BILLS OF RIGHTS AND REGRESSION TO THE MEAN

FRANK H. EASTERBROOK*

Lawyers overstate the importance of law in general and constitutions in particular. Judges are the worst sinners. It is natural to suppose that your profession is vital to society, and that its central tenets are most important of all. No wonder a group of lawyers is assembled on this bicentennial of the Bill of Rights, which most lay persons and many lawyers conceive as the core of the Constitution rather than James Madison's afterthought. I have come as a wet blanket, equipped with a skeptical view of the importance of elderly laws.

Political and economic culture have more to do with our liberties than does the written word. It is not constitutional language but civic culture, including education and (relative) toleration for differing views and practices that separates the United States from nations where none of us would want to live. Madison, whose silhouette is the emblem of the Federalist Society, wrote our Bill of Rights but thought it a sop to opponents of the Constitution. He doubted the value of his amendments in part because he thought that the bulwark lay in the political institutions created by Articles I, II, and III, and in part because he feared that to list withheld powers could support an inference that other powers had been granted (although the Ninth Amendment allayed that fear).[1] His dominant sentiment, however, was one to which Learned Hand has given the best expression:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. . . . [I]n a

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago. This essay is a revised version of a talk at the annual meeting of the Federalist Society on March 2, 1991, and is I thank Keith R. Dolliver, Richard A. Posner, Cass R. Sunstein, and Charles F. Webber for helpful comments on an earlier draft.

1. *See generally* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301.

> society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.[2]

Madison believed that constitutions exercise their influence through the structure of government they establish and by influencing public aspirations and sentiment, not through the force of judicial decisions. He was more concerned about intolerance by the States than by the national government, for he expected the difficulty of assembling like-thinking, repressive coalitions to diffuse factions.[3] Yet his Bill of Rights did not apply to the States. No wonder, then, that Madison expected few controversies within the ambit of the Bill of Rights, and he was not surprised. Until he had left the White House, the Supreme Court did not decide a single case under the Bill of Rights.[4] Despite the profusion of constitutional litigation in this century, Madison's Bill of Rights remains peripheral to our daily lives.[5]

Why is this? One reason is trite: The Supreme Court follows the election returns. Not in any crude sense, but indirectly because the political branches mold the Court by appointing justices whose views reflect conventional wisdom about wise governance. There is enough plasticity in the Bill of Rights — and enough forgetfulness about our constitutional history— that the Constitution has been remade in contemporary image several times. The justices themselves cannot escape their upbringing and the culture surrounding them; few today can even *imagine* a time when persons were treated as property, and when the ordinary business of modern government would have been seen as rollicking infringement of the rights of property.

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2. This quotation combines parts of two similar expressions by Hand, the first from THE SPIRIT OF LIBERTY (1944), *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES BY LEARNED HAND 189-90 (Irving Dilliard ed., 1960), and the second from THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION (1942), *reprinted in id.* at 164.

3. *See* FEDERALIST No. 10 (James Madison).

4. The first is Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819), which held that Congress did not violate the Seventh Amendment when providing for the application of Maryland law in the District of Columbia. Maryland dispensed with a jury trial in the case at issue. Madison died on June 28, 1836, before the Supreme Court decided another case under his Bill of Rights. He did, however, veto a statute that he believed inconsistent with the Establishment Clause of the First Amendment. *See* 22 ANNALS OF CONG. 982 (Feb. 21, 1881), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 99 (Phillip B. Kurland & Ralph Lerner eds., 1987).

5. My skepticism about the importance of law, as opposed to political culture, puts me in the company of my distinguished colleague Cass R. Sunstein, whose *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 765-69 (1991), I commend to you.

The remaking of the Constitution does not yield perfect concord with modern sensibilities. Sometimes the Constitution assumes a form that is dead politically but survives in superannuated justices. Sometimes the Constitution is cast in the image of Francis Bacon's *New Atlantis*, as justices who think they understand what right-thinking persons will want tomorrow attempt to have a constitution ready for them when they get there. We have seen enough of these varieties of change to doubt that it is *Madison's* Bill of Rights being implemented in any period, as opposed to some vision of morality and sound government being vindicated in its name. Legal views of the Constitution regress to the mean of modern culture.

