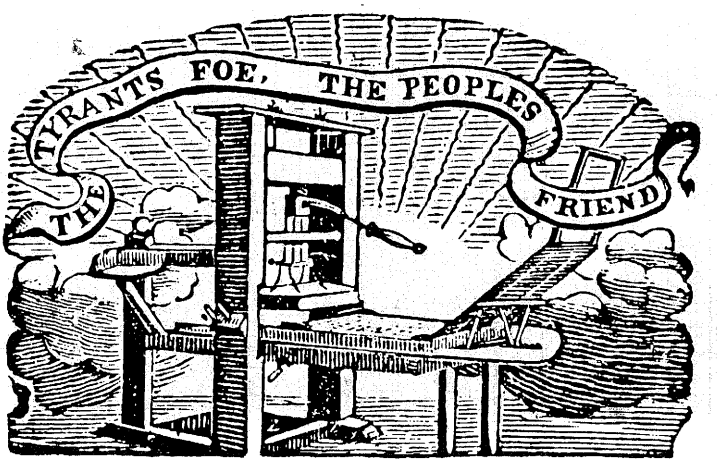
The Bill of Rights

Government Proscribed



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Contents

UNITED STATES CAPITOL HISTORICAL SOCIETY
Clarence J. Brown, President

PERSPECTIVES ON THE AMERICAN REVOLUTION
Ronald Hoffman and Peter J. Albert, Editors

Diplomacy and Revolution: The Franco-American Alliance of 1778

Sovereign States in an Age of Uncertainty

Slavery and Freedom in the Age of the American Revolution

Arms and Independence: The Military Character of the American Revolution

An Uncivil War: The Southern Backcountry during the American Revolution

Peace and the Peacemakers: The Treaty of 1783

The Economy of Early America: The Revolutionary Period, 1763–1790

Women in the Age of the American Revolution

To Form a More Perfect Union: The Critical Ideas of the Constitution

Religion in a Revolutionary Age

Of Consuming Interests: The Style of Life in the Eighteenth Century

The Transforming Hand of Revolution: Reconsidering the American Revolution as a Social Movement

Launching the "Extended Republic": The Federalist Era

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FORREST McDONALD

The Bill of Rights

Unnecessary and Pernicious

AMIDST THE MANY paeans of praise for the Framers of the Constitution that were uttered during the bicentennial season, one scarcely heard a word to the effect that the Framers flatly rejected proposals to include a Bill of Rights as part of our organic law. Most Americans today, were they so informed, would be either disbelieving or totally confused, for most think in a vague sort of way that the Bill of Rights *is* the Constitution, even as they think that the First Amendment guarantees are the Bill of Rights and that among those rights are life, liberty, and the pursuit of happiness. Historians of the subject know better, but even they—or at least the vast majority of them—seem to believe that the Framers were wrong, and that the adoption of the Bill of Rights has secured American liberties far more firmly than our constitutional order could otherwise have done.

Yet the fact remains that the thirty-nine men who signed the Constitution thought that popular rights were adequately protected by the original document. Most of them believed, as well, that adding a bill of rights could produce little or nothing in the way of further protection and might well be pernicious in its consequences. Inasmuch as their ranks included such towering figures as George Washington, James Madison, Alexander Hamilton, Roger Sherman, John Dickinson, James Wilson, Gouverneur Morris, and John Rutledge—wise men all, most of whom had risked their lives, their fortunes, and their sacred honor in the cause of American liberty—it behooves us to examine their position more closely and to survey the course of American history to determine whether their judgment proved to be sound or unsound.

The heretical position that I shall take in the pages that follow is that they were far more nearly right than wrong.

Bills of rights were a hallowed part of the legacy Americans inherited from their English forebears. The first "bill of rights" was Magna Charta (1215); during the following four centuries, according to Sir Edward Coke, it was reenacted thirty-two times. Its principles were reiterated in the 1628 Petition of Right, acceded to at least nominally by Charles I, and again in the 1689 Bill of Rights.[1] All these, however, were irrelevant to American circumstances after Independence, for they had been guarantees of the rights of the people extracted from the sovereign, which is to say the Crown. In America, the people as citizens of the several states was the sovereign, and it were a solecism to speak of guaranteeing the rights of the people against the people.

Notwithstanding the incongruity, six of the eleven states that adopted new constitutions during the American Revolution included in those constitutions declarations of rights of one sort or another, and several others incorporated provisions for certain rights, such as freedom of religion for Christians, in the body of the document. Moreover, there was a logic to these inclusions, for the new state governments, unlike governments of delegated and enumerated powers, had (as representatives of the sovereign people) all powers not constitutionally forbidden them.

But these declarations and provisions were, by and large, mere statements of principles—the bill of rights to the Virginia constitution, for example, was a preamble—without substantive force in law. The only exception of consequence was involved in the Quock Walker Case (1783), in which the Massachusetts Supreme Court ordered the freedom of a slave on the ground that the state constitution of 1780 declared that "all men are born free and equal."[2]

[1] Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis, 1965), p. 7; Sir Edward Coke, *The Second Part of the Institutes of the Laws of England*, 4 vols. (1629; reprint ed., Buffalo, 1986).

[2] Francis Newton Thorpe, comp., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws . . .*, 7 vols. (1909; reprint ed., Washington, D.C., 1977), 3:1889. The case was *Quock Walker* v. *Nathaniel Jennison* (1783). Henry Steele Commager, ed., *Documents of American History*, 7th ed., 2 vols. (New York, 1963), 1:110. Compare the Virginia constitution of 1776 (Thorpe, 7:3813), whose bill of rights, Section 1, read "that all men are by nature equally free and independent," but which did not result in freeing the slaves.

Against that background, the action, or rather inaction, of the Federal Convention of 1787 in regard to a bill of rights is scarcely surprising. The subject first arose, after a fashion, on August 20, when Charles Pinckney of South Carolina introduced thirteen propositions on a variety of subjects including popular rights. The resolutions were turned over to a committee without debate, and though they never emerged from committee, some of them found their way into the text of the Constitution by other means. The matter arose again on September 12, when Elbridge Gerry of Massachusetts proposed and George Mason of Virginia seconded a motion to appoint a committee to draft a bill of rights. The motion elicited little comment and was rejected by a unanimous vote of the delegations present.[3]

Federalists in the state conventions that ratified the Constitution repeatedly spelled out the reasons why adding a bill of rights made no sense. In New York, John Jay pointed out the inappropriateness of the English experience to American circumstances. "In days and countries where monarchs and their subjects were frequently disputing about prerogative and privileges," he said, the subjects "found it necessary, as it were, to run out the line between them" and oblige the monarchs "to admit, by solemn acts, called bills of rights, that cer-

[3] Max Farrand, ed., *The Records of the Federal Convention of 1787*, rev. ed., 4 vols. (1937; New Haven, 1966), 2:334–35, 340–42, 587–88. The Elbridge Gerry–George Mason proposal for a bill of rights to preface the Constitution arose in the context of Hugh Williamson's objection that "no provision was yet made for juries in Civil cases." Nathaniel Gorham answered, "It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter." The comment after the motion was made came from Roger Sherman who said, "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient—There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted" (2:587–88).

tain enumerated rights belonged to the people" and could not be encroached upon by the Crown. "But, thank God, we have no such disputes; we have no monarchs to contend with, or demand admissions from."[4]

In North Carolina, James Iredell repeated that argument and gave it another dimension. The English had no written constitution, "fixed and certain," that showed "plainly the extent of that authority which they were disputing about." Had they had such a constitution, "a bill of rights would have been useless." The American Constitution was different from the English, deriving its authority not from "remote antiquity" but from "a declaration of particular powers by the people to their representatives, for particular purposes." The people, through the Constitution, "expressly declare how much power they do give, and consequently retain all they do not." Iredell likened the Constitution to "a great power of attorney, under which no power can be exercised but what is expressly given."[5]

Many Federalists pointed out the difference between the state constitutions and the United States Constitution. Col. Joseph B. Varnum declared that in Massachusetts "the legislative have a right to make all laws not repugnant to the Constitution," and if that were true of the United States Constitution, "there would be a necessity for a bill of rights." But that was not the case; under Article I, Section 8, all powers were "express, and required no bill of rights." Edmund Randolph made the same argument, in different words, in the Virginia ratifying convention, as did James Wilson in Pennsylvania and others elsewhere.[6]

[4] Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution,* 5 vols. (Philadelphia, 1836–59), 1:498.

