

EIR Feature

What has gone wrong with the Supreme Court?

by Edward Spannaus

In its term which started last October and ended July 3, the U.S. Supreme Court became the third and final branch of the federal government to become discredited in the eyes of the U.S. population. The broad public uproar that accompanied its most prominent decisions—especially those on flag burning and abortion—hasn't been seen for half a century. We hear public calls for impeaching the judges or restricting their appellate jurisdiction; privately, the man on the street is simply ready to string the judges up.

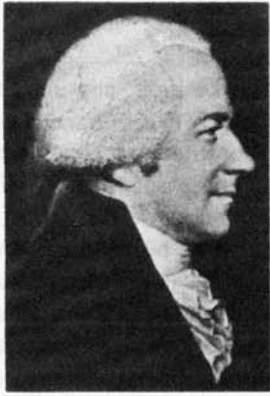
This Supreme Court has accomplished the feat of offending almost every section of the population in the past few weeks—liberals, conservatives, minorities, patriots, etc. The only consistency in the court's rulings is that they are consistently bad from the standpoint of actual constitutional law. The bulk of its major rulings this term portend just the opposite of a "kinder, gentler" nation: Its decisions hasten the advent of judicial brutality and police-state measures—especially its rulings on criminal law and civil rights. Even when the court makes a decision in the right direction, it does so for the wrong reasons. The court's July 3 ruling in the *Webster* abortion case was correctly attacked as dishonest, deceptive, and indecisive in both concurring and dissenting opinions.

Truly, this is a court adrift, cut loose from any moorings. What has gone wrong?

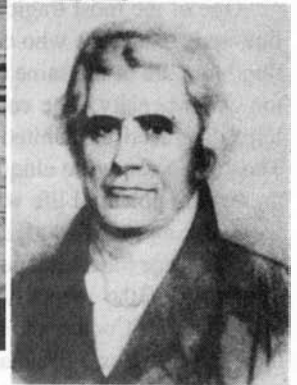
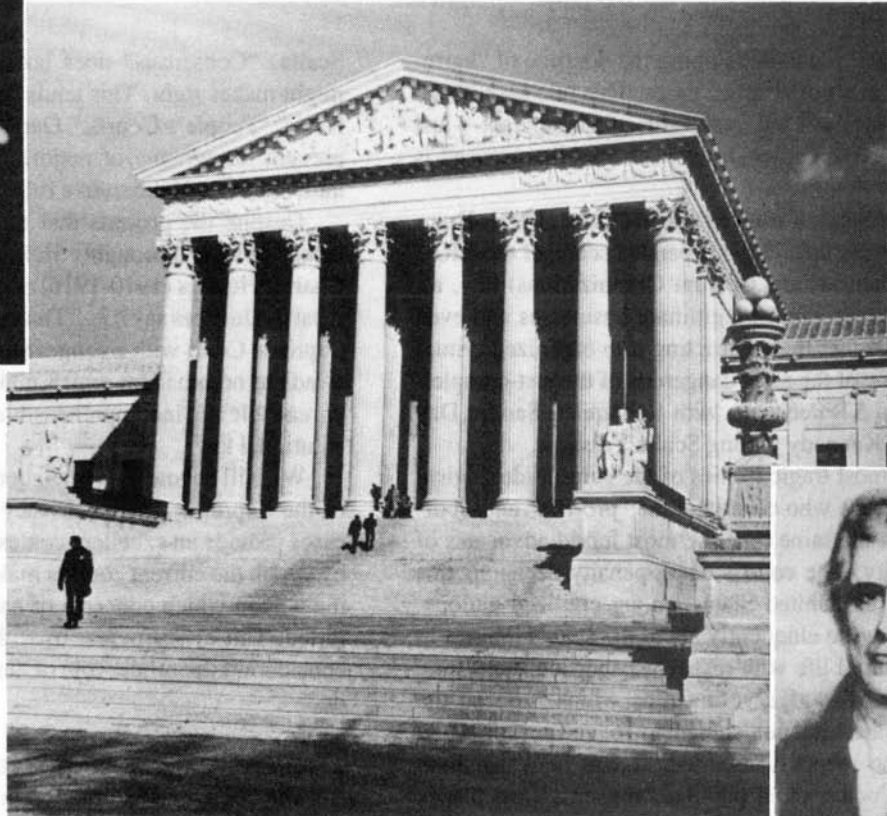
Positivism run amok

The 19th century, after the death of John Marshall, saw the gradual erosion and ultimate abandonment of the conception of natural law which provided the unwritten foundation of our Constitution. The 20th century has seen the triumph of legal positivism, which prepared the way in turn for the pure arbitrariness and caprice which now dominate the Supreme Court's decisions on constitutional issues.

