

IDENTIFYING, PROTECTING AND PRESERVING INDIVIDUAL RIGHTS: TRADITIONAL FEDERAL COURT FUNCTIONS

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As an employer of recent law school graduates and a sometime teacher of law students, I have become a great admirer of the teaching and scholarship of the law professoriate. I have only a few criticisms that are applicable generally to the present-day work of those who have devoted their legal careers to scholarship and education. In an earlier article I noted that "new lawyers are less equipped to handle the demands of modern law practice than those of a previous generation" as a consequence of "[t]he changing focus of academics, from doctrinal scholarship to interdisciplinary studies."¹ Indeed, law school curricula seem to be developing without much concern for real-world relevance. For example, I recently received a letter of recommendation from a professor who urged me to hire a student of his as a law clerk on the basis of the student's outstanding performance in a course called "Bloodfeuds." Although my court handles a rich variety of cases, we never have had one that would fit within that topical heading. Perhaps the professor thought that the course would be of interest to me in connection with my relations with my colleagues. In the same article, I placed at the door of academia the responsibility for the failure of recent law graduates "to obtain the oral and written skills of expression necessary for the survival of the profession."² Law review articles and other writings by academics themselves often are so obscure as to be incomprehensible and therefore of little value to the bench and bar. When academics talk only to each other, the rest of the profession suffers.

I have noticed that recent law school graduates increasingly tend to discuss court decisions in terms of the perceived predilections of judges rather than on the basis of legal principles and

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¹ Roger J. Miner, *Confronting the Communication Crisis in the Legal Profession*, 34 N.Y.L. SCH. L. REV. 1, 16 (1989).

² *Id.*

legal doctrine. This practice comes, as I understand it, from the inclination of most law professors to classify judges, particularly Supreme Court Justices, as "liberal," "conservative," "moderate," "activist," etc., and to examine their decisions on the basis of such classifications. It seems to me that this approach is especially dangerous to legal analysis because: i) it leads law students away from a proper understanding of legal principles; ii) it impedes the development of "think-like-a-lawyer" skills; and iii) it is valueless for predictive purposes, being based on the flawed premise that each judge has an ascertainable agenda. The professoriate would do well to abandon this approach.

"Public policy" is a response all too frequently given by young lawyers when asked to articulate the principles upon which a court decision is grounded. While public policy concerns should not be neglected in legal analysis, those who "profess" the law have an obligation to make their students aware that judges are guided by much more than public policy and that precedent, legal reasoning, rules of statutory interpretation, logic and *stare decisis* also merit study. Alison Reppy,³ who was Dean of my alma mater, New York Law School, during my student days frequently repeated the following: "Public policy is the wastebasket of legal thinking." I proudly repeated that aphorism to a recent graduate of a so-called "national" law school, and she commented as follows: "Isn't that strange? We were taught that legal reasoning is the wastebasket of public policy!" It seems to me that the modern legal education stew could do with a pinch less of "public policy" salt.

Teachers of law hardly can be described as faddists. Most (especially those who are tenured) are free-spirited individualists, always ready to abandon the beaten path, to shed new light on old doctrine, to challenge conventional wisdom, to reinterpret received knowledge, to revise history and to pour new wine into old bottles (and drink it). They revel in their eccentricities, and this is all to the benefit of their students, their colleagues and the legal profession at large. And yet — despite their independence — law professors are all too receptive to fads. The current fad, universally accepted and demonstrated in numerous scholarly

³ Still available from West Publishing Co. is a book co-authored by Dean Reppy and Joseph Koffler, another one of my professors. The book is entitled *KOFFLER AND REPPY'S HORNBOOK ON COMMON LAW PLEADING* (1969). Who am I to complain about "Bloodfeuds"? I had to study "Common Law Pleading."

writings, is the use of the term "normative."⁴ The use of that term by academics has become so widespread as to be normative. I no longer know or care what the word means. It has evolved into so imprecise a word as to have no meaning at all for lawyers and judges. I do not care if I never see it again.

