Anthony J. Steinmeyer, Richard A. Olderman, Attys., Dept. of Justice and Stanley S. Harris, U.S. Atty., Washington, D.C. (at the time the brief was filed), were on the brief, for appellees. Marc Johnston, Atty., Dept. of Justice, Washington, D.C., also entered an appearance for appellees.

Charles Lister and Arthur B. Spitzer, Washington, D.C., were on the brief, for amicus curiae urging remand.

Before BORK and SCALIA, Circuit Judges, and WILLIAMS,* Senior District Judge, United States District Court for the Central District of California.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge:

James L. Dronenburg appeals from a district court decision upholding the United States Navy's action administratively discharging him for homosexual conduct. Appellant contends that the Navy's policy of mandatory discharge for homosexual conduct violates his constitutional rights to privacy and equal protection of the laws. The district court granted summary judgment for the Navy, holding that private, consensual, homosexual conduct is not constitutionally protected. We affirm.

I.

On April 21, 1981, the United States Navy discharged James L. Dronenburg for homosexual conduct. For the previous nine years he had served in the Navy as a Korean linguist and cryptographer with a top secrurity clearance. During that time he maintained an unblemished service record and earned many citations praising his job performance. At the time of his discharge Dronenburg, then a 27-year old petty officer, was enrolled as a student in the Defense Language Institute in Monterey, California.

The Navy's investigation of Dronenburg began eight months prior to the discharge, in August, 1980, when a 19 year old seaman recruit and student of the Language Institute made sworn statements implicating Dronenburg in repeated homosexual acts. The appellant, after initially denying these allegations, subsequently admitted that he was a homosexual and that he had repeatedly engaged in homosexual conduct in a barracks on the Navy base. On September 18, 1980, the Navy gave Dronenburg formal notice that it was considering administratively discharging him for misconduct due to homosexual acts, a violation of SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix ("J.A.") at 216, which provided in pertinent part, that

> [a]ny member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale.[1]

On January 20 and 22, 1981, at a hearing before a Navy Administrative Discharge Board ("Board") Dronenburg testified at length in his own behalf, with counsel representing him. He again acknowledged engaging in homosexual acts in a Navy barracks.

The Board voted unanimously to recommend Dronenburg's discharge for misconduct due to homosexual acts. Two members of the Board voted that the discharge be characterized as a general one, while the third member voted that the discharge be an honorable one. The Secretary of the Navy, reviewing this case at appellant's request, affirmed the discharge but ordered that it be characterized as honorable. On April 20, 1981, the appellant filed suit in district court challenging the Navy's policy mandating discharge of all homosexuals. The district court granted summary judgment for the Navy.

II.

(1) As a threshold matter, we must dispose of appellees' contention that the district court lacked subject matter jurisdiction over this action. According to appellees, the doctrine of sovereign immunity precludes the bringing of this action except insofar as the Tucker Act permits damage suits in the Claims Court. Brief for Feder

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

1 Discharge for homosexual conduct was not invariably mandatory. Instruction 1900.9C ¶ 6b (Jan. 20, 1978) provides that:

> A member who has solicited, attempted, or engaged in a homosexual act on a single occasion and who does not profess or demonstrate proclivity to repeat such an act may be considered for retention in the light of all relevant circumstances. Retention is to be permitted only if the aforesaid conduct is not likely to present any adverse impact either upon the member's continued performance of military duties or upon the readiness, efficiency, or morale of the unit to which the member is assigned either at the time of the conduct or at the time of processing according to the alternatives set forth herein.

J.A. at 218. Moreover, the Secretary of the Navy retained the power to keep a person in service despite homosexual conduct on an ad hoc basis for reasons of military necessity.

These regulations have since been replaced by SEC/NAV Instruction 1900.9D (Mar. 12, 1981) which implements a Department of Defense Directive. J.A. at 219. The policy of 1900.9C, under which appellant was discharged, is continued in effect by 1900.9D.