This scandalous phenomenon is characterized by the solidification of ideolog-



The Founding of the United States and the Framers of the Constitution were governed by republican conceptions of natural law, which today have been eroded by logical positivism. The division of today's Supreme Court into "liberal" and "conservative" voting blocs would have been incomprehensible to such as Alexander Hamilton (left) and John Marshall (right).



ical voting blocs on the Supreme Court bench this term. According to the *New York Times*, almost one-quarter of the court's rulings this term were decided on a 5-4 vote; in every single 5-4 decision, William Rehnquist and William Brennan, Jr. were on opposite sides. Anthony Kennedy, the newest appointee, voted with Rehnquist in all but two of the 5-4 cases. The four "liberal" members of the court (Brennan, Thurgood Marshall, Harry Blackmun, and John Paul Stevens) constituted a bloc on 22 of these 31 rulings.

This ideological line-up has become all too predictable. The "conservatives" can be expected to be anti-civil rights, anti-abortion, anti-defendant in criminal cases, and so forth. The "liberals" take the mirror-opposite positions. The most notable exception was the flag-burning case, in which "conservatives" Kennedy and Antonin Scalia joined the "liberal" majority led by Brennan.

The very idea of "liberal" and "conservative" voting blocs is an abomination to constitutional jurisprudence. From the standpoint of the issues and battles which gave rise to the Constitution and to the rise of the "American System" in the first three decades of the 19th century—still today's fundamental constitutional and political issues—these categories are nonsensical: Was John Marshall a liberal? A conservative? His protection of a criminal defendant's rights in the Aaron Burr case, and his promotion of a strong federal government, should endear him to today's liberals—who tend to

regard him as an arch-conservative protector of property and contract rights. Thomas Jefferson was closer to a modern-day liberal with respect to individual rights, yet he was simultaneously a fanatic defender of states' rights against the federal government. Alexander Hamilton would certainly be characterized as a conservative for his promotion of manufactures, and his protection of creditors and property rights; yet he was claimed as a spiritual forefather of the Progressives and Roosevelt Democrats, for his dedication to a strong and energetic national government.

The nonsensical nature of the idea of "conservative" and "liberal" blocs on the court can also be illustrated by some current examples.

Chief Justice Rehnquist, for example, is nearly beatified as the embodiment of the "Reagan Revolution" against big government and overarching federal power. Yet in matters of the criminal justice system, Rehnquist is a proponent of very big government indeed. Under the scheme of the Constitution, the federal government was intended to have extremely limited law enforcement powers—and indeed this was the case until the early 20th century. Rehnquist has ruled consistently to increase the role of federal prosecutors and to approve their more and more intrusive practices. Rehnquist has, for example, done as much as anyone in recent decades to tear up the Fourth Amendment, and to eliminate its protection of citizens from unlawful search and seizure. He has

played the central role in developing the doctrine of “harmless error” in appeals of criminal cases. This rule says it’s all right to violate the constitutional rights of a defendant—just as long as the judge knows in his heart that the accused is guilty anyway.

On the other hand, it was the “liberal” bloc, led by Brennan, which recently upheld the expanded scope of the RICO (Racketeer Influenced and Corrupt Organizations) law, allowing it to be used against legitimate businesses and even protest groups, rather than restricting it to organized crime. This ruling—one of the most dangerous of the just-completed term—was a 5-4 decision, with Rehnquist, Sandra Day O’Connor, and Kennedy joining Scalia’s dissent.

One of the most tragic ironies of the current ideological line-up is that those who constitute the “pro-life” anti-abortion bloc, are at the same time the most fervid advocates of the death penalty. The court’s death penalty decisions this term disgraced the United States among civilized nations. Those who can write eloquently about the state’s interest in preserving potential life with respect to abortion, constitute the same exact five-judge voting bloc which lowered the minimum age for capital punishment to 16, and permitted the execution of the mentally retarded. It was here that both Scalia and O’Connor cited popular “consensus” to justify their rulings. Here, Brennan correctly attacked the “consensus” approach, arguing that “Justice Scalia’s approach would largely return the task of defining the contours of the Eighth Amendment’s protections to political majorities.”

The triumph of the legal positivism and the philosophical radical nominalism which dominates the Supreme Court today, first required the eradication of natural law from our national jurisprudence. This happened, first, through the emasculation and gutting of natural law into a social-darwinist, Lockean version, a far cry from the neo-platonic tradition of Hugo Grotius, Gottfried Leibniz, and Samuel Pufendorf which was the basis of the dominant outlook of the Founding Fathers and Framers of the Constitution. In this tradition, the promotion of scientific and technological progress was the means of accomplishing the true ends of a republic: the fostering of virtue and morality in its citizens. In the Constitutional Convention, one finds expressed the view that the perfection of the human mind, not the protection of property, is the purpose of the republic.

By the late 19th century, the Framers’ view was replaced by an Adam Smith “free market” version of “natural law” and “natural rights.” This then opened the door for Oliver Wendell Holmes, Jr. and his legal positivist “force doctrine.” Holmes viciously attacked the notion of natural law, or of any higher law existing independent of custom and experience. Law for Holmes is simply the will of the stronger; morality has no place in his legal universe.

(The most dangerous variant of the “force doctrine” is the “consensus” policy being aggressively promoted by Justice

Scalia. “Consensus” does not make right, any more than might makes right. This tends quickly in the direction of the Nazis’ “People’s Courts.” Our Constitution was designed to prevent the tyranny of majority consensus, in favor of the undemocratic, deliberative rule of reason.)

