THE BICENTENNIAL OF THE BILL OF RIGHTS

FOREWORD

On September 28, 1989, Seton Hall University School of Law sponsored a symposium entitled *The Bicentennial of the Bill of Rights*. The symposium commemorated the two hundred year anniversary of the proposal, by the First Congress to the several states, of the first ten amendments to the United States Constitution, on September 25, 1789. On November 20, 1789, New Jersey became the first state to ratify the proposed Bill of Rights. With the completion of the ratification process on December 15, 1791, the Bill of Rights became the foundation upon which rests our individual liberties.

The distinguished speakers at the symposium featured: the Honorable Antonin Scalia, Associate Justice of the United States Supreme Court; the Honorable John J. Gibbons, Former Chief Judge of the United States Court of Appeals for the Third Circuit and holder of the Richard J. Hughes Chair for Constitutional and Public Law and Service at Seton Hall University School of Law; the Honorable Peter W. Rodino, Jr., Former United States Congressman and Distinguished Visiting Professor of Law at Seton Hall University School of Law; Eugene Gressman, Distinguished Visiting Professor of Law at Seton Hall University School of Law and co-author of *Supreme Court Practice* (6th ed. 1986); and Seton Hall University of Law Professors Joseph M. Lynch and John B. Wefing.

The articles in this book are based upon the authors' presentations made during the symposium. Justice Scalia delivered impromptu comments at the conclusion of the formal presentations. Justice Scalia first addressed the contentions made by Congressman Rodino that the ninth amendment is the "uniquely central text of the Bill of Rights."

Noting that no United States Supreme Court opinion has ever rested upon the ninth amendment, the Justice emphasized his feeling that the amendment was simply an expression of federalism and not an enumeration of substantive rights. Justice Scalia observed that during "the debates on the adoption of the Bill of Rights . . . some of the principle participants didn't refer to the first ten amendments as the Bill of Rights, but [to only] the first eight amendments . . . . The ninth and tenth [amendments] have read and have always been interpreted as just an expression

of the fact that state business remains state business, one of them referring to rights and the other referring to powers."

Justice Scalia criticized the use of the ninth amendment as a vehicle of an "evolving Constitution." The Justice stressed that changing the Constitution to conform with modern ideals "is not a change in the direction of greater liberty, it's a change in the direction of less liberty." The case of *Coy v. Iowa*, 108 S. Ct. 2798 (1988), was cited by Justice Scalia as an example of how the use of "an evolving Bill of Rights based upon natural rights" may lead to less liberty.

In *Coy*, a case dealing with the sexual molestation of two young girls, a barricade was erected between the defendant and the girls during their testimony. The barricade allowed the defendant to view the witnesses, but prevented the witnesses from viewing the defendant. Justice Scalia maintained that because Americans in the twentieth century may find it desirable to protect young girls from the trauma of confronting their alleged assailants, protective procedures such as a barricade may be encouraged. He recognized, however, that the explicit language of the Constitution gives the accused the right to be confronted with the witnesses against him: "To be confronted with the witnesses against him . . . in my mind means to be face to face; . . . because it's hard to lie to somebody to his face, to send him to jail to his face on the basis of a lie." Thus, Justice Scalia rejected the contention that an "evolving Constitution," one that "always pleases the society that promulgates it," will afford greater liberties.

Next, Justice Scalia addressed the presentation by Professor Wefing on cruel and unusual punishment. Justice Scalia emphasized that the Constitution requires that any given punishment be found both cruel *and* unusual. The Justice stated that to determine whether a punishment is unusual he "insist[s] upon looking to the laws passed by legislators, the sentences handed out by juries, and the prosecution brought by prosecutors—only those indicia can show whether a punishment today is unusual. If legislators don't enact it, it's not on the books in any state, or even though it's on the books, if the prosecutor never brings action under it, or if juries never convict under or never impose that punishment, then you can say it is unusual."

Justice Scalia rebutted Professor Wefing's contention that the Justice would decline to use public opinion polls as an indication of whether a particular punishment would pass under the

eighth amendment. While Justice Scalia would not look to such sources to determine whether a punishment is unusual, he asserted that he "wouldn't mind looking at public opinion polls . . . [if] the only issue is whether it's cruel . . . ."

The Justice considered it "shocking" to suggest looking to international standards of decency to determine the parameters of the eighth amendment. According to Justice Scalia, "the Constitution, . . . [and the] Bill of Rights in particular, is meant to represent our most deeply held beliefs in society. It is not a means for imposing the deeply held beliefs of other societies, or the shallowly held beliefs of other societies, upon our people."

Addressing Professor Lynch's presentation on the religion clauses of the first amendment, the Justice noted that he disagreed with the interpretation of constitutional provisions by way of an examination of the framers' original intent. Justice Scalia emphasized that the interpretation must lie in an examination of the original meaning of the words promulgated. This is assessed, according to Justice Scalia, by determining what "an intelligent and well-informed person at the time [would] have believed the meaning of the . . . provisions to be."

The Justice closed his discussion of the religion clauses with a warning: "I urge you not to fall into the psychoanalytical school of jurisprudence which seem[s] to bloom on the intent of the framers. I don't care what they intended. I care what the society reasonably must have thought it was adopting when it adopted this Constitution."

Justice Scalia concluded his remarks with a brief comparison of the United States Constitution and constitutions of other countries. Other constitutions, noted Justice Scalia, are far more descriptive in terms of the specific liberties granted. The Soviet Constitution, recognized the Justice, even goes so far as to state that personal privacy includes freedom from intrusion upon telephonic conversations. Justice Scalia then questioned the audience: "So why isn't theirs better than ours? The answer is the other part of the Constitution, the original Constitution, the one that those fifty-five people sat around and argued about for something like four months." It is the structural protections afforded by our governmental system, stressed the Justice, that makes our Bill of Rights work.