[5] Ibid., 4:148.

[6] Ibid., 2:78, 3:467, 2:436. Rufus King and Gorham responded to Gerry's objections in a similar fashion on Nov. 3, 1787. They wrote: "When the constitution vests in the Legislature 'full power & authority,' . . . a Declaration or Bill of Rights seems proper, But when the powers vested are explicitly defined both as to quantity & the manner of their Exercise," a bill of rights "is certainly unnecessary & improper" (James H. Hutson, ed., *Supplement to Max Farrand's The Records of the Federal Convention of 1787* [New Haven, 1987], p. 284). As Alexander Hamilton wrote in *Federalist* No. 84, "The truth is . . . that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."

Wilson made additional points as well. He indicated that South Carolina, Delaware, New Jersey, New York, Connecticut, and Rhode Island had no bills of rights, despite the power of their legislatures to make all laws not prohibited, and yet those states were no less free than Pennsylvania, which did have a declaration of rights. He also made the comparison between England and America and rang a change upon that argument and upon the one about the difference between state and national constitutions. "A bill of rights to a constitution," he said, "is *an enumeration of the powers* reserved" by the people. "If we attempt an enumeration, every thing that is not enumerated is presumed to be given." Thus "an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete." Almost no one, he declared, knew enough to formulate an all-inclusive list of people's rights. The great writers on natural law and natural rights, "from *Grotius* and *Puffendorf* down to *Vattel,* have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens."[7]

In Virginia several Federalists scoffed at the supposed efficacy of "parchment" guarantees of rights. Referring especially to a wartime incident in which a Virginia renegade had been convicted and executed by bill of attainder, Edmund Pendleton said, "I believe every gentleman will see that it is unconstitutional to condemn any man without a fair trial," for to do so violated principles of justice, the common law, and the Virginia Declaration of Rights, which declared "that no man shall be condemned without being confronted with his accusers and witnesses; that every man has a right to call for evidence in his favor, and, above all, to a speedy trial by an

[7] Elliot, ed., *Debates,* 2:436–37, 453–54. The authorities cited are Hugo Grotius (1583–1645), author of *De Jure Belli ac Pacis,* Samuel von Pufendorf (1632–1694), author of *De Jure Naturae et Gentium,* and Emmerich de Vattel (1714–1767), author of *Le Droit des Gens.*

impartial jury of the vicinage, without whose unanimous consent he cannot be found guilty. These principles have not been attended to." Wilson Cary Nicholas declared that "that man who was killed, not *secundum artem,* was deprived of his life without the benefit of law, and in express violation of [the Virginia] declaration of rights. . . . This bill of rights was no security. It is but a paper check. It has been violated in many other instances. . . . If we had no security against torture but our declaration of rights, we might be tortured to-morrow."[8]

James Madison, in the same convention, discussed the matter of religious freedom, of which he was well known as a champion. Disdaining Antifederalist claims that a bill of rights was necessary for the protection of religious liberty, he employed reasoning similar to that which he used in regard to factions in his celebrated essay, *Federalist* No. 10. The country's religious freedom, he said, "arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest." Besides, he added, no constitutional restraint was necessary because "there is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."[9]

[8] Elliot, ed., *Debates,* 3:298–99, 450–51. Edmund Pendleton was referring to Section 8 of the Virginia bill of rights, which specified the rights of the accused in capital or criminal prosecutions (Thorpe, *Federal and State Constitutions,* 7:3813).

[9] Elliot, ed., *Debates,* 3:330. Edmund Randolph made a similar argument: "I am a friend to a variety of sects, because they keep one another in order. How many different sects are we composed of throughout the United States! How many different sects will be in Congress! . . . There are now so many . . . that they will prevent the establishment of any one sect, in prejudice to the rest, and will forever oppose all attempts to infringe religious liberty." Randolph extended the argument by pointing out that the constitutional prohibition of religious tests as requirements for office holding (Article VI) guarantees religious diversity in Congress and puts "all sects on the same footing" (2:204). Notice that in Jonas Phillips's letter to the Constitutional Convention (Sept. 7, 1787), as a Philadelphia Jew seeking the inclusion of what became Article VI, he expressed confidence that the prohibition of religious tests would be a sufficient constitutional protection for Jews "to live under a goverment where all Relegious societys are on an Eaquel footing" (Farrand, ed., *Records of the Convention,* 3:79). James Madison, in a letter to Thomas Jefferson, Oct. 17, 1788, in addition to calling bills of rights "parchment barriers," noted that "experience proves the inefficacy of a bill of rights on those occasions when its control is most needed" (Gaillard Hunt, ed., *The Writings of James Madison,* 9 vols. [New York, 1900–1910], 5:271–75).

The classical formulation of the Framers' argument against a bill of rights was that penned by Alexander Hamilton in *Federalist* No. 84. The whole Constitution, Hamilton wrote, was properly to be regarded as a bill of rights because of its checks and balances, the federal principle, and above all the strictly limited powers it vested in the central government, leaving all others to the states. Thus "a minute detail of particular rights is certainly far less applicable to a Constitution . . . which is merely intended to regulate the general political interests of the nation," than to the constitutions of the states, which had "the regulation of every species of personal and private concerns." But he went further and contended that an itemization of rights was "not only unnecessary in the proposed Constitution, but would even be dangerous." Such an itemization would contain "exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?" For example, to say that liberty of the press shall not be violated "would furnish, to men disposed to usurp, a plausible pretence" for claiming a national power to regulate the press in other ways.[10]

[10] Charles Cotesworth Pinckney made a similar argument before the South Carolina House of Representatives on Jan. 18, 1788. He said, "With regard to the liberty of the press, . . . It was fully debated, and the impropriety of saying any thing about it in the Constitution clearly evinced. The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press . . . and to have mentioned it in our general Constitution would perhaps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it. For the same reason, we had no bill of rights inserted in our Constitution; for, as we might perhaps have omitted

This argument was criticized at the time and has been criticized by some modern scholars on the ground that it is falsified by the Constitution itself. That is, Article I, Section 9, contains a list of things Congress or the national government in general may not do. The most thorough rebuttal to this charge was made by Edmund Randolph. Every exception contained in Section 9, Randolph said, was from powers granted to Congress in Article I, Section 8, and he went through them one by one. The first prohibited Congress from interfering with the slave trade for twenty years; otherwise Congress could have done so under "the power given them to regulate commerce." The second forbade suspending the writ of habeas corpus except during emergencies; otherwise the writ could have been suspended "by virtue of the power given to Congress to regulate courts." The third prohibited bills of attainder and ex post facto laws; these, Randolph pointed out, had "always been the engines of criminal jurisprudence." The prohibition was thus "an exception to the criminal jurisdiction" vested in Congress. The fourth prohibited the levying of capitation or other direct taxes, an exception from the enumerated power to tax, as was the fifth, banning taxes on exports; the sixth, prohibiting preference of ports in one state over another's and banning the taxation of interstate commerce; and the seventh, forbidding expenditures without appropriations. The eighth restriction prohibited granting titles of nobility. "If we cast our eyes to the manner in which titles of nobility first originated," Randolph said, "we shall find . . . these sprang from military and civil offices. Both are put in the hands of the United States," and therefore the restriction was "an exception to that power." Finally, Section 9 prohibited officers of the United States from receiving emoluments from foreign kings, princes, or states without the consent of Congress. "All men," Randolph indicated, "have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of

the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated" (Farrand, ed., *Records of the Convention,* 3:256).

the community." The restraint in the Constitution was necessary as a safeguard against corruption.[11]

In sum, the restrictions in Section 9 were qualitatively different from proposals to provide for freedom of religion or of the press, for the restrictions were against things that the national government otherwise would have been empowered to do.