Despite the protests that might be heard, the Supreme Court today is thoroughly Holmesian. Former Chief Justice Charles Hughes (1910-1916) once said, “The Constitution is what the Justices say it is.” That outlook characterizes today’s Supreme Court with a vengeance. The court is dominated by a radical nominalism which makes most of its rulings both unreadable and incomprehensible from the standpoint of constitutional law.

We will devote the remainder of this article to an analysis of the Supreme Court’s privacy and abortion cases. These cases provide an excellent context for examining the method by which the current court is making its decisions, as well as the way in which concepts of natural law have become distorted. This also provides us with an appropriate context for considering the proper role of “individual rights” in a republic.

The *Roe v. Wade* precedent

The court’s 1973 decision in *Roe v. Wade*, the decision that legalized abortion, was characterized as “an exercise of raw judicial power” by Justice Byron R. White in his dissent at the time.

The 7-2 majority declared that a woman’s right to have an abortion was a fundamental constitutional right, rooted in the right of personal privacy. This right to personal privacy was not held to be a right directly found in the Constitution, but one rooted in the Fourteenth Amendment’s concept of personal liberty.

The scope of the “liberty” rights guaranteed by the Fourteenth Amendment’s guarantee, that no person shall be deprived of “life, liberty or property without due process of law,” has been the subject of much historic controversy. The standard generally adopted by the modern court is that the Fourteenth Amendment only protects those rights regarded as “fundamental,” or “implicit in the concept of an ordered liberty.”

The most extreme formulation of the “personal privacy right” idea was that of Justice William O. Douglas, who found the privacy rights protected by the Fourteenth Amendment to include “autonomous control over the development and expression of one’s intellect, interests, tastes, and personality.”

White, in a strongly worded dissent, said the court’s fashioning of a new constitutional right for pregnant women amounted to an “improvident and extravagant exercise of the power of judicial review. . . .” He characterized the majority ruling as saying a woman is entitled to an abortion at her demand, for no reason at all, and as saying that the Consti-

DoJ moves will silence the free labor movement

The U.S. Department of Justice has announced its intention to take over the International Longshoremen's Association, now facing a criminal action under the federal racketeering (RICO) statutes. With these steps, the nation is entering the "brave new world" of state-controlled labor unions, supervised by the federal police agencies in a manner no different from the way the KGB runs unions in the Soviet Union. Further, the successful use of the conspiracy provisions of RICO has now placed the right to organize into the same legal status that prevailed at the dawn of the modern labor movement.

Following a RICO prosecution of the leadership of the International Brotherhood of Teamsters, the DoJ forced an out-of-court settlement allowing it to appoint a board of trustees on June 1, 1989 to replace the elected union leadership. Key to the Justice Department's success in securing the unprecedented agreement, was the use of the RICO conspiracy provisions, which let prosecutors amalgamate a wide variety of charges and allegations against different individual members of the executive, into a single mass trial.

The Department has now announced that the International Longshoremen's Association will face the RICO axe this fall. In a repeat performance of former U.S. Attorney Rudolph Giuliani's witchhunt against the Teamsters, the government will ask for a court-appointed trustee to run the 90,000-member union, and will allege that certain ILA leaders are under the "influence of organized crime." The ILA is the second of four unions named in the 1985 report of the President's Commission on Organized Crime.

The Justice Department must get the case into court before the 10-year statute of limitations runs out on the prior racketeering conviction of ILA leader Anthony Scotto. RICO is activated once two such cases exist, and the recent, timely conviction of Donald Carson, a high union official, on extortion charges, will now brand the operations of the union's executive as a "criminal enterprise."

The ILA has incurred the wrath of some Washington, D.C. circles, for having refused to load grain on Soviet ships after the invasion of Afghanistan.

In the civil RICO suit filed by Eastern Airlines against the Airline Pilots Association in the U.S. District Court for the Southern District of Florida, a legal strike is declared a form of racketeering activity, a prima facie challenge to the basis of a democratic trade union movement. If Eastern chairman Frank Lorenzo, the notorious takeover specialist, succeeds in this venture, the courts will become a slaughterhouse for unionists.

tution "values the convenience, whim or caprice of the putative mother more than the life or potential life of the fetus." On the contrary, White argued, there is no constitutional authority for valuing "the convenience of the pregnant woman more than the continued existence and development of the life or potential life she carries."

Warren E. Burger, then Chief Justice, was part of the 1973 *Roe* majority and stuck with it until 1986. Burger continued to deny that *Roe* had created a right to abortion on demand, but later said that the court's post-*Roe* decisions had in fact done just that. By 1986, Burger conceded that the fears of the initial *Roe* dissenters had been realized.

Roe v. Wade not only created a right to abortion on demand, but it also became the basis for a hideous series of "right to die" court rulings—all based on the alleged constitutional right of privacy articulated in *Roe*.