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); *Warin v. Director, Dept of Treasury*, 672 F.2d 890, 891-92 (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?")

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

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.

or instances, 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] the very [illegible] from regulating [illegible] general [illegible] difficult to understand how an adult's selection 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

6. At oral argument, appellant's counsel was pressed by the court concerning his proposition that the naval regulations may not permissibly be grounded 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." SECNAV 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.*, 666 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. 82-0309-3).

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 Stemmetz, 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 gaunt lets 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. Martino*, 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., Monte 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."). 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*.

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.

Argued Sept. 29, 1983.

Decided Aug. 17, 1984.

Rehearing En Banc Denied Nov. 15, 1984

Discharged Navy petty officer brought action seeking to enjoin discharge and an order for his reinstatement. The United States District Court for the District of Columbia, Oliver Gasch, J., rendered summary judgment for the Navy, and appeal was taken. The Court of Appeals, Bork, Circuit Judge, held that: (1) District Court had subject-matter jurisdiction, and (2) Navy's policy of mandatory discharge for homosexual conduct does not violate constitutional rights to privacy or equal protection.

Affirmed.

Opinion on rehearing, D.C.Cir., 746 F.2d 1579.

1. Federal Courts ⇐181

District court had jurisdiction of action by discharged Navy petty officer challenging constitutionality of mandatory discharge for homosexual conduct. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331, U.S.C.A. Const.Amends. 1, 5, 14.

2. Courts ⇐96(3)

Supreme Court's summary disposition of a case constitutes a vote on the merits and as such is binding on lower federal courts

3. Armed Services ⇐11, 22

The military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society

4. Constitutional Law ⇐82(10), 242.1(3)

There is no constitutional right to engage in homosexual conduct and, hence, Navy's policy of mandatory discharge for homosexual conduct is not violative of any constitutional right to privacy or equal protection as unique needs of the military justify determination that homosexual conduct impairs its capacity to carry out its mission. U.S.C.A. Const.Amends. 1, 4, 5, 9, 14.

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

Stephen V. Bomse, San Francisco, Cal., with whom Steven M. Block, Leonard Graff, San Francisco, Cal., and Calvin Steinmetz, Washington, D.C., were on the brief, for appellant.

William G. Cole, Atty., Dept. of Justice, 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 J. Paul McGrath, Asst. Atty. Gen., Anthony J. Steinmeyer, Richard A. Olderman, Attys., Dept. of Justice and Stanley S. Harris, U.S. Atty., Washington, D.C. (at the time the brief was filed), were on the brief, for appellees. Marc Johnston, Atty., Dept. of Justice, Washington, D.C., also entered an appearance for appellees.

Charles Lister and Arthur B. Spitzer, Washington, D.C., were on the brief, for amicus curiae urging remand.

Before BORK and SCALIA, Circuit Judges, and WILLIAMS,* Senior District Judge, United States District Court for the Central District of California.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge:

James L. Dronenburg appeals from a district court decision upholding the United States Navy's action administratively discharging him for homosexual conduct. Appellant contends that the Navy's policy of mandatory discharge for homosexual conduct violates his constitutional rights to privacy and equal protection of the laws. The district court granted summary judgment for the Navy, holding that private, consensual, homosexual conduct is not constitutionally protected. We affirm.

I

On April 21, 1981 the United States Navy discharged James L. Dronenburg for homosexual conduct. For the previous nine years he had served in the Navy as a Korean linguist and cryptographer with a top-security clearance. During that time he maintained an unblemished service record and earned many citations praising his job performance. At the time of his discharge Dronenburg, then a 27 year old petty officer, was enrolled as a student in the Defense Language Institute in Monterey, California.