Clearly, the Federalists had the better of the debate, both logically and historically. Be it remembered that they had the better of it politically, too, for the Constitution was ratified by eleven states before the Bill of Rights was even proposed and by all thirteen before it was adopted.

The proposal and adoption of the Bill of Rights came about not because of popular demand or the logic or persuasive powers of its advocates but as a tactical political response to the machinations of Antifederalist enemies of the Constitution, who were motivated by less exalted concerns than the liberties of the people. Antifederalists were unorganized during the early months of the campaign for ratification and lacked a positive program, with the result that Federalists carried the conventions of eight of the required nine states by the spring of 1788. But then the Antis agreed upon a strategy of stepping up propagandistic agitation for a bill of rights—only two states had actually called for amendments—and for a second constitutional convention, ostensibly to amend but in fact to undo the work of the first. They failed to achieve their initial aim, to make ratification by the remaining states conditional upon the calling of a second convention, but the movement had gained a large number of highly vocal adherents by the time the first presidential and congressional elections were held late in 1788. In the circumstances, most Federalists decided that they must head off the danger by reversing themselves and sponsoring a "safe" bill of rights.[12]

[11] Elliot, ed., *Debates,* 3:464–65.

[12] Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic, 1776–1790* (1965; reprint ed., Indianapolis, 1979), pp. 334, 341, 345, 351–52, 359, 366–67. For a detailed study of Antifederalist tactics and

Among the leaders in adopting the new posture was James Madison, who had political axes to grind. Patrick Henry, the leading Antifederalist in Virginia and devout personal enemy of Madison, used his great influence in the state legislature to elect two Antifederalists to the United States Senate, thus closing that avenue to Madison's ambition. Then Henry induced the legislature to place Madison's home county, Orange, in a congressional district with six Antifederalist counties. Madison campaigned for the House seat anyway and won it by depicting himself as the arch-champion of a bill of rights, which the state's ratifying convention had recommended.[13]

True to his campaign promise, Madison served notice in the House on May 4, 1789, that he would in three weeks introduce a set of constitutional amendments (thus obviating the need for a convention to draw them), and on the twenty-fifth he did so. In the ensuing debates he was opposed by a handful of Federalists from New England, but the vast majority of Federalists supported him. To the surprise of no one, the opposition was led by Antifederalists who, until a few weeks earlier, had been crying loudly for a bill of rights. Madison prevailed, and the movement for a second constitutional convention collapsed.[14]

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aims in one state, see Philip A. Crowl, "Anti-Federalism in Maryland, 1787–1788," *William and Mary Quarterly,* 3d ser. 4 (1947):446–69. See also Steven R. Boyd, *The Politics of Opposition: Antifederalists and the Acceptance of the Constitution* (Millwood, N.Y., 1979), pp. 20–22, 82; Brant, *Bill of Rights,* p. 39; and Herbert J. Storing, ed., *The Complete Anti-Federalist,* 7 vols. (Chicago, 1981), 1:67, 69. The best survey of the historical literature is James H. Hutson, "The Drafting of the Bill of Rights: Madison's 'Nauseous Project' Reexamined," *Benchmark* 3 (1987):309–20. For the shift by Federalists, see Ralph A. Rossum, "'To Render These Rights Secure': James Madison's Understanding of the Relationship of the Constitution to the Bill of Rights," *Benchmark* 3 (1987):11–13.

[13] McDonald, *E Pluribus Unum,* p. 366.

[14] Especially instructive as to Madison's reasoning and his line of argument is the speech he made in the House of Representatives, June 8, 1789. See *The Debates and Proceedings in the Congress of the United States,* 2 vols. (Washington, D.C., 1834–56), 1:449, 453, 459. See also Robert Allen Rutland, *The Birth of the Bill of Rights, 1776–1791* (Chapel Hill, 1955), pp. 190–216.

Madison had studied the subject with characteristic thoroughness. Proposals for amendments had come in from three additional ratifying conventions and from dissenters in four more; the total number of proposals was upwards of two hundred. Eliminating duplicates, Madison found eighty substantive proposals. Dismissing the most impractical and least popular, he condensed the remainder into nineteen. When these were passed by the House on August 24, they had been consolidated into seventeen. As they emerged from the House, the amendments would have applied to state governments as well as to the national government.[15]

The Senate took up the proposed amendments nine days later, almost its first action being to remove their applicability to the states. Otherwise it generally concurred, though it and a joint committee that met on September 25 consolidated the amendments into twelve. The first two, concerning the number and salaries of congressmen, were not ratified at that time by the requisite number of states. The other ten, known collectively as the Bill of Rights, became part of the Constitution on December 15, 1791.[16]

A special word concerning the Ninth and Tenth Amendments is in order. The Ninth provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Indisputably, that was designed to obviate the difficulty, pointed out by Wilson and others, of making an all-inclusive enumeration of rights, and the dangers inherent in that difficulty. The Tenth provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Clearly that was designed to ensure that the interpretation of the Constitution espoused by the Federalists during the contests over ratification—that it established a government of limited, delegated powers—would prevail. To Americans it would have appeared as a renunciation for all time of the infa-

[15] Edward Dumbauld, *The Bill of Rights and What It Means Today* (Norman, Okla., 1957), pp. 33–44.

[16] Ibid., pp. 46–48.

mous Declaratory Act of 1766, in which Parliament claimed a power to legislate for the colonies "in all cases whatsoever." Congress was to have no such power.

Another way of putting it is that the Ninth Amendment sought to guarantee that the first eight would not be dangerous, and the Tenth declared them to be unnecessary.

Before taking up the larger question, how much or how little protection the Bill of Rights has historically afforded, let us consider Hamilton's concern lest the prohibition of certain things serve as a handle for exerting powers that otherwise the national government would not have. In retrospect his caution may seem to have been misplaced, but during the early decades after the adoption of the amendments at least two were employed just as Hamilton had predicted.

The first concerned freedom of the press. As Hamilton said, the original Constitution gave Congress no power, express or implied, to legislate in regard to the press. The First Amendment declared that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The operative word is *abridging:* to abridge is to reduce, to diminish. After the adoption of the amendment, then, Congress could by inference be empowered to legislate concerning freedom of the press so long as it did not diminish it.

The subject came up less than seven years after the ratification of the amendment. In the summer of 1798, amidst the frenzy for war against France that was set off by the publication of the XYZ correspondence, President John Adams and the Federalists in Congress were avid to muzzle their Republican critics—who, in Federalist eyes, were behaving in a downright subversive fashion. They might have done so by bringing indictments under the common law of seditious libel, which according to Blackstone prohibited "malicious defamations of any person, and especially a magistrate, made public . . . in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule." Both the Washington and the Adams administrations had brought common law indictments for assorted crimes in their efforts to keep the United States neutral in the French Revolutionary wars, and they had met with considerable success. But in April 1798,

just days after the publication of the XYZ papers, Supreme Court Justice Samuel Chase, riding on circuit, ruled in the case of *United States* v. *Worrall* that there were no federal common law crimes, and he would hear no common law indictments. But for the First Amendment, the matter would have ended there.[17]

Instead, on July 14 Congress passed and Adams signed the Sedition Act, making it a federal crime to publish "any false, scandalous and malicious writing" against the president, Congress, or the United States government. The constitutional justification for the act is to be found in the use of the word *false.* Under the common law as received in every American state, truth was not a defense in cases of seditious libel, for as Chancellor James Kent would later write, "whether true or false, it was equally dangerous to the public peace." But under the Sedition Act truth was made a defense; therefore the act augmented rather than abridged freedom of the press.[18] The first of many instances in which the federal government suppressed freedom of the press was thus justified by the First Amendment.