The next most significant abortion ruling after *Roe* came in the 1976 case, *Planned Parenthood of Central Missouri v. Danforth*, in which the court ruled 7-2 that the state of Missouri could not require a husband's consent as a condition for an abortion. In White's dissent, he complained: "It is truly

surprising that the majority finds in the U.S. Constitution . . . a rule that must assign a greater value to a mother's decision to cut off a potential human life by abortion than a father's decision to let it mature into a live child."

The debate over the relationship between law and morality was confronted in a 1977 case involving birth control measures (*Carey v. Population Services*). Based on its *Roe v. Wade* right-to-privacy holding, the Supreme Court invalidated a New York State law restricting the sale of contraceptives, and prohibiting altogether their sale to minors under age 16. The state had argued that a ban on the sale of contraceptives to minors had an important symbolic effect, showing the state's disapproval of sexual activity by minors.

Justice Stevens, in a concurring opinion, called the state's concerns "irrational and perverse."

As in *Roe*, White and Rehnquist were the only two dissenters. White argued that it is frivolous to argue that a minor has a constitutional right to contraceptives, over the objections of parents and the state. Rehnquist attacked the majority for holding that the state "may not use its police power to legislate in the interest of public morality . . . a power so

fundamental to self-government.”

The first break in the *Roe* pattern came in another 1977 ruling, which held that the equal protection clause did not require a state to pay for abortions. Overturned was a district court ruling which had said that abortion and childbirth were just two different ways to deal with pregnancy. The lower court ruling had also said that a state could not use a moral judgment to justify its policy. The majority of the Supreme Court said that *Roe* did not declare an unqualified constitutional right to an abortion; the three dissenters—including *Roe* author Blackmun—called this the “first crack in *Roe*.”

Nine years then elapsed before there occurred any significant further change in the *Roe* line of cases. The Supreme Court generally continued to invalidate state restrictions on abortions. Meanwhile Sandra Day O’Connor joined the court, and also joined the dissenting minority in those cases reaffirming *Roe*.

Two rulings in 1986 presaged the move to reverse *Roe*. First, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Supreme Court by a narrow 5-4 vote, invalidated Pennsylvania state laws attempting to regulate abortion, including requirements that abortion be explained to the pregnant woman, alternatives presented, and so forth. Blackmun, writing for the five-justice majority, denounced the Pennsylvania laws as measures designed to intimidate women and prevent them from exercising their freedom of choice. White, joined by Rehnquist, said in his dissent that the court was carrying forward the “difficult and continuing venture in substantive due process” that began with *Roe v. Wade*, by defining as “fundamental,” liberties that are nowhere found in the Constitution. The court is simply imposing its own values, charged White.

Burger, for the first time, joined the dissenters. Burger contended that *Roe* did not create abortion on demand, that *Roe* had recognized that the state had an interest in “protecting the potentiality of human life.” But with the *Thornburgh* decision, wrote Burger, the court was abandoning that standard, and *Roe v. Wade* should now be examined.

About two weeks later, the court issued another ruling which had major implications for the entire range of “personal privacy” rights. This ruling (*Bowers v. Hardwick*), which had the editorial writers of the *Washington Post* and *New York Times* screaming, was a 5-4 decision holding that there is no constitutional right to homosexual sodomy.

In this ruling, Powell joined the four-justice anti-*Roe* bloc. The majority opinion drew a line between rights associated with marriage, the family, and procreation on the one hand, and homosexual activity on the other. Drawing its own temporary line on the extent of “substantive due process,” the majority said that the claimed “right” to engage in homosexual sodomy cannot be said to be “deeply rooted in the Nation’s history and tradition,” or “implied in the concept of ordered liberty”—the current test of those rights and liberties deemed to be protected by the due process clause.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is 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 design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930s, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Significantly, the 5-4 majority rejected the liberals’ assertion that notions of morality provide an inadequate rationale for law: “The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the due process clause, the courts will be very busy indeed.”

The liberals accused the majority of an “almost obsessive focus on homosexuality,” and contended that the case was not about homosexuality, but about personal privacy. They articulated a radical libertarian philosophy of law, which but for its context of homosexual sodomy, is as acceptable to a “conservative” of the William F. Buckley stripe as a liberal hedonist. It is here that right truly meets left—showing the absurdity of a political spectrum based on the seating arrangement in the National Assembly of revolutionary France.

What the liberals were saying, was something like: “Come on, folks; if you’d stop obsessing about homosexuality, you’d see that what we are saying about individual rights should be totally acceptable to you.” For, whereas the majority had drawn a distinction between privacy rights related to the protection of the family, and “rights” related to homosexual activity, the libertarian minority—led by Blackmun—said that the majority misapprehended why privacy rights related to the family are protected:

We protect these rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life. “The concept of privacy embodies ‘moral fact that a person belongs to himself and not to others nor to society as a whole.’ ” . . . And so we protect the decision whether to marry precisely because marriage “is an association that pro-

motes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply.

As the liberal columnists perceived, *Bowers v. Hardwick*'s implications were far-reaching. It was, for example, cited by both sides in the recent successful petition seeking to have the court review a Missouri anti-euthanasia ruling.

