

PANEL II: HOW EFFECTIVE ARE BILLS OF RIGHTS IN PROTECTING FREEDOM AND CIVIL LIBERTIES?

HOW EFFECTIVE ARE BILLS OF RIGHTS IN PROTECTING INDIVIDUAL FREEDOMS?

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Do bills of rights actually work? That is, are bills of rights effective at protecting individual freedoms and civil liberties, or are other factors such as the structure of government more important? What aspects of the American legal system have allowed us to enjoy so many important and fundamental freedoms for so long? Is it the structure of our government, the diversity of our people, our culture, our history, or a combination of these factors?

If we can isolate the unique characteristics of the American Bill of Rights, will that allow us to predict what might produce the same freedoms in other countries? After all, other nations have bills of rights that contain very elegant enumerated rights; in practice, however, these documents often fall far short of their purported goals. For example, the bill of rights of Cambodia provides that all citizens are equal before the law and have the same rights, freedoms, and duties regardless of gender or religion.¹ Cambodian citizens have the right to choose careers appropriate for their abilities and the needs of society,² as well as the right to denounce, complain, or demand compensation for illegal acts of the government.³ Another provision of the Cambodian bill of rights guarantees freedom of speech, freedom of the press, and freedom of assembly.⁴ The Cambodian bill of rights even protects individual Cambodian citizens from

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1. CAMBODIA CONST. ch. III (Rights and Duties of Citizens), art. 30, *reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flanz eds., Thomas Bowen & Jacqueline M. Ross trans., Oceana Publications, Inc. Sept. 1989).

2. *See id.* art. 33.

3. *See id.* art. 39.

4. *See id.* art. 37/1.

physical violation.⁵ In practice, however, we know that the rights ostensibly guaranteed by this document have not been guaranteed in fact.⁶

The Cambodian bill of rights is not alone in its ostensible consideration for the health and welfare of the country's citizens. Consider, for example, the bill of rights of another country, which holds that all citizens are equal before the law regardless of gender, social origin, and religion.⁷ This same bill of rights guarantees equal opportunities to all citizens,⁸ safeguards the dignity of man,⁹ and unequivocally prohibits any physical or psychological harm.¹⁰ Ironically, these provisions are enumerated in the Constitution of Iraq.

The Constitution of the late Soviet Union was also rather surprising. For example, it guaranteed all citizens the right to rest and leisure.¹¹ In addition, under the Soviet bill of rights, Soviet citizens were supposedly entitled to health protection,¹² material security in old age,¹³ housing,¹⁴ education,¹⁵ and benefits from the achievements of culture.¹⁶

These few examples illustrate that although bills of rights exist throughout the world, they do not always result in the same protection of individual liberties that we enjoy in this country. What makes a bill of rights effective? How effective can a bill of rights be at protecting freedom and civil liberties? This panel of distinguished and well-versed individuals will attempt to answer those questions.

5. *See id.* art. 35.

6. *See, e.g.,* Karin Davies, *Amnesty objects to Khmer Rouge killing*, UPI, Sept. 2, 1990, available in LEXIS, Nexis Library, Wires File.

7. *See* IRAQ CONST. ch. III (Fundamental Rights and Duties), art. 19(a), reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Fouad F. Shafik trans., Oceana Publications, Inc., Apr. 1990).

8. *See id.* art. 19(b).

9. *See id.* art. 22(a).

10. *See id.*

11. *See* U.S.S.R. CONST. pt. II (The State and the Individual), ch. 7 (The Basic Rights, Freedoms, and Duties of Citizens of the U.S.S.R.), art. 41, reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., John N. Hazard trans., Oceana Publications, Inc., Oct. 1990).

12. *See id.* art. 42.

13. *See id.* art. 43.

14. *See id.* art. 44.

15. *See id.* art. 45.

16. *See id.* art. 46.