Consider our track record. This nation got along without a Bill of Rights until this century. Until the Court absorbed the Takings Clause of the Fifth Amendment into the Due Process Clause of the Fourteenth in 1897,[6] none of the provisions of the Bill of Rights had been applied to the States. Until the 1960s things remained that way. The "incorporation debate" did not start until the 1940s. As for the federal government: The Nineteenth Century expired with few applications of the Bill of Rights. The first declaration of unconstitutionality in the name of the Bill of Rights was a fiasco. It was *Dred Scott*.[7] Chief Justice Taney declared the Missouri Compromise unconstitutional, asserting that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[8] The "property" to which he referred was a human being; adding insult to injury the Court skipped lightly over the fact that the word following "due" is "process", yet *Dred Scott* laid claim to a power of substantive review. More such "victories" for the Bill of Rights would have jeopardized our claim to be a civilized nation.

Let us put to one side the more than fifty years during which the Court thought most social welfare legislation inconsistent with the Constitution and turn to the last few decades. During

6. *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).
7. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
8. *Id.* at 450.

the 1960s, when the Supreme Court applied most provisions of the Bill of Rights to the States, it was not directing the States to do anything unusual. The federal Bill of Rights was assembled from provisions in state constitutions.[9] Almost nothing the Court told the States to do in the 1960s was not present already in the organic law of the great majority of them. The Court was dealing with outliers, not changing the rules under which most persons lived.

Spectacular counterexamples will be adduced to refute claims of the sort I have been making. *Brown v. Board of Education*[10] comes first in any such list. No one can deny *Brown*'s importance to the struggle for racial equality. You must put *Brown* in perspective to understand the claim that the Bill of Rights (broadly understood to include the three Reconstruction Amendments) has transformed the nation, however.

When it was politically unthinkable that public institutions would be integrated, the Supreme Court held that the Constitution requires no such thing.[11] Thoughtful persons believe that decisions such as *Plessy v. Ferguson* legitimated and helped support the Jim Crow movement; others believe that at all times the Court did what it could to assist African-Americans.[12] Be that as it may, not until integration began to be thinkable did the Court take a few tentative steps in that direction.[13] At about the same time President Truman issued an executive order desegregating the armed forces.[14] By 1954 political support for integration had grown enough that the Court believed an order might be obeyed. Only then did it issue *Brown*—after a re-argument at which the Eisenhower Administration weighed in supporting the plaintiffs. *Brown* gave the civil culture a push, but only a mild one. The Court adopted the formula "all delib-

9. *See* BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 87-90 (1977).

10. 347 U.S. 483 (1954).

11. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); Gong Lum v. Rice, 275 U.S. 78 (1927).

12. I take no side in this debate. For contrasting positions, compare ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21 Ch. 8 (1984), with Randall L. Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

13. *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Board of Regents, 339 U.S. 637 (1950).

14. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948).

erate speed,"[15] and places that complied at all emphasized "deliberate" over "speed." The Supreme Court tolerated grade-a-year and freedom-of-choice plans until 1968, when it finally said that desegregation must occur forthwith.[16]

What happened between 1954 and 1968 was not a development of constitutional jurisprudence. It was the passing through school of an entire cohort of children. The Court "grandfathered" those immediately affected by the case. What else happened? A dramatic change in the political culture—some of which *Brown* fostered, but much of which supported *Brown*. In 1957, for the first time since Reconstruction, Congress enacted a civil rights law.[17] Seven years later came the Civil Rights Act of 1964, and on its heels the Voting Rights Act of 1965. Public demonstrations and the eloquent voice of Rev. Martin Luther King, Jr., spurred action. Economic growth led business to line up against laws that hampered the choice of employees and reduced workers' intellectual capital. By 1968 the political branches were ready to support the end of segregation. They were, indeed, ahead of the Court. It was not judicial decisions but the threatened withdrawal of federal funds that brought about the collapse of segregation in the 1960s and early 1970s. The dominant federal role in paying for state government—through which so much federal power is deployed—has nothing to do with the Bill of Rights but stems from the Sixteenth Amendment, which gave Congress the power to levy income taxes. That power, plus Madison's observation in *Federalist No. 10* that the national government is less prone to capture by faction than are state governments, was more important in undermining official discrimination than were the decisions of the Court. In the end civil rights were achieved under the force of statutes.[18] Segregation was a moral offense, and its elimination required a moral and political debate, the outcome