In the euthanasia case, the Missouri Supreme Court had denied the right of the parents of Nancy Cruzan, a 31-year-old brain-damaged patient, to withdraw food and water from her, which would inevitably cause death by starvation and dehydration. A lower-level Missouri state court had ruled that Cruzan's family could starve her to death, basing its ruling on the assertion that "there is a fundamental natural right expressed in our Constitution as the 'right to liberty' which permits an individual to refuse or direct the withholding or withdrawal of artificial death-prolonging procedures when the person has no more cognitive brain function."

In its November 1988 ruling, the Missouri Supreme Court denounced what it called the "judicial approval of suicide" that has taken hold of many state courts. They noted that some courts "find the quality of life a convenient focus when justifying a termination of treatment. But the state's interest is not quality of life. . . ." Rejecting the Nazi notion of a "life not worth living," which notion has become endemic in the United States and much of Western Europe today, the Missouri court said: "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives. . . the state's interest is in life; that interest is unqualified."

In the Cruzan case, as in all right-to-die cases based on alleged federal privacy rights, *Roe v. Wade* is prominently cited as legal precedent for the notion of a constitutional right to privacy which includes the right to refuse medical treatment (or, more accurately, the right of someone else to refuse medical treatment for a patient who is too sick to resist the decision). The Missouri trial-level court, which would have permitted the withdrawal of food and water, based its ruling on a supposed "federal constitutional right . . . to die with dignity."

In another case, a federal court, deciding a life-support-removal case, explained that *Roe v. Wade* had enunciated "the paramount right to control the disposition to be made of his or her body."

In the petition for review of the Cruzan case, the right-to-die lobby asserted that the right to die is included in the constitutional right of privacy as defined in *Griswold v. Connecticut*, *Roe v. Wade*, and subsequent cases.

The petition for *certiorari* (review) of the Cruzan case was granted by the Supreme Court at the end of June, meaning the case will be heard in the October 1989 term. It only takes four justices to grant a petition for *certiorari*, so no definite conclusion as to the ultimate disposition of the case can be inferred.

The Webster case

When the Supreme Court finally got around to reconsidering *Roe v. Wade* this term, expectations on all sides reached a fever pitch. But the court's opinion, delayed until a few days after the normal June 30 end of the term, only added to the existing confusion. Rather than speaking with a clear voice, the court's opinion, written by Rehnquist, ducked the major constitutional issues. Its reasoning was called "perverse" by Scalia (who concurred), and "deceptive" by Blackmun (who dissented), with the latter saying that the majority hopes to precipitate a "constitutional crisis."

As is often the case in these matters, the dissenting opinions provide a better guide to what the court is doing than does the self-serving written opinion of the majority (or, in this case, the plurality, since only White and Kennedy joined Rehnquist's opinion in the key section).

Blackmun, joined by Brennan and Marshall, accused the majority of going about its work in "a deceptive fashion," and said that he could not recall a judgment of the court "that so foments disregard for the law and our standing decisions." The opinion "is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly," Blackmun charged. His most telling—and accurate—assessment of the opinion is as follows:

The plurality opinion is far more remarkable for the argument that it does not advance than for those that it does. The plurality does not even mention, much less join, the true jurisprudential debate underlying this case: whether the Constitution includes an "unenumerated" general right to privacy as recognized in many of our decisions, most notably *Griswold v. Connecticut*, and *Roe*, and, more specifically, whether and to what extent such a right to privacy extends to matters of childbearing and family life, including abortion. . . . These are questions of unsurpassed significance in this Court's interpretation of the Constitution, and mark the battleground upon which this case was fought, by the parties, by the Solicitor General as *amicus* on behalf of petitioners, and by an unprecedented number of *amici*. On these grounds, abandoned by the plurality, the Court should decide this case.

Interestingly, Scalia appeared to agree with Blackmun's analysis of what the plurality were doing. With respect to the key portion of the opinion, in which Rehnquist said that the *Roe* trimester framework is "unsound and unworkable,"

Pentagon hit by judiciary, Congress, and ecologists

Since the June 1988 "Operation Ill Wind" raids by the FBI on the Pentagon and military-industrial corporations, and the indictments arising therefrom, those U. S. military capabilities that had managed to escape the knife of the budget-cutters and the arms control negotiators, have come under increasing attack by judicial and legislative rulings as well as from environmental regulatory agencies. In the latest example, the U.S. Congress is preparing to enact an amendment to the 1976 Resource Conservation and Recovery Act, which will cause more harassment to U.S. military commanders than a battalion of KGB psywar specialists.

The amendment in question, HR 1056, passed the House Energy and Commerce Committee 38-5, and will give state governments and the Environmental Protection Agency (EPA) the same right to sue or issue administrative orders to federal facilities guilty of "hazardous waste violations," that they now have when dealing with munic-

ipal governments and private companies.

Environmentalists have declared war on domestic military bases, which the EPA calls the largest single source of "toxic pollution" in the country.

HR 1056 will pit the EPA and state governments against the Department of Defense, in litigation that will arise over allegations that Pentagon facilities are out of compliance with locally determined, arbitrary, and variable environmental standards.