The other early abuse of popular rights through the Bill of Rights grew out of the Seventh Amendment, which provides for jury trials in civil suits. It also provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Those provisions are not so simple and straightforward as they seem from a twentieth-century perspective. To understand them, one must review briefly the history of common

[17] Sir William Blackstone, *Commentaries on the Laws of England,* 4 vols. (London, 1795), 4:150. *United States* v. *Worrall,* 2 Dall. 384 (1798); Charles Warren, *The Supreme Court in United States History,* 2 vols. (Boston, 1922), 1:159n, 433–34. The question of a federal common law of crimes was a vexed one. For an excellent analysis of it, see Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic," *Law and History Review* 4 (1986):223–323.

[18] Commager, ed., *Documents of American History,* 1:177. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, Kans., 1985), pp. 48–49. James Kent, *Commentaries on American Law,* 4 vols. (New York, 1844), 2:18.

law juries in England and America. For centuries juries were subordinate to judges, who could imprison and otherwise punish jurors for rendering verdicts contrary to law or to the judge's reading of the evidence. That power was terminated by the Bushell case in 1670, and for almost a century English juries ruled freely in matters of law as well as fact. Then, after Lord Mansfield became chief justice in 1756, English courts began to employ an assortment of technical pleas and procedures to curtail the powers of juries.[19]

But in America such procedures were largely unused or ineffective, and on a case-to-case basis juries continued to exercise virtually absolute power. In practice they were the government, declaring what the law was, finding its source in nature and in principles of natural equity. When they saw fit, they disregarded the instructions of the judge as to what the law was, and even the plain language of an act of Parliament or of a colonial or state legislative enactment.[20]

Enter the Seventh Amendment, with its provision that no *fact* tried by a jury could be reexamined in a higher court. By implication, limiting the exemption to reexamination of facts effectively confirmed the power of appellate courts to overturn jury findings in matters of law. Within a generation after the adoption of the amendment, the process of "Mansfieldizing" American juries would be well under way, and within another generation the power to decide questions of law had been almost totally taken away from juries.[21]

The next matter to consider is how efficacious the Bill of Rights has proved to be in practice. Obviously the various provisions are meaningful only if, in the case of substantive rights, they are protected, and in the case of procedural

[19] McDonald, *Novus Ordo Seclorum,* p. 40.

[20] Ibid., pp. 40–41 and n. 40.

[21] Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, 1977), pp. 28–29, 84–85, 141–43, 155–59, 228. William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change upon Massachusetts Society, 1760–1830* (Cambridge, 1975), pp. 165–71. Edith Guild Henderson, "The Background of the Seventh Amendment," *Harvard Law Review* 80 (1966):289–337.

rights, they are adhered to in courts of law, and ultimately in the Supreme Court. Measured by those criteria, three of the ten amendments can be dismissed at the outset. For a number of historical reasons the Third Amendment, concerning the quartering of troops in private homes, never arose, though Edward Dumbauld's observation is worth recalling. The armed services, he wrote, "have not put soldiers into the houses of citizens; they have simply removed the citizens from their houses and put them in the army, navy, and air force." The Ninth Amendment, the reserved rights one, was not invoked until quite recently, and never, so far, as the sole justification of a Supreme Court decision. There is, it should be added, a large and growing body of literature by legal scholars, arguing for or against activation of the Ninth. As for the Tenth Amendment, the reserved powers one, no less an authority than Edward S. Corwin believed that it proved effective for a time, though the cases he cited turned upon a narrow reading of the commerce clause rather than upon the amendment. In any event, those cases have long since been overturned, and despite Justice Sandra Day O'Connor's dalliance with the Tenth in *Gregory* v. *Ashcroft,* I know no one who would contend that the Tenth Amendment offers any real protection today.[22]

[22] Dumbauld, *Bill of Rights,* quotation p. 62; see also pp. 65–66; Thomas B. McAffee, "The Original Meaning of the Ninth Amendment," *Columbia Law Review* 90 (1990):1215–1320; Marshall L. DeRosa, *The Ninth Amendment and the Politics of Creative Jurisprudence* (New Brunswick, N.J., 1996); Louis Fisher, *American Constitutional Law* (New York, 1990), pp. 374, 433–37; Charles A. Lofgren, "The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention," in Ronald K. L. Collins, ed., *Constitutional Government in America* (Durham, N.C., 1980); Raoul Berger, *Federalism: The Founders' Design* (Norman, Okla., 1987); Eugene W. Hickok, Jr., "On Federalism," *Benchmark* 3 (1987):229–38; Paul J. Mishkin, "The Current Understanding of the Tenth Amendment," in Eugene W. Hickok, Jr., ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville, Va., 1991), pp. 465–73. In *Report to the Attorney General: The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation,* Oct. 11, 1988, the Office of Legal Policy notes that in *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985) "the Court held that state sovereignty was adequately and more properly protected by the national political process and that issues of federalism were most appropriately debated and

The Supreme Court has sometimes used portions of the other seven amendments to protect people against excesses committed by the national government, but as a rule it has done so only in circumstances in which there is no serious threat of such excesses. To put it the other way around, the Court has not been willing to enforce or honor the Bill of Rights whenever one or more of seven sometimes overlapping conditions are present: (1) the justices feel that the integrity and independence of the judiciary are in danger of compromise or destruction by the political branches; (2) the president and Congress are united in support of particular policy objectives; (3) the Court sympathizes with or is indifferent to specific violations of the Bill of Rights; (4) the nation is gripped by a widespread sense of emergency, local or national; (5) the country is at war; (6) groups or individuals targeted by repressive policies are extremely unpopular; and (7) the revenues of the national government are at stake. To repeat, whenever any of these conditions is present—which is to say, precisely the circumstances in which individual rights are most imperiled—the Supreme Court tends to look the other way, at least until the conditions disappear. Let us take up each set of conditions, one at a time.

Grave threats to the Court by the political branches have arisen three times in American history, and on each occasion the Court pulled in its horns and allowed the government to do whatever it pleased. The first came early in the nineteenth century: Jeffersonian Republicans, outraged by the Judiciary Act of 1801, by John Adams's "midnight appointments," and by the Court's daring to declare a part of an act of Congress unconstitutional in *Marbury* v. *Madison,* virtually declared war on the federal judiciary. The most serious attempt was a scheme to purge the bench through the impeachment process. As a trial run, a Pennsylvania judge was removed by impeachment and conviction; next Congress impeached and removed a federal district judge in New Hampshire; and

resolved within such a legislative context" (p. 132). The report concludes that the Court "could decide to reverse its current course," but that "for those who view federalism as a serious concern . . . the Supreme Court's law in this area is troubling" (p. 139).

then, in 1804, the House impeached Justice Samuel Chase. Pending the trial in the Senate, Republicans made it plain that they intended to clear the Court completely and replace the judges with Jeffersonian appointees.[23]

Chase was not convicted, the movement collapsed, and the independence of the judiciary remained intact. It is significant, however, that more than half a century elapsed before the Supreme Court declared another act of Congress unconstitutional. During that period the national government repeatedly violated the Bill of Rights, but the Court declined to intervene. Interestingly, one Bill of Rights case did reach the Court during John Marshall's long tenure as chief justice. The city of Baltimore seized for public use certain property of a man named Barron, who challenged the action on the ground that it deprived him of property without due process of law and just compensation, in violation of the explicit guarantees in the Fifth Amendment. The Marshall Court ruled against him, holding that the Bill of Rights did not limit the powers of local or state governments; it applied only to the federal government.[24]

When the Supreme Court again grew so bold as to declare another act of Congress unconstitutional—in the Dred Scott case (1857)—it soon learned anew that it was (as Hamilton had said in *Federalist* No. 78) "beyond comparison the weakest of the three departments of power." The decision elicited new demands for impeachment, but the greater threats to the Court came during the Civil War and shortly afterward. As will be seen, both the Bill of Rights and the Constitution were trampled into dust during the war; when Chief Justice Roger Brooke Taney sought to protect the rights of individuals, President Lincoln simply ignored him. After the war, when radical Republicans in Congress enacted a host of measures of questionable constitutionality, the Supreme Court held its peace; when it suggested that it might rule in a politically incorrect way in a particular case, Congress summarily removed

[23] *Marbury* v. *Madison,* 5 U.S. 137 (1803); Forrest McDonald, *The Presidency of Thomas Jefferson* (Lawrence, Kans., 1976), pp. 35–36, 49–51, 81–82, 89–93.