15. Brown v. Board of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

16. *See* Green v. County School Bd., 391 U.S. 430 (1968). The Court tolerated antimiscegenation laws until about the same time. *See* Loving v. Virginia, 388 U.S. 1 (1967); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 174 (1962) (discussing Naim v. Naim, 350 U.S. 985 (1956), which allowed these laws to persist while the political heat was high).

17. Civil Rights Act of 1957, 71 Stat. 634.

18. *See* GERALD N. ROSENBURG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42-169 (1991) (describing both the limited effects of *Brown* and the social forces that ended segregation).

of which would be enforced by political and economic actors. It required a change in our civic culture.

Religion is another potential counterexample. Did not the religion clauses of the First Amendment protect us from established churches and sectarian warfare? Most unlikely. The First Amendment sailed through Congress because there was no sentiment for establishing a national church. The religion clauses were not applied to the States until 1940,[19] yet the seven States that ever had established churches gave them up in the Nineteenth Century.[20] Look at the other western democracies—the places from which some of our forbears fled in search of religious freedom. Even nations such as the United Kingdom and Sweden that retain their established churches have establishment in name only. Swedish citizens can have exemption from the church tax on request. England, whose established churches were a source of great bloodshed, still has two established religions (the Churches of England and Scotland), but neither is a source of oppression. Change came in Europe as a result of economic development and the tolerance toward others that flows from an interdependent society. It is hard to attribute equivalent tolerance in the United States to a Constitution that is missing in other nations that have undergone the same fundamental developments. Which is not to say that the religion clauses have no consequences—paradoxically, one of their principal effects may be to increase the extent of religious belief.[21]

Let me essay one more challenge to accepted wisdom. *Roe v. Wade*,[22] which restricted governmental interference with abortions, is a common example of the importance of constitutional adjudication. So you would think from the public debate. But before giving assent to the proposition, you would want to know how many abortions would have been performed in the

19. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause). Everson v. Board of Education, 330 U.S. 1 (1947), is the first application to the States of the Establishment Clause.

20. They were Connecticut, Georgia, Massachusetts, New York, North Carolina, South Carolina, and Virginia. None of the seven ever had the sort of preferential establishment, coupled with punishment for nonbelievers, that led to bloodshed in Europe. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 25-62 (1986).

21. *See* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 54-59 (1989).

22. 410 U.S. 113 (1973).

absence of that decision. *Roe* was a thinkable decision only because public toleration of abortion was growing in the 1960s and early 1970s, and a substantial political movement supported liberal abortion laws. Several States had relaxed their rules,[23] and the number of legal abortions in the United States began to increase rapidly in 1969. In 1972, the year before *Roe*, there were 587,000 legal abortions.[24] In 1973 there were 745,000—and it is unlikely that *Roe* had much effect on that number, because it took a year or two for the abortion clinics that perform most of the abortions newly authorized by the Court to enter business. Abortions had been increasing at a rate of some twenty-five percent per year in the early 1970s. That rate of increase *diminished* after *Roe*, falling to twenty-one percent in 1974 and fifteen percent in 1975. Of course these were increases from a bigger base, and by 1980 the number of legal abortions topped 1.5 million. (It has been stable since.) My point is simple: If you looked at a graph with time on one axis and the number of abortions on the other, you could not spot *Roe* and would have no reason to think that anything out of the ordinary happened in 1973—the curve is smooth.