The officer in command of a military base is commissioned by the Congress (not the local government or the EPA), and the budget for his base and his mission is determined by the Congress as well. If he diverts his limited funds to purposes other than his assigned mission, he will fail to perform his duty as an officer. However, if his facility is out of compliance with standards set by local environmental agencies, he must divert funds from his assigned mission to bring the facility into compliance, or he will face felony charges under the new law. It is widely reported that military officers facing this quandary are taking steps to shelter personal property and purchase liability insurance, in anticipation of hostile litigation against them.

Scalia said in his concurring opinion that he agreed with Blackmun that this would effectively overrule *Roe v. Wade*, and argued it should be overruled explicitly.¹

Rehnquist's evasive opinion did indeed manage to go through 23 printed pages of detailed, technical analysis of the Missouri statute under review, without ever addressing the actual constitutional issues involved. He only mentions the broader question of "privacy rights" and "liberty interests" when he is responding defensively to Blackmun's accusations that the court's opinion "invites charges of cowardice and illegitimacy." Scalia said that declaring *Roe's* trimester framework "unsound and unworkable," without overruling *Roe* itself, simply "preserves the chaos that presently surrounds the issue of abortion."

The most perceptive comment was made by the liberal dissenters (although the shoe is just as often on the other foot as well):

[T]he plurality asserts that the trimester framework cannot stand because the State's interest in potential life is compelling throughout pregnancy, not merely after viability. The opinion contains not one word of rationale for its view of the State's interest. This "it-is-so-because-we-say-so" jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place.

Perhaps inadvertently, and certainly not self-conscious-

ly, Blackmun here has put his finger on the radical nominalism and positivist methodology which dominates the Supreme Court today.

'Liberties' in a republic

The crux of the matter in *Roe v. Wade* is the issue of "substantive due process," or what rights are guaranteed to the individual by the Constitution, even though not enumerated in the Constitution or Bill of Rights. The idea is that the Fourteenth Amendment's guarantee that no person shall be deprived of life, liberty, or property without due process of law, applies to substantive rights, not just procedural formalities. But the vexing question then is, how do courts determine just what are these rights and liberties which are to be protected?

The irony of this whole matter is that the notion of substantive due process, used in recent years by the courts to invalidate state laws pertaining to abortion and other areas of "personal privacy," is the same theory that was used at the turn of the century to strike down state wage and hours legislation, and other laws regulating economic relations and the conditions of workers. "Substantive due process" has also been used as the basis for expanding—and in recent years restricting—the recognized Constitutional rights of defendants in criminal proceedings.

In the late 19th and early 20th centuries, "substantive due process" was used to promote a theory of individual econom-

By granting administrative agencies and the states the power to impose criminal penalties on the Pentagon or its officers, Congress has elevated these agencies to a higher authority than the Congress itself.

Impact on nuclear weapons facilities

This amendment will impose chaos on both the Department of Energy and the Department of Defense. Clever footwork by Energy Secretary Adm. James Watkins has allowed him to get out ahead of HR 1056; but nonetheless, nuclear weapons production facilities are high on the target lists of the environmentalists, and no matter what the DoE budgets for cleanup of antiquated facilities, it will not be enough to satisfy activists who now have more authority than the Secretary himself over some parts of the Energy Department's budget, and who intend to use it to cripple the national defense.

The money involved in the efforts to meet the standards enacted by the state and local authorities is awesome. Conservative estimates are that it will cost the Pentagon \$20 billion to clean up sites already targetted by EPA. This is roughly the same amount as is budgeted for the Strategic Defense Initiative.

ic "liberty" and property rights à la Adam Smith; today it is used to promote a conception of individual hedonist liberty. Both are variants of classic British liberalism; both are at variance with the philosophy of our Constitution. As we shall see, the idea of substantive due process is not wrong in itself; but it goes radically astray when cut loose from the natural law moorings of our Constitution.

One of the famous examples in which the Supreme Court applied the "natural justice" argument, was the 1905 *Lochner v. New York* case. In striking down a New York law limiting the hours that bakers could work, to 60 per week, the U.S. Supreme Court declared that the right to freely purchase and sell labor was part of the liberty protected by the Fourteenth Amendment.

Earlier, in 1897 the Supreme Court had applied a Lockean-Adam Smith bastardization of "natural law," to uphold property rights in two important cases which held that the Fourteenth Amendment protected substantive liberties. In one of these cases, involving the condemnation of property for a railroad company, the court said that depriving an owner of property without just compensation deprives the owner of the right to property "founded in natural equity."

In the other of these two cases, *Allgeyer v. Louisiana*, the Supreme Court for the first time invalidated state economic legislation on substantive due process grounds. The court said that the "liberty" of the Fourteenth Amendment is not just the right to be free from physical restraint, but includes:

the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to carrying out to a successful conclusion the purposes above-mentioned.

The *Allgeyer* ruling referred to an earlier dissent in the 1873 *Slaughterhouse* cases, harking back to the "inalienable rights of freemen which our ancestors brought with them to this country," and declaring that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence."

So far, so good. Would that these "natural law" conceptions had been applied in pursuance of a Hamiltonian dirigist economic system, and in favor of what was known in the first decades of the 19th century as "the American System" of political economy—this, in explicit opposition to the British system.