THE EFFECTIVENESS OF BILLS OF RIGHTS

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Bills of rights, in and of themselves, do not effectively protect liberty. Guatemala, Iran, the Soviet Union and various authoritarian regimes elsewhere have had wonderfully worded bills of rights that produced no discernible increase in respect for individual liberties in those countries.¹ Rather, a bill of rights depends for its effectiveness on other political and constitutional conditions, as is evident from the quite different legal situations in the United States and France, the two countries with the most famous bills of rights. In the United States, courts give practical impact to the Bill of Rights through the doctrine of judicial review;² in France, without judicial review, the constitutional role of the Declaration of the Rights of Man is largely instructive.³ At the same time, without a bill of rights or the doctrine of judicial review, England has managed to provide greater protection for basic individual rights than many countries having bills of rights.⁴

Regardless of the experience of other countries, the conventional wisdom here and abroad is that the Bill of Rights is the principal protector of American liberties. A more balanced view recognizes that claims about the American Bill of Rights generally overstate its effectiveness; the protection of liberty in the United States derives in large part from other components of the constitutional system.

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1. The constitutions of Guatemala, Iran, and the Soviet Union do not contain sections designated formally as bills of rights. The constitutions do contain specific provisions addressing individual rights. See GUATEMALA CONST. arts. 3-46, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Peter B. Heller trans., Oceana Publications, Inc. Sept. 1986); IRAN CONST. arts. 19-42, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Changiz Vafai trans., Oceana Publications, Inc. Apr. 1980); U.S.S.R. CONST. arts. 33-69, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., John N. Hazard trans., Oceana Publications, Inc. Oct. 1990). See generally Maimon Schwarzschild, *Variations on an Enigma: Law in Practice and Law on the Books in the USSR*, 99 HARV. L. REV. 685 (1986) (reviewing OLYMPIAD S. IOFFE AND PETER B. MAGGS, *SOVIET LAW IN THEORY AND PRACTICE* (1983)).

2. See IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 257-58 (5th ed. 1959).

3. See *id.* at 261.

4. See *id.* at 259, 264, 278.

This paper distinguishes and separates the political and symbolic effectiveness of the Bill of Rights from its structural and practical effectiveness. The Bill of Rights has been quite successful politically and symbolically. Adoption of the Bill of Rights was a politically prudent act that solidified support for the Constitution.⁵ James Madison, who doubted the efficacy of a bill of rights, proposed the Bill of Rights largely to quiet those opposed to the Constitution who feared for their liberty under a new and more energetic government.⁶ At the same time he reassured his colleagues in the House of Representatives, when he introduced his proposal for the Bill of Rights, that nothing therein changed the structure of the Constitution.⁷ With ratification of the Bill of Rights, the Constitution enjoyed almost universal approbation.⁸ By guaranteeing overwhelming consensus rather than mere majority support for the Constitution, the Bill of Rights was and continues to be a very effective political accomplishment.

The Bill of Rights has been almost too successful in its symbolic sense. Its effect on the minds of people is so strong that many think the Constitution consists of only the Bill of Rights. Attempts to educate the public about the Constitution naturally focus on the Bill of Rights, because it is simply more exciting "stuff" than other aspects of the Constitution. As Justice Scalia has said, "A crowd is much more likely to form behind a banner that reads 'Freedom of Speech or Death' than one that says 'Bicameralism or Fight;' but the latter in fact goes much more to the root of the matter."⁹

The political and symbolic success of the Bill of Rights has fulfilled the hopes of its chief proponents, the Anti-Federalists. As Professor Herbert Storing wrote, the Anti-Federalists "were typically quite doubtful about the practical utility" of a bill of

5. See FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC* 233-234 (1965) (noting that adoption of the Bill of Rights diffused calls for a second constitutional convention).

6. See Editorial Note, *Madison's Election to the First Federal Congress, October 1788-February 1789*, 11 *THE PAPERS OF JAMES MADISON*, at 302-03 (Robert A. Rutland et al. eds., 1977).

7. See 1 *ANNALS OF CONG.* 432-33, 441 (Joseph Gales ed., 1789).

8. See generally J.R. Pole, *Introduction to THE AMERICAN CONSTITUTION: FOR AND AGAINST* 17-19 (J.R. Pole ed., 1987) (discussing the historical battle over the adoption of the Bill of Rights and positing that the Constitution would have encountered less opposition if a bill of rights had been included in the original draft).

9. Justice Antonin Scalia, Speech at the University of Georgia (April 6, 1989).

rights.¹⁰ Rather, they viewed it as “a prime agency of that political and moral education of the people on which free republican government depends.”¹¹

I.