This year I have received approximately 250 applications for the three clerkship positions available in my chambers. Each is accompanied by two or more letters of recommendation from law professors. A typical letter includes the following:

Of the three hundred students in my contracts class, Ms. Smith achieved the third highest grade. She participated in classroom discussions, and I spoke to her after class on at least two occasions. From these contacts, I have formed the conclusion that Ms. Smith would be the most outstanding law clerk ever to serve in any court anywhere at any time. If you desire further information, do not hesitate to call me at the telephone number listed below. I am available in my office at the law school from 9:45 a.m. to 10:15 a.m. on the third Thursday of each month.

If I never see another letter of this type, it would be too soon!

Finally, and to the point of this Article, it is generally bruited about by the professoriate that the federal courts did not become concerned with individual rights until the twentieth century. According to common academic wisdom: "[t]he concern of the framers, especially the Federalists who fully supported the venture, was principally with creating a central government that would work and last, not with whether that government of limited powers would engage in abuses of power."⁵ From this viewpoint, individual rights and the enforcement of those rights in the federal courts were not on the minds of the Framers. In the same vein, one author has written as follows on the subject of "The Supreme Court and Individual Rights:"

The Supreme Court's role as guardian of the rights and liberties of the individual is a new one, a responsibility assumed in the twentieth century.

For most of its history, the Court had little to say about the Constitution's guarantees of individual freedom. Preoccupied with defining the relationship of nation to state, state to

⁴ See, e.g., Martin A. Kotler, *Competing Conceptions of Autonomy: A Reappraisal of the Basis of Tort Law*, 67 TUL. L. REV. 347, 383-84 (1992).

⁵ Stephen J. Wermiel, *Rights in the Modern Era: Applying the Bill of Rights to the States*, 1 WM. & MARY BILL OF RTS. J. 121, 122 (1992).

state, and government to business, the Court found little occasion and less reason to deal with individual rights.

Indeed, until the twentieth century there was no broad constitutional basis for the assertion of individual rights against government action.⁶

My purpose is to demonstrate that the original Constitution was concerned with individual rights, that the Bill of Rights gave even greater voice to this concern and that, from the beginning, the federal courts were deeply involved in identifying, protecting and preserving individual constitutional rights.

In writing the original Constitution, the Framers were indeed concerned with establishing a structure of government. They certainly were occupied with questions of separation of powers, of federalism and of commerce. But a close examination of the document itself demonstrates that the rights of individual citizens were very much on the minds of those who drafted the Charter. In the article dealing with legislative powers, the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."⁷ Another clause in the same article mandates that "No Bill of Attainder or ex post facto Law shall be passed."⁸ The same article imposes restrictions upon the States in respect of individual rights: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"⁹

Article III, the Judiciary Article, which extends the judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,"¹⁰ refers to individual rights in the following particulars:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed¹¹

No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.¹²

. . . [N]o Attainder of Treason shall work Corruption of

⁶ ELDER WITT, *THE SUPREME COURT AND INDIVIDUAL RIGHTS* 1 (2d ed. 1988).

⁷ U.S. CONST. art. I, § 9, cl. 2.

⁸ U.S. CONST. art. I, § 9, cl. 3.

⁹ U.S. CONST. art. I, § 10, cl. 1.

¹⁰ U.S. CONST. art. III, § 2, cl. 1.

¹¹ U.S. CONST. art. III, § 2, cl. 3.

¹² U.S. CONST. art. III, § 3, cl. 1.

Blood, or Forfeiture except during the Life of the Person attained.¹³

Included in Article IV are two very significant provisions protective of individual rights. The first provision demands that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states."¹⁴ The second provision in Article IV mandates that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government"¹⁵

It seems clear that the Framers intended the federal judiciary to enforce these rights. In discussing the importance of permanent tenure for judges, Hamilton wrote:

This independence of the judges is equally requisite to guard the Constitution and the *rights of individuals* from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.¹⁶

. . . .