But instead, contract and property rights were defined so as to prevent the states from enacting regulatory legislation which might promote economic progress and the "harmony of labor and capital." What should be the appropriate role of government in promoting industrial and technological development, can be gleaned from Alexander Hamilton's reports on manufacturing, credit, and national banking, written during the first Washington administration; Hamilton and Washington's policies were in express opposition to the Adam Smith free enterprise practices which later became largely hegemonic in the United States.

Thus, under the guise of protecting "liberty," all manner of state and federal laws concerning wages and hours, working conditions, unions, etc. were struck down, as, of course, was much of Franklin Roosevelt's economic legislation in the first phase of the New Deal.

But there also exists a healthier side to the substantive due process notion. Two cases from the 1920s which still remain standing, and which have been used to provide underpinning for the modern line of "privacy" cases, reflect the actual constitutional tradition. Both cases, *Meyer v. Nebraska*, and *Pierce v. Society of Sisters*, dealt with education and with the right of parents to send their children to church-sponsored schools. The *Meyer* case invalidated a state law which forbade the teaching of foreign languages in schools; it involved a 10-year-old child who was being taught German in a Lutheran school. In this ruling, the Supreme Court defined the liberty guarantees of the Fourteenth Amendment as the liberty to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to worship God according to one's beliefs. Remarkably, the court cited the Northwest Ordinance of 1787: "Religion, morality and knowledge being necessary to good

government and the happiness of mankind, schools and means of education shall be forever encouraged.”

The Northwest Ordinance would probably be declared unconstitutional by today’s Supreme Court (which has barred Christmas displays which serve “only” a religious purpose). But as a document contemporaneous to the Constitution itself, the Northwest Ordinance provides a powerful guide to the proper context in which to consider the “unenumerated” rights of citizens of our republic. The rights to freedom of religion, the acquisition of useful knowledge, the pursuit of an occupation, serve the great purposes of the republic, especially the achievement of “the happiness of mankind.” The concept of “happiness” as used by the Founding Fathers did not mean hedonistic individual gratification. It referred to a citizenry embodying reason and virtue; this “happiness” was counterposed to the social and political misery existing under the colonial system and under the heel of oligarchic tyranny.

Bearing this in mind, let us now look at the modern constitutional debate over individual liberties and privacy rights.

The landmark “privacy” case is *Griswold v. Connecticut* (1963), in which the Supreme Court held, in the context of striking down a law prohibiting sale of contraceptives to all, including married adults, that there exists an area of personal privacy into which the state should not intrude.

The *Griswold* majority opinion was written by William O. Douglas, who elaborated the idea of a general constitutional right of privacy which, he said, is older and broader than the Bill of Rights. Douglas, however, presented a rationale which veered away from the traditional reasons for protecting the family. He explicitly contended that this protection was not because of any social purpose; he asserted that marriage is protected because “marriage is an association that promotes a way of life, not causes . . . political faiths, commercial or social projects.”

Dissenter Hugo L. Black took the opportunity to attack any idea of “natural law,” which he mischaracterized as judges believing they could strike down any law simply because they deemed it capricious, unreasonable, or oppressive. Black’s dissent in *Griswold* shows how a false conception of natural law (as practiced in the late 19th century) provided the pretext for a Holmesian, positivist assault on the very idea of natural justice and natural law. Black wrote:

I cannot rely on the due process clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. . . . The due process clause [was] used to strike down economic legislation in the early days of this century. . . . That formulation, based on subjective considerations of “natural justice,” is no less dangerous when used to enforce this Court’s view about personal rights than those about economic rights. I

had thought we had laid that formula, as a means of striking down state legislation, to rest for once and for all. . . .

Hugo Black notwithstanding, the Supreme Court continued to conduct what Justice White called “a difficult and continuing venture in substantive due process.” In *Roe v. Wade*, Douglas’s concurring opinion expanded privacy rights to include such things as “autonomous control” over the expression of one’s interests and tastes. In subsequent years, the Supreme Court and the lower courts have gone further and further afield, sanctioning, for example, abortion on demand, or utilizing “contemporary community standards” to define the outer limits of pornography and sexual conduct.

Blackmun’s dissent in the 1986 sodomy case presaged his recent dissent in the *Webster* case: Both adopted a radical individualist, hedonistic perspective. Blackmun argued that the Constitution does *not* protect personal privacy because it contributes to the general public welfare: “A person belongs to himself and not to others, nor to society as a whole,” he repeated.

The danger of reaction

The tentative and pragmatic steps taken by the Supreme Court’s new “conservative” majority unfortunately seem to represent little more than a political reaction to the excesses of the court’s liberal bloc; they show little comprehension of a positive outlook on the Constitution from which a proper foundation for defining the protection of individual rights could be derived. Without an understanding of the actual natural law conception which guided the Framers of the Constitution, it is impossible to understand that instrument’s purpose and intent. The ideas of Grotius, Leibniz, and Pufendorf—popularized in the United States by Emmerich de Vattel, among others—provide the essential groundwork without which the Constitution absolutely cannot be understood or interpreted.