[24] *Barron* v. *Baltimore,* 32 U.S. (7 Pet.) 243 (1833).

its jurisdiction. Only after all danger to the Court had passed did it resume its full powers and duties.[25]

The other major threat to the integrity of the Court came in the 1930s. In 1937 Franklin Roosevelt, irate because the Court had declared unconstitutional several of his New Deal measures, proposed his "court-packing plan." The plan was not passed into law: it suddenly became unnecessary, for two conservative justices prudently switched sides, converting a 5–4 majority into a 3–6 minority, and other justices resigned or died. During the next generation, however, despite countless overt violations of the Bill of Rights, the Court held only one act of Congress and one action of a president unconstitutional.

A second circumstance under which the courts and the Bill of Rights are unlikely to provide protection is when Congress unites behind a strong president who is determined to pursue a policy at all costs. A stunning case is afforded by the efforts of the Jefferson administration to enforce the embargo enacted in December 1807 and strengthened by additional statutes in the first few months of 1808. Defiance of the embargo began as soon as northern ports started to thaw in February and March, whereupon Jefferson asked for and obtained from Congress legislation empowering collectors of the revenues to seize ships and cargoes, without a warrant or the prospect of a trial, upon the mere formation of a suspicion that a shipper or merchant *contemplated* a violation of the embargo. This was in direct violation of the Fourth and Fifth Amendments. He also asked for and obtained congressional authorization to use the army and navy to enforce the law. Contemporaneously, Jefferson declared the region around Lake Champlain—where some entrepreneurs from Vermont and upstate New York were transporting goods to Canada on rafts—to be in a state of insurrection. He ordered state and federal officials, "and all other persons, civil and military, who shall be found within the vicinage," to suppress the supposed rebellion "by all means in their power, by force of arms or

[25] *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857); *Ex parte McCardle,* 74 U.S. (7 Wall.) 506 (1869).

otherwise." Local residents protested in vain at being subjected wholesale to the stigma of insurrection for the violations of a few.[26]

The enforcement policy was challenged in the courts, and to Jefferson's mortification it was overruled by one of his Republican appointees. The collector at Charleston had impounded a ship and its cargo not because he suspected any intention to violate the law but because he was bound by executive order. The owners brought suit to clear the vessel, and Supreme Court Justice William Johnson, sitting on circuit court, issued the appropriate writ late in May. Jefferson's attorney general, Caesar Rodney, promptly issued and released to the press a contrary opinion, including a scathing rebuke of Johnson; the administration thenceforth followed Rodney's opinion in disregarding adverse rulings by lower courts.[27]

As the summer wore on, defiance of the embargo spread, and Jefferson and Secretary of the Treasury Albert Gallatin became convinced that judges and juries were totally unreliable. Instead of going to the courts, they increasingly resorted to martial law and the armed forces. Gallatin advised the president that "arbitrary powers," which were "equally dangerous and odious," would be necessary to enforce the embargo. Jefferson agreed, insisting that "Congress must legalize all *means* which may be necessary to obtain its *end*"—and then proceeded as if all possible means had already been legalized. Throughout the summer and fall the army and navy were deployed against American citizens, pitched battles erupted frequently, and scores of civilians were wounded and some killed. Whole towns were declared under the taint of treason. By November, when Congress was scheduled to reconvene,

[26] McDonald, *Presidency of Jefferson,* p. 149; Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (New York, 1973), pp. 107, 130–31; Dumas Malone, *Jefferson the President: Second Term, 1805–1809* (Boston, 1974), p. 585. For the embargo in general, see Walter W. Jennings, *The American Embargo, 1807–1809* (Iowa City, 1921), and Louis M. Sears, *Jefferson and the Embargo* (Durham, N.C., 1927).

[27] McDonald, *Presidency of Jefferson,* pp. 150–51; Levy, *Jefferson and Civil Liberties,* pp. 126–30; Donald G. Morgan, *Justice William Johnson: The First Dissenter* (Columbia, S.C., 1954).

Jefferson was preparing a final solution to the problem of uncooperative courts: persons accused of violating or intending to violate the embargo would in effect be deprived of the right to offer any defense. The president suggested to one congressman that historically, in times of emergency, "the universal resource is a dictator."[28]

Still another circumstance under which the Court is passive in the face of violations of the Bill of Rights arises when it regards particular infringements with indifference or approval. That the Court does so might surprise novices in the field, but specialists are aware that what the Court cares about varies from time to time; it is prone to be preoccupied with one kind of rights for a generation or two and then lose interest in the subject. For example, it was intensely concerned with protecting property rights between the 1890s and the 1930s, at which time interest in such rights went out of fashion. In 1944 it overturned a large body of public utility regulatory law it had fashioned over the decades, now ruling that the Federal Power Commission could set rates so low as to be confiscatory, despite the taking clause of the Fifth Amendment.[29] A little earlier, the Court had upheld the presidential seizure of the property of certain Russian-Americans on the strength of an executive agreement, the so-called Litvinov Assignment of 1933—again despite the Fifth Amendment. On the basis of that and two related decisions, the president might theoretically bargain away the rights of all citizens merely by agreeing to do so with a foreign head of state.[30]

[28] McDonald, *Presidency of Jefferson,* pp. 151–52; Levy, *Jefferson and Civil Liberties,* pp. 115–19; Jefferson to James Brown, Oct. 27, 1808, Andrew A. Lipscomb and Albert Ellery Bergh, eds., *The Writings of Thomas Jefferson,* 20 vols. (Washington, D.C., 1904–5), 12:183.

[29] Forrest McDonald, *A Constitutional History of the United States* (Malabar, Fla., 1986), p. 203; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 584 (1944).

[30] *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936); *United States* v. *Belmont,* 301 U.S. 324 (1937); *United States* v. *Pink,* 315 U.S. 203 (1942). For the Court's more recent failure to protect private property rights, see *Hawaii Housing Authority* v. *Midkiff,* 467 U.S. 229 (1984); Fisher, *American Constitutional Law,* p. 471.

Similarly, the Court was for several decades not so concerned with First Amendment rights as it has been in recent years. In 1842 Congress passed an act prohibiting the importation of "indecent and obscene prints, paintings, lithographs, engravings, and transparencies," and in 1865 it prohibited the mailing of any "obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character." In 1872 Congress added to the banned material "disloyal devices printed or engraved." None of these enactments was successfully challenged in the Court; indeed, the Court explicitly declared that Congress could refuse the use of the mails "for the distribution of matter deemed injurious to the public morals." In 1912 Congress saw fit to protect the public's morals by making it illegal to import or ship in interstate commerce or send through the mails films of prize fights intended for purposes of exhibition. Such statutes and the Court decisions that upheld them laid the foundation for the development of an enormous federal police power, not contemplated by the original Constitution, that enables the federal bureaucracy to flout the Bill of Rights wantonly.[31]

A fourth set of circumstances under which the Bill of Rights is apt to be trampled upon arises whenever there is a general sense of emergency, justified or unjustified, local or national. On the local level, the city of New Orleans offers instructive examples. In the winter of 1806–7 Gen. James Wilkinson, commander of the small American army in the Louisiana Territory, asked Territorial Governor William Claiborne to declare martial law, on the ground (which Wilkinson knew to be false) that Aaron Burr was about to invade New Orleans with his rebel band. Claiborne refused, whereupon Wilkinson imposed martial law anyway; and in the name and authority of the United States, he proceeded to crush the Constitution and