A proper judgment about the structural and practical effect of the Bill of Rights turns on several points. First, some amendments that are structural in nature may or may not be understood as being part of the Bill of Rights. The Bill of Rights in other words, may or may not include the Ninth,¹² Tenth¹³ and Fourteenth¹⁴ Amendments. Second, the Bill of Rights is selectively enforced. Third, the Bill of Rights, arguably, does nothing in practice that otherwise would not be done under a system of separation of powers that includes the doctrine of judicial review.

A.

Reference to the Bill of Rights sometimes includes the first ten amendments and sometimes only the first eight. Exclusion of the Ninth and Tenth Amendments seems to be a tacit statement that these amendments are “states’ rights,” not “individual rights,” and therefore do not belong in a bill of rights. With the discovery by some of an individual “right of privacy” within the Ninth Amendment,¹⁵ the list of “states’ rights” may have been reduced to only the Tenth Amendment. Nevertheless, for many of the Anti-Federalists, the subject matter addressed by the Tenth Amendment was the most important component of a bill of rights.¹⁶ As Madison wrote in *The Federalist Number 43*, advocates of a bill of rights differed, with some wanting protections of individual rights and others wanting protec-

10. HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 67 (Murray Dry ed., 1981).

11. *Id.* at 70.

12. See U.S. CONST. amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

13. See U.S. CONST. amend. X (“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.”).

14. See U.S. CONST. amend. XIV.

15. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Blackmun, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 485, 487 (1965) (Goldberg, J., concurring); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-21, at 1429 (2d ed. 1988).

16. See ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 204 (1955).

marily for states' rights.¹⁷

The Anti-Federalist leaders opposed the shift of power to the central government epitomized by the Necessary and Proper Clause.¹⁸ What became the Tenth Amendment was intended by James Madison as a response to this concern, although it actually did nothing to change the structure of powers as provided in the main body of the Constitution.¹⁹ The Bill of Rights, even with the Tenth Amendment, was not meant to be and has not been effective in the way many Anti-Federalists would have wanted.²⁰ It added nothing that was not already contained in the structure of the Constitution. Federalism and separation of powers guaranteed liberty and protected against statism by preventing a consolidated government.

Changes in the constitutional structure, in particular the Fourteenth Amendment and the Seventeenth Amendment,²¹ have centralized power at the expense of the States.²² References to the Fourteenth Amendment tend to emphasize its relation to the Bill of Rights rather than to the shift of power it effects. The incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, a development occurring mostly since the 1960s, and its application to the States, represents more the triumph of the Fourteenth Amendment than the Bill of Rights.²³ Attaching the Bill of Rights to the Fourteenth Amendment expanded its reach and further eroded federalism.²⁴ As national powers have become more

17. See THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

18. See U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power. . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution").

19. See 1 ANNALS OF CONG., *supra* note 7, at 441.

20. See *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The [Tenth Amendment] states but a truism. . . . There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between national and state governments as it had been established by the Constitution before the amendment. . . .").

21. See U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .").

22. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) ("[C]hanges in the structure of the Federal Government have taken place since 1789, not the least of which has been . . . the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the Federal political process.").

23. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (discussing selective incorporation and listing the Bill of Rights provisions made applicable to the States); Akhil Reed Amar, *Some Comments on "The Bill of Rights As A Constitution,"* 15 HARV. J.L. & PUB. POL'Y 99, 103 n.21 (1992).

24. See generally McDONALD, *supra* note 5, at 234 (noting that as originally passed by

consolidated, the rights of the people necessarily have been reduced. Greater concern for protecting liberty through the Bill of Rights naturally arises because the other institutional protections have become less effective.

B.

A survey of the first eight amendments shows that they do not receive equal enforcement. Within the first eight amendments, the Second²⁵ and the Third Amendments²⁶ are generally ignored by the courts. The Third Amendment is undoubtedly obsolete, but the failure to give the Second Amendment any effect²⁷ seems to reflect its disfavor in the judiciary and among elite opinion makers. Nothing on the face of the Bill of Rights suggests that it has less importance than any other of the eight amendments.