That inflexible and uniform adherence to the *rights of the Constitution, and of individuals*, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.¹⁷

The provisions for individual rights and the constitutional guarantee of judicial independence clearly are interrelated. Judge Richard Posner, my colleague on the Seventh Circuit Court of Appeals, once stated the proposition most succinctly:

[I]t is hard to imagine why the framers of the Constitution would have bothered to give the federal judges such extraordinary guarantees of independence if they had not expected them to be aggressive in protecting individual rights against encroachment by other branches of government — and plainly they did; and though the framers' thinking ran more to property rights than to what we call civil liberties the constitutional

¹³ U.S. CONST. art. III, § 3, cl. 2.

¹⁴ U.S. CONST. art. IV, § 2, cl. 1.

¹⁵ U.S. CONST. art. IV, § 4.

¹⁶ THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

¹⁷ *Id.* at 470-71 (emphasis added).

text is not so confined.¹⁸

An excellent example of the role played by the federal courts in the protection and enhancement of individual rights is found in the enforcement of the constitutional provisions prohibiting Congress or the state legislatures from passing bills of attainder.¹⁹ According to the records of the Constitutional Convention, a unitary provision prohibiting *ex post facto* laws as well as bills of attainder first was introduced and debated.²⁰ Interestingly, some delegates thought that a prohibition of *ex post facto* laws would be superfluous and were reluctant to support such a provision:

Mr. Govr. Morris thought the precaution as to *ex post facto* laws unnecessary; but essential as to bills of attainder.

Mr. Elsworth [sic] contended that there was no lawyer, no civilian who would not say that *ex post facto* laws were void of themselves. It cannot be necessary to prohibit them.

Mr. Wilson was against inserting anything in the Constitution as to *ex post facto* laws. It will bring reflexions on the Constitution — and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so.²¹

The records of the Convention revealed that before any further debate was had on the *ex post facto* issue, "[t]he question [was] divided, [and] [t]he first part of the motion relating to bills of attainder was agreed to *nem. contradicente*."²² Although the *ex post facto* provision, an important protection of individual rights, eventually was adopted, it is apparent that the Framers perceived a greater danger from legislative derelictions in regard to bills of attainder than from legislative derelictions in regard to *ex post facto* laws. An examination of the history of bills of attainder makes it clear why this was so.

A sentence of death under the common law of England was said to fix a mark of infamy upon the person to be executed, who was "then called attaint, *attinctus* [or] stained."²³ The consequences of this common law attainder were the forfeiture to the crown of the personal and real property of the attainted person and the "corruption of blood," which perforce forbade inheritance from ancestors

¹⁸ Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 15-16 (1983) (footnotes omitted).

¹⁹ U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

²⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 375-76 (Max Farrand rev. ed. 1966.).

²¹ *Id.* at 376.

²² *Id.*

²³ 4 WILLIAM BLACKSTONE, COMMENTARIES *373.

and transmission of wealth and titles to heirs.²⁴ Bills of attainder, being legislative enactments designed to inflict punishment without trial, are different from the common law attainder that followed a sentence of death following trial, and Blackstone recognized the significant distinction between the two.²⁵

First enacted by the English Parliament around the year 1300, bills of attainder originally were designed to ensure that dead traitors' estates would escheat to the crown.²⁶ They later were used to punish those who engaged in a wide range of activities that were considered inimical to the interests of the crown.²⁷ Bills of pains and penalties, also enacted by the English Parliament, were different from bills of attainder only in that they provided for punishments other than death.²⁸ Unhappily, these English practices were imported to colonial America.²⁹ During the American Revolution, each of the thirteen colonies enacted bills of attainder or bills of pains and penalties directed at British loyalists.³⁰ Bills of attainder found their way into the laws of the new states, and the New York Constitution, adopted on April 20, 1777, was typical in that it prohibited the state legislature from enacting bills of attainder but provided an exception "for crimes . . . committed before the termination of the present war."³¹ Approximately sixty pieces of attainder legislation were enacted in New York between the Declaration of Independence and the 1783 Treaty of Peace.³² Among these was the Attainder Act of October 22, 1779, under which fifty-nine New York citizens were subjected to the forfeiture of their property

²⁴ *Id.* at *381.