The Navy's investigation of Dronenburg began eight months prior to the discharge, in August, 1980, when a 19 year old seaman recruit and student of the Language Institute made sworn statements implicating Dronenburg in repeated homosexual acts. The appellant, after initially denying these allegations, subsequently admitted that he was a homosexual and that he had repeatedly engaged in homosexual conduct in a barracks on the Navy base. On September 18, 1980, the Navy gave Dronenburg formal notice that it was considering administratively discharging him for misconduct due to homosexual acts, a violation of SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix ("J.A.") at 216, which provided in pertinent part, that

> [a]ny member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale.[1]

On January 20 and 22, 1981, at a hearing before a Navy Administrative Discharge Board ("Board") Dronenburg testified at length in his own behalf, with counsel representing him. He again acknowledged engaging in homosexual acts in a Navy barracks.

The Board voted unanimously to recommend Dronenburg's discharge for misconduct due to homosexual acts. Two members of the Board voted that the discharge be characterized as a general one while the third member voted that the discharge be an honorable one. The Secretary of the Navy, reviewing this case at appellant's request, affirmed the discharge but ordered that it be characterized as honorable. On April 20, 1981 the appellant filed suit in district court challenging the Navy's policy mandating discharge of all homosexuals. The district court granted summary judgment for the Navy.

II

[1] As a threshold matter, we must dispose of appellees' contention that the district court lacked subject matter jurisdiction over this action. According to appellees, the doctrine of sovereign immunity precludes the bringing of this action except insofar as the Tucker Act permits damage suits in the Claims Court. Brief for Feder

* Sitting by designation pursuant to 28 U.S.C. § 294(d)

1 Discharge for homosexual conduct was not invariably mandatory. Instruction 1900.9C ¶ 6b (Jan. 20, 1978) provides that:

> A member who has solicited, attempted, or engaged in a homosexual act on a single occasion and who does not profess or demonstrate proclivity to repeat such an act may be considered for retention in the light of all relevant circumstances. Retention is to be permitted only if the aforesaid conduct is not likely to present any adverse impact either upon the member's continued performance of military duties or upon the readiness, efficiency, or morale of the unit to which the member is assigned either at the time of the conduct or at the time of processing according to the alternatives set forth herein.

J.A. at 218. Moreover, the Secretary of the Navy retained the power to keep a person in service despite homosexual conduct on an ad hoc basis for reasons of military necessity.

These regulations have since been replaced by SEC/NAV Instruction 1900.9D (Mar. 12, 1981) which implements a Department of Defense Directive. J.A. at 219. The policy of 1900.9C, under which appellant was discharged, is continued in effect by 1900.9D.

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); *Warren 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* 946 (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?")

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, 142, 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.[1] Limiting distribution to licensed pharmacists significantly burdened that right. *Id.* at 689, 97 S.Ct. at 2018.[1]

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

[1] 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 its result and it would not advance our inquiry to discuss the various opinions offered.

s[illegible] 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 decision would be such 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] behavior is the very [illegible] from regulation [illegible] general constitutional protection [illegible] difficult to understand how an adult's selection 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." SECNAV 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 status 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. Kommel, 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 Stemmetz, 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. Martino*, 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., Morris 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*, *Copper & 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."). 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*.

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.[1]

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

[1] 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

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.

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 disapproval for certain types of behavior is the very [illegible] from regulating [illegible] matter of general constitutional principle [illegible] difficult 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

6. At oral argument, appellant's counsel was pressed by the court concerning his proposition that the naval regulations may not permissibly be grounded 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. Martino*, 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., Mosrie 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*, *Copper & 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"). 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*.

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.

⇐182. Nature and scope.

C.A.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.

C.A.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.

C.A.D.C. 1984. Interpretation by the FCC of its own policies and regulations is entitled to great deference.—National Ass'n of Regulatory Utility Comrs 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.

C.A.9 1984. Agencies must comply with their own regulations.—Confederated Tribes and Bands of Yakima Indian Nation v. F.E.R.C., 746 F.2d 466.

⇐419. —— Retroactivity.