Judicial selectiveness is evident elsewhere with regard to the Bill of Rights. The grand jury provision of the Fifth Amendment²⁸ and the right to civil jury trial of the Seventh Amendment²⁹ have not been applied to the States although the Court has so applied substantially all other provisions of the first eight amendments.³⁰ Although part of the failure to apply the

the House, the first proposed amendments to the Constitution would have applied to the States, but the Senate eliminated that feature of what became the Bill of Rights). For an early case decided before the Fourteenth Amendment was adopted, see *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which held that the Fifth Amendment's Takings Clause is not applicable to the States.

25. See U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be abridged.").

26. See U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

27. See *United States v. Miller*, 307 U.S. 174 (1939) (holding that the Second Amendment does not prevent congressional firearms control legislation that is not shown to interfere with a state militia); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (holding that the Second Amendment does not limit state power to regulate bearing of arms); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (holding that the Second Amendment is inapplicable to purely private conduct).

28. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

29. See U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

30. See *Hurtado v. California*, 110 U.S. 516 (1884) (holding that the Fifth Amendment right to a grand jury indictment is inapplicable to the States); *Walker v. Sauvinet*, 92 U.S. 90 (1875) (holding that the States are not required to provide trial by jury in suits at common law). For a discussion of selective incorporation and a list of cases in

grand jury and civil jury trial provisions to the States may be attributable to practical difficulties, those difficulties are not any greater than the problems associated with applying other provisions of the Bill of Rights to the States.

The Supreme Court's failure to apply these amendments to the States may reflect a value judgment about the substantive content of these provisions. Like the Second Amendment, the jury provisions represent community rights.³¹ The grand jury protects individual liberty in some cases, but it more prominently enforces the attitudes of the community. Its inquisitorial nature and utility to prosecutors have put it in disfavor with civil libertarians.³² The civil jury trial, one of the two rights the Anti-Federalists most demanded, has detractors who argue that some civil jury trials may violate due process.³³

The Supreme Court has exercised judicial review to protect individual rights without great regard for the particular wording or even the list of rights in the Bill of Rights. The Supreme Court has ignored some rights, given more or less importance to some over others as it chooses, and has invented others. As Justice Scalia remarked in a recent dissent, the "Court's constitutional jurisprudence . . . alternately creates rights that the Constitution does not contain and denies rights that it does."³⁴

The most dramatic constitutional changes effected by federal courts have come under the Fourteenth Amendment. Whether considered as part or as absorber of the Bill of Rights, the Fourteenth Amendment does not list concrete rights. The Due Process³⁵ and Equal Protection³⁶ Clauses, if held to their his-

which the Supreme Court has held that particular Bill of Rights provisions are applicable to the States, see *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) and *TRIBE*, *supra* note 15, § 11-2, at 772-773.

31. See FORREST McDONALD, *NOVUS ORDO SECLORUM* 289 (1985).

32. See, e.g., MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 52-116 (1977).

33. See *In Re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069, 1086 (3d Cir. 1980) (holding that the Seventh Amendment right to civil jury trial may be limited by the constitutional right to due process). See generally Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 44-47 (1990) (discussing the emergence of judicial controls over jury conduct).

34. *County of Riverside v. McLaughlin*, 111 S.Ct. 1661, 1671 (1991) (Scalia, J., dissenting) (criticizing the Court's holding that the Fourth Amendment does not compel immediate determination of probable cause upon completion of steps incident to a warrantless arrest).

35. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

36. See *id.* ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

torical meanings, would not have yielded such a creative jurisprudence.³⁷ The development of these clauses has not been unlike the development of a right of privacy based on the Ninth Amendment.³⁸ Indeed, the expansive interpretation of the Fourteenth Amendment made outright invention of rights seem not terribly radical. Judges have come to view constitutional wording as only hooks on which to hang their notions of the good, which results in a distorted form of natural law interpretation of the Constitution.

C.

Evaluating the effectiveness of the Bill of Rights comes down to the effect the Bill of Rights has had on the operation of judicial review. Although not controversial in itself, this observation leads to a more controversial point made in *The Federalist*. Alexander Hamilton, who gave the classic argument for judicial review,³⁹ also argued shortly thereafter that a bill of rights was not only unnecessary but dangerous.⁴⁰ How could Hamilton expect the courts to protect individual rights if not through a bill of rights? One answer is that the Constitution already provided certain rights,⁴¹ such as the right to a jury trial in criminal cases,⁴² the writ of habeas corpus,⁴³ and the *ex post facto* provision.⁴⁴ But Hamilton's point goes beyond positive provision for rights. In his view the national government does not give rights; the source of rights is elsewhere.⁴⁵ As stated in the Ninth Amendment, the listing of rights does not negate those retained by the people. *The Federalist* and the Ninth Amendment make two points: (1) that any bill of rights is non-exhaustive, and (2) that the source of rights lies outside of the federal gov-

37. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) (arguing that the Fourteenth Amendment was meant to be read narrowly).