Judges spend a good deal of their time explaining what they are *not* saying. I am not saying that *Roe* was unimportant. It is a landmark opinion, and it authorized abortions that doubtless would not have occurred had the matter been left to politics. But had there been no *Roe v. Wade*, the political fight would have proceeded, and I think it likely that most States (certainly California, New York, and the other largest States) would have continued to allow abortion more readily. To understand the effect of law, you must look at effects on the margin. In other developed nations with radically different constitutions, abortions became more available during the 1960s and 1970s without judicial action.[25]

This may become clearer if you think about current events. Two years ago the Supreme Court issued an opinion enlarging

23. Some of these developments are described in Richard G. Morgan, Roe v. Wade *and the Lesson of the Pre-*Roe *Case Law*, 77 MICH. L. REV. 1724, 1726-30 (1979), and Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and Problems*, 1972 U. ILL. L. F. 177.

24. These data come from Rosenburg, *supra* note 18, at 180. I round to the nearest thousand. *See* Sunstein, *supra* note 5, at 766 & n.51 (reaching the same conclusion using other data).

25. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 10-62, 145-54 (1987).

the scope of political choice over abortion.[26] Two jurisdictions (Louisiana and Guam) have seized on this to reinstate their old laws; a handful of other States have enacted more complex reporting and parental notice rules; legislatures in one or two other States have tried to act but have been unable to overcome vetoes. But the dominant effect has been extended debate and little or no action.

My home state provides an illustration. Every two years Illinois would enact some anti-abortion law, expecting the courts to hold it unconstitutional. Governor Thompson routinely vetoed the bills on constitutional grounds; the legislature routinely overrode the vetoes. Debate was desultory; everyone knew that in the end nothing would happen. After the court obliged by holding the law unconstitutional, the legislature would produce another. When *Webster* came down in June 1989, members of the legislature realized that courts just might *enforce* what they were enacting. This produced panic—and, after the panic, stasis. No new laws have been enacted. The Attorney General of Illinois compromised the pending litigation on terms favorable to women seeking abortions.[27] Illinois was a jurisdiction firmly in the anti-abortion camp so long as it was clear that its laws did not matter. Now that laws matter once again, legislators have engaged in responsible debate and been more tolerant than either supporters or opponents of *Roe* believed they would be. The increase in civic responsibility is one of the virtues of a decision such as *Webster*.

Law is full of assertions, but where is the proof? One way to test propositions of the kind I have advanced is to look at state constitutions. The language and history of these constitutions differs. Before the application of the Bill of Rights to the States in the 1960s, did the different constitutions produce discernable differences in civil liberties among the States? I have not encountered a claim that they did. A second way to test the importance of constitutional language is to ask whether the text and history of the Bill of Rights itself matters. The two hundred years of constitutionalism has been two centuries of homogenization, of regression to the mean, as precise or sweeping language is watered down and vague language used as a

26. Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

27. Ragsdale v. Turnock, 941 F.2d 501 (7th Cir. 1991).

receptacle for modern views.[28] The Takings Clause applies only to the federal government, the Contracts Clause only to the States; the Supreme Court's cases read as if both clauses apply to both levels (and neither means much, as they protect disfavored rights in property). The Equal Protection Clause applies only to the States, yet the Court routinely speaks of the "equal protection component" of the Due Process Clause of the Fifth Amendment—more than a linguistic oddity, as the Fourteenth Amendment contains both due process and equal protection clauses, a redundancy if equal protection is instinct in due process. A right to travel has been teased out of the interstices of the Constitution, and other rights (the Second Amendment, for example) have faded.[29] Judges exercise preferences in deciding which parts of the Bill of Rights to apply to the States; the Seventh Amendment and the Grand Jury Clause of the Fifth have never been incorporated. The status of the Bail Clause of the Eighth is ambiguous. Modern application of the Due Process Clauses, emphasizing "fundamental" rights, leaves judges with great discretion to deem particular practices or interests fundamental and so expand or contract the constitutional rule. The "balancing" so much in vogue amounts to the denial of *law* and the assumption by judges of the power to say what is reasonable.[30] What is reasonable varies as conceptions of The Good (or at least the tolerable) change.