[31] O. John Rogge, *The First and Fifth: With Some Excursions into Others* (New York, 1971), pp. 76–77. The development of a federal police power arose slowly. As late as 1891 in *In re Rahrer,* 140 U.S. 545, 554 (1891), the Court held that the police power "is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive" (Fisher, *American Constitutional Law,* p. 472).

the Bill of Rights beneath his boot. He arrested without warrants and held incommunicado three of Burr's associates, and when writs of habeas corpus were obtained in their behalf he had them chained and sent by sea to Washington. In addition, he jailed their attorney, the judge, the judge's closest friend, a newspaper editor, former Senator John Adair, and about sixty other citizens. None was charged with a specific crime, none was allowed his constitutional rights, and a number were transported from the vicinage, where they had a constitutional right to a speedy and public trial, and were shipped in secret to Washington. The president of the United States approved of these doings, his only reservation being that Wilkinson must stay within the limits, not of the Constitution, but of what public opinion would bear.[32]

Eight years later in the same city, *after* he had won the Battle of New Orleans, General Andrew Jackson also imposed martial law. A newspaper dared publish an article criticizing him, and Jackson had the editor arrested. A lawyer procured a writ of habeas corpus from the federal district judge, and Jackson had both of them arrested. A certain Mr. Holander ventured to criticize some of these doings, and he promptly found himself in a military prison with the others.[33]

On the national level, flagrant violations of the Bill of Rights during times of perceived peril accompanied the great red scares after the First and Second World Wars. After the first, revolutions, terrorism, and violent strikes swept the entire globe, and socialists, anarchists, and communists sought to transform the disruptions into a world revolution. Beginning in April 1919, terrorists in a number of American cities planted and exploded bombs. The American people, their hostilities already enflamed by wartime government propaganda, overreacted. President Woodrow Wilson added to the near-hysteria by denouncing enemies of his proposed peace settlement as dupes of the Bolsheviks, and he asked Congress

[32] McDonald, *Presidency of Jefferson,* p. 127; Levy, *Jefferson and Civil Liberties,* pp. 81–89.

[33] Michael Linfield, *Freedom under Fire: U.S. Civil Liberties in Times of War* (Boston, 1990), p. 27.

to enact a peacetime sedition act. His attorney-general, Thomas W. Gregory, arrested and deported 249 radicals, and when Gregory was replaced by A. Mitchell Palmer, persecutions of radicals and suspected radicals began in earnest. Throughout 1920 Palmer's agents conducted raids in thirty-three cities from coast to coast. Several thousand people were jailed briefly without formal arrest or trial and then released. Formally, Palmer and his agents arrested more than 5,000, released about a third of them to the states for prosecution, and deported 556.[34]

It is to be observed that whenever government or a demagogic politician engages in such crusades, far more people suffer at the hands of unofficial vigilante-style groups than from official activity. As it happened, when Palmer was making his raids a goodly number of the socialists in the United States were Jews from eastern Europe and a goodly number of the anarchists were of Italian origin. These people were highly visible, and in the unofficial persecution they had to endure, the Bill of Rights was utterly meaningless. The same is true of people who were victimized by the new version of the Ku Klux Klan that the wave of nativism washed up.

Private persecutions similarly accompanied the anti-communist crusade conducted during the early phases of the Cold War, but official activity was quite bad enough. Even before Sen. Joseph McCarthy began to grab headlines with his sensational charges that communists had infiltrated the State Department and the army, President Harry Truman had instituted a comprehensive loyalty review program that resulted in the resignations of 7,000 government employees and the discharge of 560 more. Others were fired during the early 1950s, and many reputations were destroyed by reckless and unsubstantiated charges levied by demagogues who jumped on McCarthy's bandwagon.[35]

[34] McDonald, *Constitutional History,* p. 191; Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919–1920* (Minneapolis, 1955); Linfield, *Freedom under Fire,* pp. 56–58.

[35] McDonald, *Constitutional History,* p. 214; Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* (New York, 1970), pp. 886–88, 893–95; Linfield, *Freedom under Fire,* p. 108.

But the gravest damage came in the form of direct attacks upon the First Amendment, made by Congress and upheld by the Supreme Court. One of the earliest such attacks came with the passage of the Taft-Hartley Act of 1947, which contained a provision requiring labor union officials to take an oath that they were not communists. The communications union, well known to be dominated by communists, challenged the provision on the grounds that it violated the First Amendment guarantees of freedom of speech and assembly and also that it amounted to a bill of attainder. The Supreme Court, in *American Communications Association* v. *Douds,* ruled to the contrary. The Wagner Act, said the Court, had been aimed at removing impediments to the flow of interstate commerce in the form of labor strife; Taft-Hartley had the same end, eliminating communist leadership to stop the threat of "political strikes." The right to be a communist was not at stake, the Court declared; what was at issue was only whether the government, from whose support the power of unions derived, could deny its support to communists.[36]

The right to be a communist soon became the issue, however. In 1948 the Justice Department obtained indictments against eleven top communist officials under the 1940 Smith Act, which had made it illegal to "advocate, abet, advise, or teach" the violent overthrow of any government of the United States and had prohibited publishing materials, organizing groups, or engaging in a conspiracy to commit such acts. The communists were found guilty in federal district court in New York and appealed to circuit court, where Judge Learned Hand abandoned the "clear and present danger" doctrine formulated by Oliver Wendell Holmes in 1919. There was no serious likelihood, Hand declared, that the communists would succeed in overthrowing the government, but the consequences if they did would be so horrendous that the First Amendment must not be allowed to prevent the government from protecting itself. This "sliding scale" rule for deciding

[36] Kelly and Harbison, *American Constitution,* pp. 888–89; *American Communications Assn.* v. *Douds,* 339 U.S. 382 (1950); Fisher, *American Constitutional Law,* p. 536.

sedition cases was approved by the Supreme Court on appeal in 1951.[37]

In the meantime, in 1950 Congress had passed the McCarran Internal Security Act, declaring that the "world Communist conspiracy" sought to establish a dictatorship in America and thus that American communists did constitute a "clear and present danger." Communists and communist-front organizations were required to register with a Subversive Activities Control Board; the president was authorized to declare at any time an "internal security emergency" during which anyone who "probably will conspire with others to engage in acts of espionage and sabotage" could be held indefinitely in one of the detention camps created by the act. The Communist Party refused to register, and a long court battle followed. It was not until eight years after Senator McCarthy died in 1957 and the atmosphere had become discharged that the Supreme Court screwed up the courage to declare the McCarran Act unconstitutional.[38]

The greatest threat to Bill of Rights guarantees comes, of course, during times of war. Except for occasional confiscations of private property by military commanders there were few if any violations of private rights during the War of 1812 and the Mexican War, but the Lincoln administration violated them on a grand scale during the Civil War. The national government took over telegraph service and censored telegrams throughout the conflict. When newspapers published articles or editorials critical of the government or its policies, troops were repeatedly dispatched to close the papers, arrest the editors, or seize the presses.[39]

[37] Kelly and Harbison, *American Constitution,* pp. 889–93; *Dennis* v. *United States,* 341 U.S. 494 (1951); *Schenck* v. *United States,* 249 U.S. 47 (1919); Fisher, *American Constitutional Law,* pp. 536, 554–56, 568–73.

[38] Kelly and Harbison, *American Constitution,* pp. 981–85; *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965); Fisher, *American Constitutional Law,* p. 537.

[39] Linfield, *Freedom under Fire,* pp. 24–25.