38. See, generally, CALVIN R. MASSEY, *FEDERALISM AND FUNDAMENTAL RIGHTS: THE NINTH AMENDMENT* (1987), reprinted in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 321-34 (Randy E. Barnett ed., 1989).

39. See *THE FEDERALIST* No. 78, at 466-471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

40. See *THE FEDERALIST* No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

41. See *id.* at 510-511.

42. See U.S. CONST. art. III, § 2, cl. 3.

43. See *id.* art. I, § 9, cl. 2.

44. See *id.* cl. 3.

45. See *THE FEDERALIST* No. 84, *supra* note 40, at 513.

ernment.⁴⁶ This idea did not derive from abstract philosophic discussion, but from the history of English rights as reflected in the common law. For the Federalists, it was more important to provide constitutional protection for existing rights through judicial review than it was to speculate about what should be written into a bill of rights.⁴⁷

On the other hand, the Anti-Federalists wanted a list of rights that were beyond the power of government, even the judiciary, to alter.⁴⁸ Their objective has been partly accomplished to the extent that provisions of the Bill of Rights are removed from the reach of Congress; but these amendments, of course, have remained subject to judicial control. At the time the Bill of Rights was being debated, the practice of judicial review had not yet been implemented,⁴⁹ and thus its implications were not fully appreciated. Nevertheless, the Anti-Federalists trusted jurors more than judges to protect rights, and some Anti-Federalists even predicted the federal courts would become a threat to liberty.⁵⁰ Ironically, the practical effect of the Bill of Rights has been to protect Court pronouncements on rights from Congress whether or not the Court has been faithful to the Bill of Rights itself. Given the Anti-Federalists' preference for popular will,⁵¹ they probably would not have approved of such an outcome.

II.

Finally, then, the inquiry becomes whether the Supreme Court has been faithful to the Bill of Rights. Since the 1960s and through much of the 1970s and 1980s, the Court has applied the Bill of Rights expansively. When going well beyond the textual basis in the Bill of Rights and operating often as common law or natural law judges, the Justices have pleased civil libertarians. In the long term, however, such liberality actually undermines the security of rights; courts can easily take away the rights they have given. When a new majority on the

46. See STORING, *supra* note 10, at 65.

47. See *id.* at 74.

48. See *Letters from the Federal Farmer XVI*, in 2 THE COMPLETE ANTI-FEDERALIST 214, 323 (Herbert Storing ed., 1981).

49. The Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), introduced the principles of federal judicial review.

50. See STORING, *supra* note 10, at 50.

51. See George R. Johnson, *Introduction to THE WILL OF THE PEOPLE: THE LEGACY OF GEORGE MASON 1-2* (George R. Johnson, Jr. ed., 1991).

Court contracts its view of rights, proponents of expansion have no secure ground from which to make a critique. Indeed, once judicial creativity is taken for granted it is difficult to distinguish whether a contraction amounts to a failure to expand further, a return to the text, or a narrowing of the text.

In terms of the first eight amendments, what remains to be evaluated are the First, Fourth, Fifth, Sixth, and Eighth Amendments. Other than the First and parts of the Fifth, these Amendments deal primarily with criminal investigation, trial, and punishment.⁵² The Fifth does include the non-criminal applications of the Due Process Clause as well as the Takings Clause. Given that the criminal provisions and the Due Process Clause largely restate common law rights, the new rights in the first eight Amendments are the First Amendment and the Takings Clause of the Fifth Amendment. The First Amendment's speech and press clauses have received vigorous enforcement by the Court since early in this century.⁵³ The Takings Clause has all but been ignored by the federal courts until recently. The following discussion divides therefore into a discussion (a) of the First Amendment and (b) of the provisions related to criminal investigation, trial, and punishment.