C.A.2 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.—Harrigan 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).—Harrigan 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

LAW, MORALITY, AND THOMAS MORE

Robert H. Bork

September 26, 1985

The 450th anniversary of the death of Thomas More, which we remember this year, has produced a flood of scholarship and reflections. Anyone who imagines he can say anything in the slightest degree new in an after-dinner talk is certainly foolhardy, not to say worse. When he is addressing a group most of whose members know more about Sir Thomas than he does, I cannot think of words sufficient to describe his presumption. Nevertheless, you see such a person before you tonight.

I shall not dwell upon the details of Sir Thomas's career, because they are well known and also because some of them make me distinctly uncomfortable. More was, for example, a superbly accomplished lawyer but before the lawyers among us preen too much over that fact, we ought to recall what Erasmus reported of More's view: "The study of ... law is as far removed as can be from true learning .... More's mind, fitted for better things, naturally dreaded these studies ..." That puts a more favorable light, perhaps, on some of our law school transcripts. We may explain our grades on the ground that our minds were fitted for better things.

Nor would it be discreet of me to rehearse More's career as Lord Chancellor. One of his biographers tells us that when he took over the post some cases had been pending there for a dozen years, but "he now applied to the legal business of Chancery that peculiarly rapid mind which in earlier days had enabled him to grasp the meaning of a Greek sentence with a quickness which astonished his humanist colleagues.

"His day of triumph came when, having taken his seat and settled a case, he called for the next, and was told that there was no man or matter to be heard." Now that accomplishment is a matter of no small annoyance to a federal judge, at least to this one. On the other hand, if Sir Thomas had had some of the regulatory cases that are our standard fare, he wouldn't have needed a hair shirt.

What I do intend to talk about, oddly enough, is the subject disclosed by the title of these remarks — the thoughts raised by Thomas More's life, and the manner of his death, upon issues of law and morality, issues that remain vital today.

The first thing to be observed is that, contrary to some impressions, for Thomas More, in a real sense, law was morality. It is equally true that for More morality was superior to law and was the standard by which law is judged. If that seems a paradox, I do not think it is a true one.

It is a great irony that Thomas More has come to be seen as a hero of civil disobedience, a man who refused to obey immoral law. Perhaps it is a sign of the distemper of our age that he should be so misunderstood.

Ours is an age that glorifies, practically deifies, the individual conscience. It was not always so. It must have been well into this century before one began to hear words such as civil disobedience or heresy used as terms of approbation. What would Thomas More have thought of that? What would he have thought of those who disobey law in the name of moral imperatives? His life, particularly his public life, gives a tolerably clear answer.

More not only lived under but served a sovereign, many of whose policies he believed to be immoral or profoundly unwise. From the beginning, More was under no illusions about that. When William Roper, his son-in-law, rejoiced at how friendly Henry was to More, More replied, "I have no cause to be proud thereof, for if my head could win him a castle in France it should not fail to go."

Yet he did not disobey; he might give contrary advice; but, the policy or the law once decided upon, he complied. For example, he completely disapproved of Henry's ruinous war with France but, as Speaker, he asked Parliament for extraordinary and unpopular taxes to support that war. Later, when More was Lord Chancellor, and it was proposed to put Parliament in control of the church, Marius tells us "More was sick at heart at the prospect ...[but] he could not control events. Worse, he was a respectable figurehead, kept by the government to lend it whatever authority his reputation gave him, serving by his very presence in the post of Lord Chancellor a cause which was to him abominable." He wanted to resign. "Yet he could not resign, for to do so would have been to run the risk of making his opposition to the king public."

Again, Henry commanded More to speak in the House of Lords to say that Henry was pursuing his divorce from Catherine as a matter of religious scruple and not for love of any other woman. In doing so, More pointed out that various universities agreed that the first marriage had been unlawful. Someone asked More's opinion on the matter and he replied that he had given it to the king, and he said no more.

As R.W. Chambers put it, "respect for authority ... was the foundation of the political thinking ... of More." And so it was. He consented to present the king's case to the House of Lords but would not go an inch further than required.

This was his attitude toward law and the duty of a judge. He once said, "... [I]f the parties will at my hands call for justice, then, all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right."