Far more serious was Lincoln's policy of subjecting suspect persons to military arrests. There were, it is true, many disloyal people in the four border slave states and in the southern parts of Ohio, Indiana, and Illinois, and these often propagandized against the war, discouraged enlistments in the army, spied for the Confederacy, and even engaged in paramilitary harrassment of Union troops. To keep them in check, Lincoln declared vast areas to be under martial law and ordered provost marshals and other military officers to arrest and detain the suspicious without charges or trials. When civilian judges ordered the release of prisoners, they were ignored.[40]

In September 1862 Lincoln issued a proclamation that governed such matters during the remainder of the war. It declared that all persons resisting the newly authorized draft, discouraging enlistments, or engaging in any other "disloyal practice affording aid and comfort to rebels . . . shall be subject to martial law, and liable to trial and punishment by courts-martial or military commissions." The substantive rights nominally guaranteed by the First Amendment and the procedural rights nominally guaranteed by the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments were effectively suspended by this proclamation, as was the writ of habeas

[40] Kelly and Harbison, *American Constitution,* pp. 437–38; Linfield, *Freedom under Fire,* pp. 23–32. Linfield notes the irony that the Confederacy, despite containing pockets of Union supporters, never suspended the writ of habeas corpus. The case of *Ex parte Merryman,* 17 F. Cas. 144 (1861), is particularly instructive. Merryman, a Maryland citizen, was arrested and detained by the military at Fort McHenry. When Chief Justice Roger B. Taney issued a writ of habeas corpus, the commanding general of the fort refused to obey it and said he was acting under the authority of the president. Taney then cited the general for contempt, but the general refused to receive the citation. Taney filed an opinion on this affair, the last paragraph of which read: "I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. . . . I shall therefore order all the proceedings in this case, with my opinion, to be filed and recorded . . . and direct the clerk to transmit a copy . . . to the President. . . . It will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed' to determine what measure he will take to cause the civil process of the United States to be respected and enforced" (Commager, ed., *Documents of American History,* 1:401).

corpus. Under its provisions perhaps 20,000 people were summarily arrested and imprisoned throughout the Union. In combat zones such arbitrary action may have been justified, at least most of the time; but military courts also overran civil courts in areas far removed from the fighting, especially in the middle west.[41]

Two well-known Supreme Court cases illustrate the inefficacy of the Court and the Bill of Rights during wartime. In 1863 Gen. Ambrose Burnside, commander of the military department of Ohio, ordered the arrest of former congressman Clement Vallandigham for denouncing Lincoln's conduct of the war; Vallandigham was tried by a military commission and sentenced to close confinement for the duration of the war. He appealed to the Supreme Court for a writ of certiorari to review the sentence, but the Court dodged the issue on the ground that it had no jurisdiction in appeals from military tribunals. Then in 1866, the war safely over, the Court reversed its position, reviewing and overturning a sentence of L. P. Milligan for subversive activity in Indiana in 1864.[42]

Constitutional liberty fared even less well during the First World War. The legal foundation for what happened was two acts, the 1917 Espionage Act, providing severe penalties for statements or actions promoting insubordination, disloyalty, disunity, or interference with the draft; and the 1918 Sedition Act, providing the same penalties for writing, printing, or uttering profane or abusive language about the flag, the Constitution, the government, or the armed services or tending to reduce production. Under these acts more than a thousand persons, most of them innocent pacifists, were imprisoned, and a number of newspapers were suppressed. Additionally, under a presidential proclamation several thousand enemy aliens were temporarily detained, and 6,000 more were arrested and many were detained for the duration.[43]

[41] Kelly and Harbison, *American Constitution,* pp. 439, 443–44.

[42] *Ex parte Vallandigham,* 1 Wall. 243 (1864); *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).

[43] Linfield, *Freedom under Fire,* pp. 33–67. The May 16, 1918, act not only made it a criminal offense to "utter, print, write, or publish" any "disloyal,

These were small affairs compared to what was done by two congressionally created propaganda and vigilante agencies, the Committee on Public Information and the State Councils of Defense. The first exercised censorship and distributed propaganda that went so far as to expunge from high school history books favorable references to Germany or the German people. The State Councils of Defense organized networks of vigilance committees to investigate, spy upon, and harrass the inhabitants of every neighborhood in the country. Much of what they did was petty, such as breaking the windows of German-American shopkeepers and banning the playing of Bach and Beethoven at concerts, but much of it was far from petty. In July 1918, for example, vigilance committees in Chicago alone seized and searched 150,000 men, detained 20,000 in jails and warehouses, and triumphantly announced that 14 of the men were draft dodgers. Indeed, for nineteen months the nation was policed by controlled hysteria, by government-sponsored mob action, and by totalitarian democracy. The Supreme Court lifted not a finger in protest, and shortly after the war it confirmed the constitutionality of most of what had happened.[44]

During the Second World War there was less hysteria, but the Bill of Rights was effectively suspended whenever its guarantees were deemed by government to conflict with the conduct of the war. The grossest violation was the incarceration in "Relocation Centers" of 115,000 persons of Japanese descent, of whom about 70,000 were American citizens. It is be-

profane, scurrilous, or abusive language" against the government, the Constitution, the military, the uniforms of the military, and the flag, it extended criminality to "whoever shall wilfully advocate, teach, defend, or suggest the doing of any of the acts"; to make "defending" an act of criminal espionage is to deny accused persons of right to counsel and to create a rather chilling lawyer-client atmosphere (Commager, ed., *Documents of American History,* 2:146).

[44] Kelly and Harbison, *American Constitution,* pp. 674–80; Forrest McDonald, *Insull* (Chicago, 1962), pp. 168–72. As to the cases, see *Schenck* v. *United States,* 249 U.S. 47 (1919); *Frohwerk* v. *United States,* 249 U.S. 204 (1919); *Debs* v. *United States,* 249 U.S. 211 (1919); *Abrams* v. *United States,* 250 U.S. 616 (1919); *Schaefer* v. *United States,* 251 U.S. 466 (1920); *Pierce* v. *United States,* 252 U.S. 239 (1920); *Gilbert* v. *Minnesota,* 254 U.S. 325 (1920).

side the point that many of the noncitizens professed loyalty to the Japanese emperor and willingness to engage in covert action in the Japanese cause; that it was difficult if not impossible to distinguish loyal Japanese-Americans from the others; that detention doubtless saved some victims from mob action; and that no one was maltreated at the detention centers. The episode was scarcely the Bill of Rights' finest hour. Three cases reached the Supreme Court regarding the internments: in the first the Court hedged its decision but refused to act, in the second it upheld the internments, and in the third it ordered the release of one female.[45]

Lest anyone suppose that these horror stories are ancient history, and that the "rights revolution" perpetrated by the libertarian Warren and Burger courts has finally enshrined the Bill of Rights as the law of the land, let us consider in present terms the remaining circumstances under which the amendments are suspended. One of these is when the targets of government persecution are all but universally reckoned to be "bad guys."