A. *The First Amendment*

Freedom of speech, press, and religion existed on a wide, if imperfect, scale long before Court enforcement of the First Amendment. Congressional passage of the Alien and Sedition Acts in 1798⁵⁴ produced a political outcry that judged these acts to be incompatible with the American constitutional system.⁵⁵ The acts were never declared unconstitutional by the Court; the Jeffersonians did not want to test them in the Court because they feared the Federalist Court would uphold them as constitutional.⁵⁶ The solution came not from the Court, but

52. See notes 67-70 *infra* and accompanying text.

53. See *Herndon v. Lowry*, 301 U.S. 242 (1937) (adopting the "clear and present danger" test); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (holding that peaceable assembly for lawful discussion cannot be made a crime); *Fiske v. Kansas*, 274 U.S. 380 (1927) (overturning convictions for protected speech); see also *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (stressing the importance of encouraging free speech and maintaining a free marketplace of ideas).

54. See *The Sedition Act*, ch. 74, 1 Stat. 596 (1798); *Alien Act (or Alien Friends Act)*, ch. 58, 1 Stat. 570 (1798).

55. See RUTLAND, *supra* note 16, at 220.

56. See *id.* at 221.

rather, as predicted in *The Federalist*, from the people.⁵⁷ Politically, the Federalists lost and destroyed their party in the process because they did not heed the injunction of *The Federalist*; namely, that freedom of the press and freedom of speech would be protected by public opinion,⁵⁸ as indeed the Jeffersonians proved.

Likewise, freedom of religion has been widespread since the beginning of the Republic, due in large part to the efforts of Congress. In the Northwest Ordinance, Congress required that all new states provide a freedom of religion provision in their own state constitutions in order to be admitted to statehood.⁵⁹ The freedom of religion provisions of the Northwest Ordinance were connected to its provision for education.⁶⁰ Beginning in the late 1940s the Court used the Establishment Clause⁶¹ to undo the linkage established by Congress between education and freedom of religion.⁶² The Court deviated from James Madison's view of religious freedom, which involved promotion of many religious sects.⁶³ The Court has unwittingly promoted polarization by ignoring the lessons of experience.

57. The Sedition Act and the Alien Act expired by their own terms on March 3, 1801 and June 25, 1800, respectively. Before this date, public outcry and Thomas Jefferson's efforts led to passage of the Virginia and Kentucky Resolutions declaring the Alien and Sedition Acts unconstitutional. See generally Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909 (1991) (discussing constitutional protection of non-citizens and outlining Jefferson's use of public outcry against the Alien and Sedition Acts to bolster support for the Jeffersonian Republicans).

58. See THE FEDERALIST No. 84, *supra* note 40, at 513.

59. See Ordinance of July 13, 1787, *reprinted in* Act of Aug. 7, 1789, ch. VIII, 1 Stat. 50, 51 n.(a).

60. "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and means of education shall forever be encouraged." *Id.* at 52 n.(a).

The Northwest Ordinance also prohibited slavery in the new territories. See *id.* at 53 n.(a). Unfortunately Congress later compromised this provision by exempting the Southern territories. As history has shown, the Court did not do better than Congress. Instead, the Court ignored the anti-slavery provision in the Northwest Ordinance in the course of declaring the Missouri Compromise unconstitutional. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

61. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

62. See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (declaring program unconstitutional that allowed a private religious group representing Catholic, Protestant, and Jewish faiths to use public school buildings to give religious instruction).

63. See THE FEDERALIST No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961). See also John S. Baker, Jr., *The Establishment Clause*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* (E. Hickok ed., 1991).

B. *Amendments and Criminal Law*

While history shows that legislative bodies have both protected and threatened liberty, courts are not generally seen as potential threats to liberty. Despite *Dred Scott*,⁶⁴ the Court is generally thought of as the least dangerous branch.⁶⁵ *The Federalist*, however, recognizes that a bill of rights could be the basis from which to derive constructive powers.⁶⁶

Consider the Fourth,⁶⁷ Fifth,⁶⁸ Sixth,⁶⁹ and Eighth Amendments,⁷⁰ which deal primarily with matters of criminal procedure. Quite apart from their application to defendants in state trials, these Amendments assume that the federal government has a general police power. To the contrary, however, one of the few things on which Federalists and Anti-Federalists seem to have agreed was that the national government had no general police powers.⁷¹ Yet the Court in 1903 posited a general police power that had never before existed.⁷² After a long evolution elaborated elsewhere,⁷³ we have come to the point

64. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (holding that a free black person was an article of property and not a citizen protected by the Constitution).