²⁵ As Blackstone noted:

As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being.

Id. at *256.

²⁶ Michael P. Lehmann, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 HASTINGS CONST. L.Q. 767, 772 (1978); Note, *Bills of Attainder and the Supreme Court in 1960* — Flemming v. Nestor, 1961 WASH. U. L.Q. 402, 403.

²⁷ Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 331 (1962).

²⁸ *Id.*

²⁹ Alison Reppy, *The Spectre of Attainder in New York*, 23 ST. JOHN'S L. REV. 1, 3-4 (1948).

³⁰ Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 376-79 (1978).

³¹ Quoted in Reppy, *supra* note 29, at 19.

³² See *id.* at 17-35.

as a consequence of being attainted.³³ In Virginia, Thomas Jefferson himself, while serving in the legislature of that state in 1778, participated in the adoption of legislation to attain one Josiah Phillips for "hav[ing] levied war against the Commonwealth."³⁴

It is clear that the Framers recognized the evils inherent in bills of attainder. James Madison wrote that "[b]ills of attainder . . . are contrary to the first principles of the social compact and to every principle of sound legislation."³⁵ Quoting Montesquieu, he noted the principal reason for prohibiting bills of attainder: "Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*.'"³⁶ There was some ambivalence in the courts about enforcing the Bill of Attainder Clauses in the early years of the Republic, however, because the bills enacted at the time of the Revolution were designed to attain the hated British loyalists and to confiscate their property. For example, in *Cooper v. Telfair*,³⁷ the Court refused to declare that a 1782 act of the Georgia legislature attainting British loyalists was void. (It will be remembered that the Constitution prohibited states as well as the federal government from enacting bills of attainder.) Each Justice who participated in the *Cooper* decision wrote a separate opinion, but the opinion of Justice Samuel Chase expressed the common denominator: "There is . . . a material difference between laws passed by the individual states, during the revolution, and laws passed subsequently to the organization of the federal constitution. Few of the revolutionary acts would stand the rigorous tests now applied"³⁸ Clearly, the Court had a problem with bills of attainder passed during the Revolutionary War.

The significant protections afforded by the Bill of Attainder Clauses eventually found full expression in the cases involving the so-called "test oath" statutes that were the product of the Civil War. On the same day in 1867, the Supreme Court decided two cases involving test oaths that clarified bill of attainder jurisprudence and, in doing so, struck an important blow for individual rights. In *Cummings v. Missouri*,³⁹ the Court examined a provision of the Missouri

³³ *Id.* at 22.

³⁴ Thomas Jefferson, *Bill to Attain Josiah Phillips* (May 28, 1778), reprinted in 3 THE FOUNDERS' CONSTITUTION 345, 345 (Philip B. Kurland & Ralph Lerner eds., 1987).

³⁵ THE FEDERALIST NO. 44, at 282 (James Madison).

³⁶ THE FEDERALIST NO. 47, at 303 (James Madison).

³⁷ 4 U.S. (4 Dall.) 14 (1800).

³⁸ *Id.* at 19.

³⁹ 71 U.S. (4 Wall.) 227 (1867).

State Constitution declaring it a criminal offense for a Catholic priest to engage in his priestly duties without complying with the Missouri constitutional requirement that he swear under oath that he did not support the Confederacy. Finding the state constitution in conflict with the Federal Constitution's Bill of Attainder Clause, which had been read broadly to prohibit bills of pains and penalties as well as bills of attainder, the Supreme Court noted that the intention of the clause was "that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."⁴⁰ Similarly, in *Ex parte Garland*,⁴¹ the Court found that an act of Congress prohibiting any person who would not swear that he had not supported the Confederacy from holding public office or practicing law contravened the Bill of Attainder Clause. In both cases, the Court performed a traditional federal court function by giving life and meaning to a constitutional right.