From this standpoint, it is clear that individual rights and liberties—both “personal” rights and civil rights, “personal” liberties and political liberties—are protected insofar as they foster and promote the great objects of the Republic as summarized in the Constitution’s Preamble. That is why, for example, the First Amendment places a premium on the protection of *political* speech; the contemporary idea that pornography or satanic practices are subject to the same protections, is a travesty. That licentiousness, which degrades and demoralizes the individual, is not what our Constitution was intended to protect.

The freedom we are given by our Constitution is the freedom to develop our moral and intellectual powers in order to contribute to the betterment of mankind, the freedom to develop and use our skills and talents to contribute to the improvement of society as a whole, so that we may “secure the blessings of liberty to ourselves and our posterity.” Our Constitution explicitly recognizes the dignity of the individ-

RICO statutes make political protest a crime

The federal court certification of the use of civil racketeering (RICO) statutes in the persecution of the Operation Rescue anti-abortion group, is designed to strip constitutional protection from political protests, which can now be categorized as a form of violent, organized crime, subject to aggressive and even brutal actions by police authorities.

This is underscored by actions of the U.S. Civil Rights Commission, which voted 5-3 on Aug. 1 to reject the proposal of its chairman, William Allen, to conduct its own investigation of police brutality against Operation Rescue demonstrators in Pittsburgh, Pennsylvania.

The charges result from complaints filed by protesters who were subjected to unspeakable treatment at the hands of Pittsburgh police during a March 11 sit-in conducted at an abortion clinic. According to eyewitnesses, protesters who refused to move from the entrance of the clinic were subjected to excruciating "pain/compliance" techniques administered by police who had removed their badges and name tags. Protesters—male and female—were abused physically and sexually at the detention facility.

The charges against the Pittsburgh police seemed fantastic to many, but the story was repeated in Los Angeles in April, and this time, the calculated and egregious brutality was captured on videotape. Police Chief Daryl Gates defended the conduct of his officers to the press, and it was reported that the City Council directly ordered and even supervised the brutal tactics.

Within days, similar events occurred in San Diego, California.

In West Hartford, Connecticut, a June 17 protest became the bloodiest confrontation yet. A 70-year-old grandmother, observing but not participating in the protest, was knocked down, cuffed, dragged away, and eventually hospitalized by frenzied police. A 70-year-old retired bishop, George Lynch, was treated similarly. Reporters and photographers attempting to film the brutality were arrested, held for as long as 12 hours incommunica-

do, and had their cameras and film destroyed.

Police Chief Robert McCue, accompanied by the Catholic chaplain of the department, ordered his men to "make an example" of Fr. Norman Weslin, a former Marine paratrooper who was participating in the protest. Eyewitnesses report that the priest's face, "purple-red, covered with cuts," was unrecognizable after the beating he received. Father Weslin, a missionary of the Rome-based Oblates of Wisdom, was arrested at an Atlanta "rescue" last year, and while saying a mass for his fellow prisoners, was forced to stop and placed in solitary confinement. A Catholic newsletter reports that the Hartford police, "led, we're told, by Sturmfuerher McCue himself—used Weslin as a human 'training dummy' for teaching the boys inhuman 'pain/compliance' holds. He got solitary again."

Commission was 'pressured'

Despite this litany of horrors, the Human Rights Commission determined that its charter prevented it from addressing the issue of "abortion." Chairman Allen, who brought the case to the commission, argued that it was not an issue of abortion, but of civil rights of protesters.

Allen had revealed to the press on July 28, that the commission had been pressured by congressman Don Edwards of California, prior to its vote. The congressman, a former FBI agent who has carefully cultivated an image as an opponent of FBI abuses, claimed that the commission would lose "credibility" on the eve of a vote to renew its federal funding, if it investigated Allen's claims.

Allen issued a stinging rebuke to Edwards: "It is no less fair to observe that only ill-breeding addresses to a gentleman the language of chastisement—as though he were a slave. . . . Finally, it is idle to seek to intimidate those of us who sacrifice time and livelihood to serve the people of this country. Such threats are aimed at ordinary American citizens themselves. It is they, and not we, who yet need a Commission on Civil Rights courageous enough to shine a spotlight on abuses."

Will Allen's words begin the epitaph of political freedom in the United States? If the RICO statutes are allowed to criminalize political protest movements, and if the judicial railroad of political organizers led by Lyndon LaRouche is allowed to stand, there is little doubt that they will indeed.

ual, and implicitly recognizes the potential for the increasing perfection of the individual in the image of God. It is intended to provide for its citizens that social and political framework in which this potential can best be realized.

That is the standard which would be applied if we had judges who knew their business. Without it, we are faced with a Supreme Court bending, like straws in the wind, to political and ideological pressure. Under conditions of social

and economic collapse, this court is becoming a leading instrument for the loss of our fundamental liberties and the rise of totalitarian rule in the United States.

Note

1. The *Roe* trimester framework set different standards for abortions in different trimesters of pregnancy: no restrictions for the first trimester; allowable to protect the mother's health for the second; and strict regulation, or prohibition, for the third.