65. See THE FEDERALIST No. 78, *supra* note 39, at 465. See also ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

66. See THE FEDERALIST No. 84, *supra* note 40, at 514.

67. See U.S. CONST. amend IV. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

68. See U.S. CONST. amend. V. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

. . . .

69. See U.S. CONST. amend. VI. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

70. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

71. See McDONALD, *supra* note 31, at 288.

72. See *Champion v. Ames*, 188 U.S. 321 (1903) (upholding constitutionality of congressional act to suppress lottery tickets in interstate commerce).

73. See John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495 (1985).

today that neither conservatives nor liberals seem to question the appropriateness of Congress enacting massive criminal legislation and exercising extensive police powers. It seems to be accepted both that such powers exist and that the courts will protect against any abuse of federal police powers. If courts, however, allow criminal prosecutions under federal statutes of questionable constitutionality, is this not a deprivation of liberty? This creation of national police powers seems to have come about in a way predicted in *The Federalist*, namely, that a bill of rights could imply that the central government had powers that it actually does not have.⁷⁴

Prior to the application of the Fourth, Fifth, and Sixth Amendments to the States in the 1960s,⁷⁵ federal courts had developed the interpretation of criminal protection in the context of the federal government extending the reach of federal criminal law—first against gambling,⁷⁶ then against alcohol,⁷⁷ and more recently against drug trafficking.⁷⁸ Today, criminal defendants have all these protections while courts generally pass lightly over very basic issues related to the constitutionality of the statute under which a defendant has been indicted. An inadequately defined statute, whether or not vague, may violate separation of powers because the failure adequately to define thereby delegates that function to the judiciary.⁷⁹

The federal courts did not need a bill of rights to protect rights expansively under federal law. Courts recognized common law rights and exercised supervisory jurisdiction. Congress could have overturned the existing or expansive interpretations of the common law. While the Supreme Court was dealing only with federal criminal matters, it was unlikely

74. See THE FEDERALIST No. 84, *supra* note 40, at 513.

75. The following Bill of Rights provisions pertaining to criminal defendants were applied to the States during this period: Fourth Amendment freedom from unreasonable search and seizure and exclusionary rule, *Mapp v. Ohio*, 367 U.S. 643 (1961); Fifth Amendment privilege against self-incrimination, *Malloy v. Hogan*, 378 U.S. 1 (1964); Fifth Amendment guarantee against double jeopardy, *Benton v. Maryland*, 395 U.S. 784 (1969); Sixth Amendment right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); Sixth Amendment right to confront opposing witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965); Sixth Amendment right to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

76. See Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (1895) (suppressing national and interstate lottery traffic).

77. See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

78. See Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961 (1988).

79. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820).

to arouse the ire of many people or attract the attention of Congress. Federal criminal matters were relatively few and far removed from the concern of ordinary citizens so long as the federal government was not exercising general police powers. For example, the exclusionary rule, which had been applied in federal courts for years,⁸⁰ caused a great public debate only after it was applied to the States in the 1960s.⁸¹

The Court's determination to supervise the States was more important than any belief that the Bill of Rights was actually incorporated into the Fourteenth Amendment Due Process Clause. Not until the 1960s did a majority of the Court begin to accept the idea that there is a connection between the Fourteenth Amendment Due Process Clause and the Bill of Rights.⁸² This conclusion resulted from the influence of Justice Hugo Black, who was concerned about the Court's apparently arbitrary supervision of the States through a natural law approach to the Fourteenth Amendment,⁸³ and also from a consensus on the Court that lower federal courts needed guidance in the form of rules. As the Court therefore increasingly turned to the Bill of Rights in deciding what was "fundamental," it eventually produced something like a code of criminal procedure.