Continuing to identify the Bill of Attainder Clause as an important individual right worthy of protection and preservation, the Supreme Court in 1946 invalidated a statute that foreclosed the payment of salaries to three federal employees said to be "subversive."⁴² The Court there noted that individuals need not be targeted by name because the Constitution forbids any legislation, "no matter what [its] form, that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."⁴³ In 1965 the Court overturned legislation that barred certain Communist Party members from labor union employment.⁴⁴ The Court once again warned against a cramped definition of punishment for bill of attainder purposes and reiterated its "emphatic[] reject[ion] [of] the argument that the constitutional prohibition outlawed only a certain class of legislatively imposed penalties."⁴⁵

Ultimately, the Court defined punishment for bill of attainder purposes in terms of three tests to be applied to challenged legislation, an affirmative answer to any one of the tests being sufficient to meet the definition: "(1) whether the challenged [act] falls within the historical meaning of legislative punishment; (2) whether the [act] 'viewed in terms of the type and severity of burdens imposed,

⁴⁰ *Id.* at 325.

⁴¹ 71 U.S. (4 Wall.) 333 (1867).

⁴² *See* *United States v. Lovett*, 328 U.S. 303 (1946).

⁴³ *Id.* at 315.

⁴⁴ *See* *United States v. Brown*, 381 U.S. 437 (1965).

⁴⁵ *Id.* at 447-48.

reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'"⁴⁶ And so the courts, in the great common law tradition, gave shape and substance to the stark verbiage of the original constitutional provision prohibiting the passing of bills of attainder by: i) expanding the Bill of Attainder Clauses to include the prohibition of pains and penalties; ii) extending protections to members of named groups as well as named individuals; and iii) explicating the meaning of punishment for bill of attainder purposes. Beginning in the aftermath of the American Revolution and continuing throughout American history up to the present, bill of attainder jurisprudence has evolved as the federal courts have performed their traditional functions in relation to individual rights.⁴⁷ Each court decision in this area, including those discussed above, stands as a separate argument to contradict the widely-held opinion that "[t]he seeming [sic] individual liberties contained in the body of the Constitution . . . were inserted into the federal Constitution because they were necessary for a federal structure, not as an assurance of rights considered fundamental or crucial to human happiness or fulfillment."⁴⁸

The story of the adoption of the Bill of Rights need not be repeated at length here. Suffice it to say that Madison, although originally opposed to a so-called declaration of rights, eventually came around to favor it and, in fact, became its author.⁴⁹ The Federalists, supporters of the Constitution in its original form, thought that a national bill of rights was unnecessary because i) the Constitution created a limited government and was not a threat to individual rights; ii) an attempt to specify rights could be harmful because certain important rights that were not listed might be considered unprotected; iii) a national bill of rights might reflect the "lowest common denominator" of the rights considered important by the individual states; and iv) a bill of rights might imply certain powers in the federal government that were not intended.⁵⁰ Added to this,

⁴⁶ *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 473, 475-76, 478 (1977)).

⁴⁷ See, e.g., *In re Extradition of McMullen*, Nos. 91-2402, 2420 (2d Cir. Mar. 24, 1993) (in banc) (majority and dissenting opinions).

⁴⁸ WILLIAM E. NELSON & ROBERT C. PALMER, *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 88 (1987).

⁴⁹ David M. O'Brien, *The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism*, 8 CONST. COMMENTARY 119, 131-37 (1991).