In this, Robert Bolt's A Man For All Seasons got the man remarkably right. (I was somewhat surprised to discover this since I had assumed that Bolt, like many writers of historical dramas had taken liberties to make his subject more interesting or appealing.) In one scene, More, then the Lord Chancellor, argues with his family who are urging him to arrest Richard Rich. His daughter, Margaret, says, "Father, that man's bad." More answers, "There is no law against that." His son-in-law, Roper: "There is! God's law!" More: "Then God can arrest him.... The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal.... I'm not God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester."

Why, then, this obedience to constituted authority and to law, even when he regarded them as immoral? It was, in part, fear of the alternative to law. An Elizabethan play, that may have been written by Shakespeare, has More quell rioters against aliens in London with this speech:

MORE: Grant them removed, and grant that this your noise
Hath chid down all the majesty of England.
Imagine ...
that you sit as kings in your desires
Authority quite silenced by your brawl
And you in ruff of your opinions clothed,
What had you got? I'll tell you. You had taught
How insolence and strong hand should prevail,
How order should be quelled; and by this pattern
Not one of you should live an aged man;
For other ruffians, as their fancies wrought
With self same hand, self reasons and self right
Would shark on you; and men like ravenous fishes
Would feed on one another.

And Bolt, in a much quoted passage, has More say when assailed with the charge that he would give the Devil the benefit of law:

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: . . . Oh? . . . And when the last law was down, and the Devil turned round on you — where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down — . . . — d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.

But there is more than the fear of lawlessness and tumult. There is the thought that he is not sure about morality, he may be wrong. When Roper says to him, "the law's your god," More replies, "Oh, Roper you're a fool, God's my god.... But I find him rather too subtle.... I don't know where he is nor what he wants."

And again he says: "God made the angels to show him splendor — as he made animals for innocence and plants for their simplicity. But Man he made to serve him wittily, in the tangle of his mind." Not in the pride and certainty of the individual conscience, you will note, but in the tangle of his mind.

The recalcitrance that brought More to the scaffold — his refusal to take the oath that Henry's second marriage was valid and that Henry was the Supreme Head of the church in England — that recalcitrance may be seen, as it usually is, as More's one great act of disobedience. Bolt writes that More became to him "a man with an adamantine sense of his own self. He knew where he began and left off, what areas of himself he could yield to the encroachments of his enemies, and what to the encroachments of those he loved. It was a substantial area in both cases, for he had a proper sense of fear and was a busy lover. Since he was a clever man and a great lawyer he was able to retire from those areas in wonderfully good order, but at length he was asked to retreat from that final area where he located his self. And there this supple, humorous, unassuming and sophisticated person set like metal, was overtaken by an absolutely primitive rigor, and could no more be budged than a cliff."

It is this behavior that causes Bolt to refer to More as a "hero of selfhood." Indeed it was extraordinary behavior: More was the only person, not a member of the clergy, who refused the oath and thus chose martyrdom.

Yet the refusal to take the oath need not, of course, be viewed as disobedience at all. There was a law higher than Henry's, and More knew that the oath violated that law. As to this ultimate thing, he, at last, knew where God was and what he wanted. At this extremity, God was no longer too subtle for him, and More obeyed God's law and went to his death. This was not disobedience but obedience, a thought he expressed in his last words as he lay down before the headsman: "I die the King's servant, but God's first."

For More, then, until law changed, it was to be obeyed, and that injunction he applied as much to the judge on the bench as to rioters in the street. We all recognize rioters or draft resisters as civil disobedients but we are less likely to recognize that the judge who ignores law or who creates constitutional law out of his own conscience is equally civilly disobedient. I had not thought of it that way until Alexander Bickel, in his wonderful book, The Morality of Consent, recounted the recent American experience with the phenomenon in the streets and then said, "The assault upon the legal order by moral imperatives was not only or perhaps even most effectively an assault from the outside." He argued that it came as well from a court that cut through law to do what it considered "right" and "good." The theoretical justification for that peculiarly corrupting form of civil disobedience is now being constructed by many of the most prominent constitutional scholars in our law schools. It is the philosophy that judges should create and enforce as constitutional law, individual rights that are not to be found in the Constitution.