Ad hoc decisionmaking by the Supreme Court has proven to be a very inefficient method of creating a code of criminal procedure. Although exciting to academics, the case method of developing fact-oriented rules in the area of search and seizure has produced great uncertainty resolved only after years of litigation over metaphysical distinctions such as those previously pertaining to whether a container in a vehicle is subject to search.⁸⁴ Although at least one attempt was made to codify pre-indictment procedure, including search and seizure,⁸⁵ the idea of Congress promulgating a set of rules for pre-indictment pro-

80. See *Boyd v. United States*, 116 U.S. 616, 638 (1886) (holding that use of evidence seized in unconstitutional search is prohibited in federal court); *Weeks v. United States*, 232 U.S. 383 (1914) (holding that a search or seizure violating the Fourth Amendment would result in the exclusion of the seized evidence from the trial).

81. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence obtained by unconstitutional searches and seizures is inadmissible in state court).

82. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

83. See *Adamson v. California*, 332 U.S. 46, 75 (1947) (Black, J., dissenting).

84. See, e.g., *California v. Acevedo*, 111 S.Ct. 1982 (1991) (holding that police can conduct a warrantless search of a container in a vehicle even when lacking probable cause to search the entire vehicle and therefore simplifying previous rules).

85. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975).

cedure consistent with the Court's interpretation of the Bill of Rights would not receive much academic support. Generally, writers in the field would object both to "freezing" the law and to recognizing that Congress has any authority over Bill of Rights matters.⁸⁶

Regarding the first objection, one would think that rules would make the protection of rights more certain. But the same mindset that opposes reading the Bill of Rights as adopted also opposes tying the Bill of Rights to any particular content that might preclude further judicial expansions. Codification by Congress would not prevent later codal modifications—at least within constitutional limits. To admit this reality, though, would be to admit that Congress has a role in the interpretation and implementation of the Bill of Rights.

Continual expansion of some rights does not necessarily mean greater implementation of the Bill of Rights. When courts expand the Fourth and Fifth Amendments, they also contract the Sixth Amendment right to jury trial because application of exclusionary rules in the Fourth and Fifth Amendments takes issues away from the jury. Although the most important right for both the Federalists and the Anti-Federalists was a right to jury trial in criminal cases,⁸⁷ the Supreme Court has been cutting back on the right to criminal jury trial almost since the beginning by constantly turning questions of fact into questions of law. The current conventional wisdom considers jury trials to be too expensive and too time consuming. In criminal cases, courts and lawyers prefer to "move" cases by plea bargaining; thus, that most important right of criminal jury trial exists in practice in relatively few cases. In civil cases, some argue that some jury trials violate due process.⁸⁸ The legal establishment, which historically has been more devoted to law than liberty,⁸⁹ has substituted efficiency

86. In discussing what he termed "constitutional common law," Professor Henry Monaghan argued for recognition of a congressional power to revise "subconstitutional rules" laid down by federal courts, but he recognized that such a notion conflicts with basic assumptions about the authoritativeness of judicial review held not only by supporters of judicial activism, but also by adherents of judicial restraint. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 744 (1975).

87. See THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y, 119, 120-22 (1992).

88. See *supra* note 33 and accompanying text.

89. See ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 285 (Phillipe Bradley, ed.

for what was once deemed to be the most important right.

CONCLUSION

In the matters that most concerned proponents of a bill of rights—matters of conscience, speech and press, and jury trial—the Court has had a great effect but probably not the effect the Anti-Federalists intended. The Court's interpretation of the First Amendment has produced a much more open society at the local level than the Anti-Federalists intended—a society in which a local majority cannot use the power of the state to inhibit the expression of unorthodox views by a minority, but a minority can use the power of federal courts to suppress the expression of religious views by the local majority. Similarly, the overall effect of the Court's decisions in matters of criminal procedure—increasing federal police powers, limiting the right to jury trials, and applying the Bill of Rights to the States—has been to produce a constitutional system that is both more libertarian at the local level⁹⁰ and more statist at the national level. In all these areas, the federal courts have roughly reversed the ideals of the Anti-Federalists, which prompted their call for a bill of rights.

1945) (1838) ("It must not be forgotten . . . that if [lawyers] prize freedom much, they generally value legality still more; they are less afraid of tyranny than of arbitrary power and provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied.").

90. "Typically [the Anti-Federalists] favored both governmental encouragement of religion and liberty of individual conscience." STORING, *supra* note 10, at 64 (footnote omitted).

