

Parchment Barriers?

"The Bill of Rights in Its Context" by Oscar Handlin, in *The American Scholar* (Spring 1993), 1811 Q St. N.W., Washington, D.C. 20009.

Americans revel in their rights. Every educated American knows what the First Amendment says and even children know what it means to "take the Fifth." But nobody seems to know the Ninth Amendment, observes Handlin, the noted Harvard historian. They should, he argues, for it holds the key to a different, and wholly superior, notion of rights from what we know today.

The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It reflects, says Handlin, the Revolutionary era belief that rights "were not to be rummaged for among old parchments or musty records." Citizens looked not to the courts but to "their own experience and reason" to define their rights. The Founders worried that listing some rights would make it easier for the government to trample others that were not explicitly protected. And they did not have much faith that "parchment barriers" would defend the rights enumerated. As James Madison pointed out, the states repeatedly violated their own bills of rights. They added the Bill of Rights to the Constitution only at the insistence of some of the state ratifying conventions.

History has borne Madison out, Handlin says. The federal government stamped out Mormon polygamy in the 19th century without giving a thought to religious freedom, and neither the Constitution nor the courts saved Japanese Americans from being "hustled off to concentration camps" during World War II.

In Handlin's view, the most disturbing consequence of the modern view of rights is the rise of judge-made law, especially during the past four decades. It has transformed the First Amendment, for example, into an object of idolatry. Before the 20th century, Handlin says, "Americans assumed that the protection served reasonable citizens capable of persuasion by rational argument, not flag burners blowing off steam or artists letting it all hang out." The Founders themselves did not imagine that the rights to free speech and a free press were abso-

lutes. As president, John Adams won enactment of a sedition law, and his successor, Thomas Jefferson, prosecuted a number of cases under it.

A major defect of judge-made law is its impermanence. Abortion-rights advocates, for example, are acutely aware that *Roe v. Wade* (1973) provides a fragile foundation on which to base such rights. The ruling rests on a "right to privacy" that Justice William O. Douglas discovered in the "penumbras" of the Constitution. Americans, of course, vaguely believe in a right to privacy, but the judicial confection we have today may be expanded in controversial directions—or it may be utterly erased overnight. Small wonder, Handlin observes, that 20 years after *Roe*, abortion remains a matter of passionate controversy for millions of Americans. The court's ruling, after all, is only a parchment barrier.

The New Gay Politics

"The Politics of Homosexuality" by Andrew Sullivan, *The New Republic* (May 10, 1993), 1220 19th St. N.W., Washington, D.C. 20036; "Straight Talk About Gays" by E. L. Pattullo, in *Commentary* (Dec. 1992), 165 E. 56th St., New York, N.Y. 10022.

The love that once dared not speak its name now will not shut up—and that fact is changing the way in which "the homosexual question" is being approached politically. So argues Sullivan, the editor of the *New Republic* and an avowed homosexual.

The "conservative" approach, which insists that homosexuality as such does not exist in nature, and which seeks to discourage and "cure" it, is undermined, Sullivan contends, by "the testimony of countless homosexuals" who say they have not chosen their orientation and by indications from scientific research that homosexuality may be, in part at least, genetically determined. Whether the proportion of homosexuals in the populace is 10 percent, as the oft-cited 1948 Kinsey report claimed, or one percent, as a recent study has it, the fact that "a small but persistent part of the population is involuntarily gay" makes the conservative position untenable, Sullivan says.

The "radical" approach, taken by such homo-