One more warning about what I am not saying. Only a fool would deny that decisions under the Bill of Rights have affected many persons' lives, that some decisions created substantial change, and that our nation's focus on "rights" (and legalism in general) influences our civil culture deeply. I am not here to take on Tocqueville! What I do suggest is that these effects are less substantial than most people believe, that other nations have had comparable developments that cannot be attributed

28. If you believe that *Roe* shows *the Court* to be more important than I portray it, you may still think that *Roe* casts doubt on the importance of the Bill of Rights. *Roe* was unsuccessful in locating its rule in the text, structure, or history of the Bill of Rights—as opposed to medicine, ethics, and the interests of the pregnant women. That *Roe* is not a traditionally legal opinion is common ground among all partisans.

29. *See* Chicago Board of Realtors v. City of Chicago, 819 F.2d 732, 742-45 (7th Cir. 1987); Frank H. Easterbrook, *The Constitution of Business*, 11 GEO. MASON U. L. REV. 53 (1988).

30. *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1129-30 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-78, 986-92 (1987).

to our Bill of Rights (on which more below), and that effects on the margin beget counter-effects. Think for a moment about *Miranda v. Arizona*,[31] which obliged police to give the famous four warnings if they wish to use in criminal prosecutions statements obtained during custodial interrogation. *Miranda*'s list tracked procedures the FBI had adopted voluntarily, but the sanction of exclusion was new. Other nations have not followed suit. *Miranda* affected police behavior (interrogation became more civil) and has led to the dismissal of many prosecutions (and has dissuaded prosecutors from filing others). Has *Miranda* strengthened the hand of suspects against the state? That depends on how political society responds. If a decision such as *Miranda* makes it harder to investigate crimes and to prosecute guilty persons (there will be fewer confessions, some of which will be suppressed), crime becomes more attractive. How does society maintain the deterrent force of the law? By increasing the sentences of those caught and convicted. It is no accident that the United States both extends suspects more rights and imposes longer sentences than other western nations. The net effect of fewer crimes solved and longer sentences for persons who are convicted may be the same level of deterrence, but a different distribution of the costs of crime. Persons whose constitutional rights are *respected* by the police, and who then are convicted, spend more time in jail, while persons whose rights were violated avoid criminal sanctions. It is not pellucid that suspects as a class perceive this redistribution as a benefit. No bill of rights, no judicial decision, can ensure *net benefits* for suspects when the political branches control elements such as the penalty for crime.

To examine more fully the question how much bills of rights influence society, you must look outside the borders of the United States. You will find nations with dramatically different constitutions and judiciaries but roughly similar levels of economic development—and as it turns out personal liberties quite similar to ours. This congruence suggests that something other than words on parchment accounts for our liberties.

The United Kingdom has no constitution and no judicial review. But its independent judiciary emphasizes the importance of the rule of law, as have a long succession of governments.

31. 384 U.S. 436 (1966).

Canada tracked the United Kingdom until recently, when it adopted a bill of rights—with a "notwithstanding clause."[32] That is, notwithstanding a decision by the Supreme Court of Canada that a statute violates the bill of rights, a province may reenact the law. It has only to assert its power, and set a time limit on the life of the statute. You may think this shocking, but it has rarely been used. What you may find even more shocking is that the United States, too, has a notwithstanding clause. Article III allows Congress to decide whether there shall be any inferior federal courts. It could abolish these courts tomorrow, and thus remove most of the national capacity for judicial review. Article III also allows Congress to make "exceptions" to the appellate jurisdiction of the Supreme Court. That power implies, at least in principle, almost total control over the judiciary. Yet Congress has tried this avenue so infrequently that in 200+ years the Court has not decided how far Congress could go if it pleased.[33] Abstinence from what could be the nuclear bomb of constitutional adjudication shows the importance of political culture. President Roosevelt failed to pack the Court for political reasons, not constitutional ones; jurisdiction-stripping bills fail for political reasons, not constitutional ones.