⁵⁰ Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL OF RTS. J. 115, 117 (1992).

of course, would be the argument that the rights considered most fundamental already were included in the original Constitution. The Anti-Federalists, on the other hand, saw the omission of a bill of rights as a basis for defeating the Constitution and urged the citizenry to demand additional constitutional provisions for individual rights.⁵¹ The ratification conventions of the states urged adoption of certain individual rights amendments, and the First Congress submitted twelve amendments to the states for ratification in 1789. Ten of the amendments were ratified by the states by 1791 and became the Bill of Rights.⁵² What does need repeating here, in support of the theme of this Article, is the following statement made on June 8, 1789 by James Madison during the debate in the House of Representatives on the Bill of Rights amendments:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.⁵³

This statement may have had its genesis in a letter dated March 15, 1789 sent by Thomas Jefferson to Madison from Paris expressing support for the proposed declaration of rights:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.⁵⁴

Both Jefferson and Madison correctly foresaw that the individual rights enumerated in the Bill of Rights would find their primary source of protection in the federal courts.

Besides adopting the constitutional amendments known as the Bill of Rights, the First Congress adopted an enduring piece of legislation officially titled: "An Act to Establish the Judicial Courts of the United States."⁵⁵ This legislation frequently has been referred

⁵¹ *Id.* at 116.

⁵² *Id.* at 118.

⁵³ Quoted in 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1031 (1971).

⁵⁴ Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 *THE PAPERS OF THOMAS JEFFERSON* 659, 659 (Julian P. Boyd ed., 1958).

⁵⁵ Ch. 20, 1 Stat. 73 (1789).

to as the Judiciary Act of 1789 or the First Judiciary Act, and it established a three-level system of national courts that has continued, with various changes related to the jurisdiction and functions of the courts, to the present day.⁵⁶ There can be little doubt of the interrelationship between the Bill of Rights and the First Judiciary Act. Both were adopted with an eye to Anti-Federalist objections to the lack of specificity in the Judiciary Article of the Constitution as well as to the omission of a declaration of rights in the original Charter.⁵⁷ Accordingly, a number of rights in the Bill of Rights had to do with the judiciary: i) the requirement of a grand jury indictment;⁵⁸ ii) the prohibitions against double jeopardy and self-incrimination;⁵⁹ iii) the requirement of due process;⁶⁰ in criminal cases, the rights to a speedy and public trial by jury in the vicinage of the crime,⁶¹ compulsory process to obtain favorable witnesses,⁶² and assistance of counsel;⁶³ iv) the right to trial by jury in suits at common law and a restriction on the reexamination of facts so tried;⁶⁴ and v) the prohibitions against excessive bail and cruel and inhuman punishment.⁶⁵ The complementary jurisdiction conferred upon each of the three tiers of the new federal judicial system in civil and criminal cases by the Judiciary Act of 1789 clearly evinced the intent of the First Congress to establish "independent tribunals of justice" as "guardians of [the bill of] rights."⁶⁶

It was not until 1833, in a case titled *Barron v. The Mayor and City Counsel of Baltimore*⁶⁷ that the Supreme Court decided that the Bill of Rights applied only to the national government and did not restrict state authority. The holding arose in the context of a claim by the plaintiff that the City of Baltimore had rendered his wharf useless by causing the deposit of large amounts of sand and earth to be made

⁵⁶ See generally PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 30-49 (3d ed. 1988) (tracing the evolution of the federal court system).

⁵⁷ Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS OF THE FEDERAL JUDICIARY 13, 29 (Maeva Marcus ed., 1992); see also WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 21 (1990).

⁵⁸ U.S. CONST. amend. V.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ U.S. CONST. amend. VI.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ U.S. CONST. amend. VII.

⁶⁵ U.S. CONST. amend. VIII.

⁶⁶ See *supra* note 53 and accompanying text.