More would have had none of that. As Bickel noted, civil disobedience, no matter by whom or in what cause, is always "a decision in favor of self, in favor of the idea of self." That is why, in the law, it encourages moral relativism, which is a leading feature of modern constitutional adjudication. But More was a communitarian. As Chambers notes, "From [his book] Utopia to the scaffold, More stands for the common cause, as against the private commodity of the single man ...." It is for that reason I say that obedience to constituted authority and to established law was a major part of More's morality. If that was his view in the reign of Henry VIII, how much more would it have been his view when law and policy are democratically made, when they are, in the realest sense they can be, the will of the community.

For More, morality was superior to the will of the sovereign and to law in the sense that it might be brought to bear to shape or to alter that will and that law, though not to justify disobedience. This clearly appears in Utopia where he showed himself arguing that it was a man's

duty to enter public life despite the evil he thought that necessarily entailed, saying, "That which you cannot turn to good, so to order it that it be not very bad."

And after More had resigned as Lord Chancellor he spoke to Cromwell, who still served the king:

> Master Cromwell, ...
> if you will follow
> my poor advice, you shall, in your
> counsel-giving unto his Grace, ever tell
> him what he ought to do, but never what
> he is able to do ... For if a lion knew
> his own strength, hard were it for any
> man to rule him.

In a word, try to make law as moral as you can, but when it is made, whatever it is, morality lies in obedience to the law. If disobedience is ever justified, it is only when the issue is of transcendent importance and when you are absolutely sure of the right and wrong of the matter. In a democratic polity there can be such occasions, but they will be very few.

If some find the lesson More taught too austere for comfort, they ought at least reflect on the question of how much glorification of the individual conscience any legal order can tolerate and remain a legal order. They ought also to ask how much privatization of morality the moral order can tolerate and remain a moral order.

These are issues of law and morality internal to the United States, but they arise internationally as well. What we call international law is, of course, in many respects not yet law in any real sense. It is in a formative stage, the stage at which More would have felt free to infuse morality. This raises the question whether we should try to build an international law, or pretend there is one, about the use of armed force between nations? In the present condition of the world — a condition that looks permanent — I think More would say the answer must be no. It must be no because that law cannot be moral.

These reflections were prompted by the debate over the legality of the United States' invasion of Grenada. At the time, you will recall, a number of people denounced the invasion as illegal. Others defended its legality.

My point, however, is that this debate of necessity ignored crucial moral questions. Insofar as there is or might be international law about the use of force between nations, the rules could not reflect the moral reasons for the use of force. This is true because the rules, to be called international, must necessarily express a morality acceptable to immoral regimes.

Thus, in a discussion with an international law expert, I pointed to three factors that most people deem relevant to the American action in Grenada.

The Grenadan government had been formed by a minority that seized power by violence and maintained it by terror.

It was a Marxist-Leninist regime and so represented a further advance in this hemisphere of a power that threatens freedom and democracy throughout the world.

The people of Grenada were ecstatic at being relieved of that tyrannical government.

I said these three factors seemed to me morally relevant and I asked whether they were relevant in international law. The answer was no. This means that when we act for moral reasons, we cannot give those reasons and must, to the degree we acquiesce in the false notion that there is already a binding international law, cast ourselves in a false position.

When the rules that we are asked to call law must exclude, and indeed condemn, moral action it would appear better not to confer the prestige of the name law upon them. Otherwise, we must either renounce our morality or accept the role of disobedients. Sir Thomas would not approve of either course.

In my brief acquaintance with Sir Thomas — an acquaintance prompted by this Society, and for which I thank you — I have learned a good deal. Erasmus it was who called him A Man For All Seasons. He may be. But what astounds and impresses me is that across four and one-half centuries, he still speaks to us.