Let us return to other nations. Germany has a bill of rights and a constitutional court, which exercises judicial review. Very little of the judicial power has been expended defending civil liberties as we understand them today; the court held abortions unconstitutional (in Germany the fetus has a constitutional right to protection from unjustified abortions); many decisions are distinctly *Lochner*-ian, protecting commerce from regulation.[34] Still, civil liberties in Germany look much like our own. France has a constitution without a bill of rights, and although it has a constitutional court it lacks judicial review as we know it. The Conseil Constitutionnel may review proposed laws only during the brief interval between enactment and entry into

32. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33.

33. The extent of this power is a subject outside the scope of this essay. For a thoughtful discussion, see Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990), and the commentaries by Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990), and Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990).

34. *See* David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333.

force, and then only at the request of a select list of political figures. Once a law has become effective, no court in France may refuse to enforce it on constitutional grounds. Yet France recognizes rights quite like our own. By the way, the lack of a bill of rights in the French constitution has not stopped the Conseil Constitutionnel from finding rights. It has declared that the Declaration of the Rights of Man, a document of the French Revolution, is part of the constitution of the Fifth Republic! (This is a lot like our Supreme Court suddenly discovering that the Declaration of Independence is part of the Due Process Clause.) As European Community courts have begun to assert jurisdiction over national tribunals, they also have begun to recognize as part of Community law rights culled from national constitutions and the European Convention on Human Rights.[35] The fundamental similarity across developed nations in both formal statements of rights and practical liberties—despite substantial differences in written constitutions and judicial systems—implies that the written documents are not responsible.

Professor Merrill offers a counterexample: During the Persian Gulf War, England imprisoned many Iraqi nationals, and the United States did not.[36] He attributes this to differences in our constitutions. If we were going to point to differences I would start with the Official Secrets Act, showing that the United Kingdom affords the press less protection than do we. Differences are inevitable; I do not claim that liberties are identical across nations, only that the similarity is too great to depend on bills of rights. Professor Merrill's example, though, is weaker than he believes. During World War II the United States impounded U.S. citizens of Japanese ancestry, and the Supreme Court held this action permissible.[37] Aliens have fewer rights than citizens. Indeed, as a close approximation aliens have no constitutional rights against the national government, although they possess rights against States (the Fourteenth Amendment speaks of "persons" rather than "citizens"). Justice Frankfurter's remark that "the right to ter-

35. *See* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY 223-25 (2d ed. 1988).

36. *See* Thomas W. Merrill, *The Role of Institutional Factors in Protecting Individual Liberties*, 15 HARV. J.L. PUB. POL'Y 85, 86-87 (1992).

37. Korematsu v. United States, 323 U.S. 214 (1944).

minate hospitality to aliens . . . [is] wholly outside the power of this Court to control"[38] remains an accurate statement of the law.[39] Accurate though this is as a statement of *law*, it is not accurate as an understanding of our civic culture. Congress has created for aliens, despite their inability to vote, a set of procedural and substantive entitlements far exceeding anything the Constitution requires. These entitlements come from a widely shared view that aliens are entitled to dignity and respect as persons—and this even if we do not see them as tomorrow's citizens. This cultural view, and not any constitutional command, made a dragnet of Iraqi nationals unthinkable in the United States.

My advice to you is to exercise caution in evaluating claims that bills of rights are important in themselves. The Framers were right to call them parchment barriers. It takes a tolerant political and economic culture to nurture individual liberties, to support claims of personal freedom. Our nation has used the judiciary and our particular Constitution as one embodiment of this tolerant spirit, but alternate institutions are conceivable, and used effectively, in other nations. The ability of political society to create and protect many different institutions to the same end implies that the United States would have adapted too. It is important to understand these alternatives, even though the Bill of Rights is our civil religion.

38. Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

39. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 796 (1977) (quoting this passage with approval).