Consider RICO, the Racketeer Influenced and Corrupt Organizations Act. This statute, aimed at suppressing organized crime, turns the criminal justice system upside down. It provides that if a person is guilty of a "pattern of crime," consisting of two or more "predicate acts," or if one is engaged in a "criminal enterprise," these activities constitute another crime, and the guilty party must forfeit all assets used or gained in the pattern or enterprise. Predicate acts are defined as certain specific criminal acts for which one has been convicted during the previous ten years. The real catch comes with the definition of a criminal enterprise: any coordinated activity of two or more persons in which any of the participants has been convicted of a crime during the preceding ten years. Suppose, for example, fifty investors pool their resources to build a shopping mall. If it turns out that one of them, unknown to the others, had earlier been convicted of

[45] The cases were *Hirabayashi* v. *United States,* 320 U.S. 81 (1943); *Korematsu* v. *United States,* 323 U.S. 214 (1944); *Ex parte Endo,* 323 U.S. 283 (1944).

one of the specified crimes, then all are guilty of the crime of violating the RICO statute; and their property is forfeit. A more flagrant violation of due process, of the presumption of innocence, of excessive fines, and of the right to counsel can scarcely be imagined. Yet the Supreme Court held in two decisions rendered in 1989 that the constitutional right to the assistance of counsel is not violated when government seizes "ill-gotten gains."[46]

As indicated, RICO was originally aimed at the Mafia, and though that organization is now virtually defunct, the statute is still used in the so-called war on drugs. But it has also been employed against another group widely perceived as bad guys, namely, the very rich. The prejudice that anyone who makes obscenely large sums of money must necessarily be a crook is deeply rooted in American tradition, and government prosecutors seem to share it. Moreover, the mere threat of a RICO prosecution is sufficient to force targeted firms or individuals to settle out of court for exorbitant fines, lest they lose everything. Such was the case when Shearson-Lehman, which was guilty of no crime, took over E. F. Hutton, one of whose branch managers was.[47]

Another way in which the wealthy are treated as bad guys, not protected by the Constitution, arises from the revolution in tort law—personal damage suits and product liability cases. Perhaps the wildest example is the California case in which the telephone company was required to pay damages when a drunk driver crashed into a telephone booth and injured a man who was inside it. State courts have repeatedly, over the past two decades, employed the "deepest pocket" rule, meaning that when a product liability award is given by a jury, the

[46]The cases were *United States* v. *Monsanto,* 109 S.Ct. 2657 (1989) and *Caplin and Drysdale* v. *United States,* 109 S.Ct. 2647 (1989); Fisher, *American Constitutional Law,* p. 799; Kathleen F. Brickley, "The Current Understanding of the Sixth Amendment Right to Counsel," in Hickok, ed., *Bill of Rights,* pp. 382–90.

[47]In 1988 E. F. Hutton paid a $1.01 million fine for an "alleged" money laundering scheme involving a Rhode Island branch office. For prosecution of corporations as "bad guys," see Milton Eisenberg, *Corporate Criminal Liability: Is It Time for a New Look?* (Washington, D.C., 1991).

richest defendant, no matter how remotely involved, must pay the damages. The Supreme Court has not seen fit to judge such awards as "excessive fines," prohibited by the Eighth Amendment, even though they have amounted to death sentences for many corporations.[48]

Most Americans, of course, are neither filthy rich nor corporations; but they should remember that the definition of the designated bad guy can change and has changed from time to time. Any of us might be next.

Finally, there is the suspension of the Bill of Rights in regard to a matter that affects all Americans, namely the collection of federal income taxes. The First Amendment is suspended by the provision against filing "frivolous returns." What that means is that, though you have a right to burn the flag as political speech, you do not have the right to write "I protest" above your name on your tax return. You do not have the right to remain silent, as a common mugger has, for you must give all the information the Internal Revenue Service requires of you. You do not have immunity against self-incrimination, as a drug dealer has, for you must report all income obtained illegally. And when the IRS accuses you of fraud, the burden of proof is upon you.

One more point needs to be made. Enough has been said above to demonstrate that the Bill of Rights has never been an especially effective guarantor of the rights of people vis-à-vis the national government, and indeed that it has tended to be least effective in those circumstances wherein its protection was most needed. But the question remains, what about protection against abuses by state and local governments?

That question arises because of the development of the doctrine of incorporation—the proposition, first posited in a Supreme Court decision in the 1920s but seriously implemented only since the 1960s, that the due process and equal protec-

[48]The California case was *Bigbee* v. *Pacific Tel. and Tel. Co.,* 665 P.2d 947 (Cal. 1983). See also, for example, National Legal Center for the Public Interest, *Pernicious Ideas and Costly Consequences: The Intellectual Roots of the Tort Crisis* (Washington, D.C., 1990); and L. Gordon Crovitz, "Torturing Torts: Common Law Activism in the States," *Benchmark* 4 (1988):35–43.

tion clauses of the Fourteenth Amendment extended to the states such of the first nine amendments as were "fundamental to ordered liberty." Unfortunately the selective application of that doctrine has resulted, in fact, in an undermining of the very ordered liberty it professes to protect.[49]

Because an adequate summary treatment of this subject would more than double the size of this essay, I shall confine myself to a few general comments. First, the application of the doctrine of incorporation has effectively completed the destruction of the federal system. This means that the power to make decisions in matters of local concern has been taken from local governmental and nongovernmental institutions—where it can be most intelligently, efficiently, and humanely exercised—and has been placed instead in the hands of remote, faceless, unelected bureaucrats and judges who are rarely sensitive to local needs and preferences.

Secondly, the Court has, through the incorporation doctrine, used the Fourth, Fifth, and Sixth Amendments—which were designed to protect the people in their rights to life, liberty, and property—to protect instead the activities of vicious criminals and to render life, liberty, and property unsafe against such sociopaths. In other words, the rights of society have been sacrificed to the rights of certain individuals.

Thirdly, the Court has been utterly capricious in its application of the Bill of Rights to the states and has simultaneously exempted the federal government from its rulings. The result has been to undermine the very idea of the rule of law as

[49] Fisher, *American Constitutional Law,* pp. 393–94, has a table of the incorporation of the Bill of Rights. Notice, however, that in *Gitlow* v. *New York,* 268 U.S. 652 (1925), although the Court maintained that part of the First Amendment was incorporated through the due process clause of the Fourteenth Amendment, the Court upheld the conviction of Gitlow for violating the New York laws of criminal anarchy. In *Palko* v. *Connecticut,* 302 U.S. 319 (1937), the Court admitted that the line of incorporation "may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other." But the Court went on to say that there is a "rationalizing principle," in that those rights that are incorporated are "of the very essence of a scheme of ordered liberty." The Court then ruled against Palko, answering the question if the prohibition against double jeopardy was one of the "fundamental principles of liberty and justice" with a resounding "no."

the antithesis of arbitrary government. Consider the matter of religion alone. The First Amendment provides that "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof." By a process of reasoning that would have thrilled medieval theologians concerned with angels and pin heads, the Supreme Court has construed that language to prohibit the display of the Ten Commandments on a Kentucky elementary school wall,[50] the opening of a high school football game in Georgia with a prayer for the safety of the players, and the presence of a nativity scene on the lawn of a county courthouse. A nativity scene accompanied by plastic effigies of Frosty the Snow Man and Rudolph the Red-Nosed Reindeer, on the other hand, is acceptable. We do not have freedom of religion, only freedom from religion, on the local level. All the while, the confusion is compounded because on the national level Congress can open its sessions with prayers, the United States mint can print "In God We Trust" on the currency, the words "under God" remain in the pledge of allegiance, and the White House can display a Christmas tree without the protective coloration of Frosty or Rudolph.

Fourthly, the Court's posture as the champion of individual liberties through the Bill of Rights has given birth to the widespread impression, mentioned at the outset, that the Constitution for practical purposes *is* the Bill of Rights.[51] That, in turn,

[50] Local defiance and the innate common sense of most Americans result in some interesting compliance with what the Supreme Court says is the supreme law of the land: "In Liberty, Kentucky, for instance, a school forbidden to post the Ten Commandments in classrooms posted instead a page from the *Congressional Record*—on which were found the Ten Commandments" (John Shelton Reed, *Whistling Dixie: Dispatches from the South* [Columbia, Mo., 1990], p. 133).

[51] Rossum opens his article "To Render These Rights Secure," with a quotation from a dedicatory speech for the Bill of Rights Room, Subtreasury Building, 1964, by John Marshall Harlan: "We are accustomed to speak of the Bill of Rights . . . as the principal guarantee of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. The Framers staked their faith that liberty would prosper in the new nation not primarily upon declarations of individual rights but upon the kind of government the Union was to have."

has obscured the erosion of the substance of the Constitution. One by one, the provisions that made the Constitution a body of rules governing the exercise of power—a law governing government itself, prescribing what government can do and how—have been eaten away, and nobody seems to have noticed or cared. The illusion is liberty. The reality is Leviathan.