

## 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-

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sexual groups as Act-Up and Queer Nation, also insists that homosexuality is not a natural condition; rather, it is a cultural construction (as is heterosexuality). In their "queer" activism, the radicals seek to subvert this oppressive construct by abandoning all shame at being "queer," demanding an end to all restrictions on homosexuality, and attacking the heterosexual monopoly on "normality." But their approach also is being undermined, Sullivan says, by "the gay revolution that has been quietly taking place in America. . . . As the closet slowly collapses, as gay people enter the mainstream . . . the whole notion of a separate and homogeneous 'queer' identity will become harder to defend."

Pattullo, who until his retirement in 1987 was director of Harvard's Center for the Behavioral Sciences, takes (in Sullivan's terminology) a "moderate" approach. He contends that while many people may never have wavered in their sexual orientation, many others have a capacity

to become either "straight" or "gay"—and that the social environment almost certainly plays a part in determining their orientation. Homosexuals should be treated with dignity and respect, Pattullo argues, but "to the extent that society has an interest both in reproducing itself and in strengthening the institution of the family—and to the extent that parents have an interest in reducing the risk that their children will become homosexual—there is warrant for resisting the movement to abolish all societal distinctions between homosexual and heterosexual."

In Sullivan's view, the "moderate" approach is also being undercut by the loud public argument over homosexuality: "For those who privately do not believe that homosexuality is inherently evil or always chosen, it has become increasingly difficult to pretend otherwise in public."

But Sullivan does not embrace the "contemporary liberal" approach, either. This would use government regulation to prevent employers or

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### *Remaking American Politics*

Washington correspondent Michael Kelly explains in the *New York Times Magazine* (May 23, 1993) Hillary Rodham Clinton's call for "a new politics of meaning."

She is 45 now and she knows that the earnest idealisms of a child of the 1960s may strike some people as naive or trite or grandiose. But she holds to them without any apparent sense of irony or inadequacy. She would like people to live in a way that more closely follows the Golden Rule. She would like to do good, on a grand scale, and she would like others to do good as well. . . .

The First Lady's vision is singular, formed by the intellectual passions and experiences of a life. But it is also the most purely voiced expression of the collective spirit of the Clinton administration, a spirit that is notable both for the long reach of its reformist ambitions and the cocky assurance of its faith in the ideas of its own design. It is very much a work in progress, but its emerging shape is,

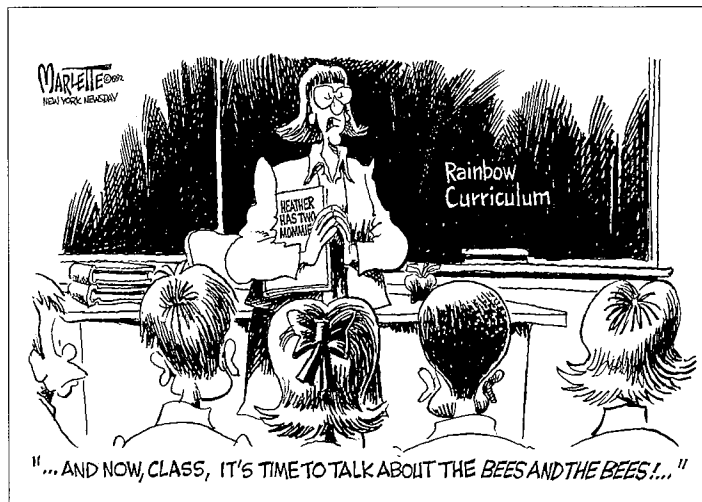
even by the standards of visions, large. . . .

She is, it develops in the course of two long conversations, looking for a way of looking at the world that would marry conservatism and liberalism, and capitalism and statism, that would tie together practically everything: the way we are, the way we were, the faults of man and the word of God, the end of communism and the beginning of the third millennium, crime in the streets and on Wall Street, teen-age mothers and foul-mouthed children and frightening drunks in the parks, the cynicism of the press and the corrupting role of television, the breakdown of civility, and the loss of community.

The point of all this is not abstract or small. What Mrs. Clinton seems—in all apparent sincerity—to have in mind is leading the way to something on the order of a Reformation: the remaking of the American way of politics, government, indeed life. A lot of people, contemplating such a task, might fall prey to self doubts. Mrs. Clinton does not blink.

property owners from discriminating against homosexuals. The trouble with this strategy, Sullivan argues, is that it treats homosexuals as permanent victims, infringes on the liberties of heterosexuals, and only scratches the surface of the problem. "[The] real terror of coming out . . . is related to emotional and interpersonal dignity."

The only viable political stance remaining, Sullivan concludes, is not to try to legislate private "tolerance" of homosexuals but to insist that all public discrimination against them by the state be brought to an end. That means, in his view, ending the ban on homosexuals in the military and allowing people of the same sex to marry. "These two measures . . . represent a politics that . . . makes a clear, public statement



*Going aggressively beyond tolerance, school administrators in New York City promoted an elementary-school curriculum portraying homosexuality as a morally legitimate way of life, until outraged parents objected.*

of equality, while leaving all the inequality of emotion and passion to the private sphere, where they belong."

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## FOREIGN POLICY & DEFENSE

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### Vietnam: Who Served and Who Did Not?

*A Survey of Recent Articles*

**E**ighteen years ago, a young journalist named James Fallows described in the *Washington Monthly* (Oct. 1975) how, as a Harvard student during the Vietnam War, he and others like him had dodged the draft. Fallows starved himself sufficiently so that, although standing more than six feet tall, he weighed only 120 pounds when he and others from Harvard and MIT, most of them chanting, "Ho, Ho, Ho Chi Minh/NLF is gonna win," reported to the Boston Navy Yard for their physicals on a spring day in 1970. When the doctor asked Fallows if he had ever contemplated suicide, he replied, "Oh, suicide—yes, I've been feeling very unstable and unreliable recently."

He was rewarded with an "unqualified" verdict, as were most of his Cambridge friends. "I was overcome by a wave of relief . . . and [a] sense of shame," he wrote. Later in the day, buses began to arrive at the navy yard, bearing "the boys from Chelsea . . . the white proles of Boston. . . . They walked through the examination lines like so many cattle off to slaughter." This same scene was repeated all across the country, Fallows maintained. The "mainly-white, mainly-well-educated children of mainly-comfortable parents" took advantage of "this most brutal form of class discrimination" and allowed "the boys of Chelsea [to] be sent off to die." By doing so, Fallows argued, he and his friends helped pro-