⁶⁷ 32 U.S. (7 Pet.) 243 (1833).

near the wharf. The water adjacent to the wharf thereby became too shallow for the berthing of most vessels and Barron sought recovery on a claim of deprivation of property without due process, in violation of the Fifth Amendment. Chief Justice Marshall saw the issue as one "of great importance, but not of much difficulty,"⁶⁸ and sent the matter off by reasoning that the amendments were not *explicitly* made applicable to the states:

[If] the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.⁶⁹

There are those who question whether the issue was as lacking in difficulty as the Court perceived it to be. Professor Gerald Gunther, for example,

[n]ote[s] that a different inference might be drawn from the text of the Bill of Rights: the First Amendment explicitly inhibits "Congress" (but has been read to apply to the entire national government); the Seventh Amendment is explicitly addressed to "any Court of the United States"; but all of the other Bill of Rights provisions speak in general terms. And a few courts, before *Barron*, thought those provisions generally applicable.⁷⁰

As will be seen, it was not until the courts seized upon the Fourteenth Amendment that the Bill of Rights would be considered to protect against state action. Until then, however, the courts would continue to identify, protect and preserve individual rights against adverse action by the federal government as specifically provided in the original Constitution as well as in the Bill of Rights.

It often escapes notice that the celebrated case establishing the power of the federal courts to review legislative acts was all about the enforcement of individual rights. In *Marbury v. Madison*,⁷¹ William Marbury and three others sought mandamus to compel the delivery of commissions evidencing appointment as justices of the

⁶⁸ *Id.* at 247.

⁶⁹ *Id.* at 250.

⁷⁰ GERALD GUNTHER, CASES AND MATERIALS ON INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 82 (3d ed. 1981).

⁷¹ 5 U.S. (1 Cranch) 137 (1803).

peace for the District of Columbia. Although the Court concluded that Congress was without constitutional authority to confer original mandamus jurisdiction upon the Supreme Court, a history-making decision establishing the power of judicial review, the Court made it clear that Marbury and the others were entitled to the delivery of the commissions, which had been signed by the President and sealed by the Secretary of State. Although the Supreme Court was the wrong place to go for the relief sought, Chief Justice Marshall acknowledged the role of the courts in the enforcement and protection of the rights of the citizenry:

The very essence of civil liberty certainly consists in *the right of every individual* to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.⁷²

. . . . The province of the court is, solely, to decide on the *rights of individuals*, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.⁷³

It is generally accepted that the Framers intended the federal courts to have the power of judicial review, despite the lack of a specific provision in the Constitution. According to Hamilton, limitations on legislative authority

can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.⁷⁴

. . . . The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.⁷⁵

Federal court power to review state laws also has served as an important protection for individual rights. In *Fletcher v. Peck*,⁷⁶ one of the earliest cases to assert the power, the Supreme Court invali-

⁷² *Id.* at 163 (emphasis added).

⁷³ *Id.* at 170 (emphasis added).

⁷⁴ THE FEDERALIST NO. 78, at 466 (Alexander Hamilton).

⁷⁵ *Id.* at 467. For further historical support for the intentions of the framers in regard to judicial review, see George S. Brown, *The Supreme Court's Duty to Defend the Constitution*, 14 WASH. L. REV. 202 (1939).

⁷⁶ 10 U.S. (6 Cranch) 87 (1810).

dated a Georgia statute that purported to annul certain conveyances of land supposed to have been made corruptly by the state to private persons. The Court there enforced the rights of a good faith purchaser, determining that the state law impaired the obligation of contracts within the meaning of Article I, Section 10 of the Constitution. *Fletcher* came to the Supreme Court on a writ of error to the Circuit Court for the District of Massachusetts.⁷⁷

A later case invalidating a state statute, *Martin v. Hunter's Lessee*,⁷⁸ came to the Supreme Court on a writ of error to the Court of Appeals of the State of Virginia. Martin was a British citizen who asserted a claim to land in Virginia under a line of title going back to the days before the Revolutionary War. Hunter claimed title as the beneficiary of state laws confiscating the lands of British subjects and parceling them out to the citizens of Virginia. Martin claimed protection under a federal treaty, but the Virginia Courts rejected his argument. In an earlier appeal, the Supreme Court had reversed a Virginia Court of Appeals' ruling against Martin and remanded for the entry of judgment in his favor.⁷⁹ The Supreme Court determined on appeal that Martin's title was secured by the treaty and that the state law was subordinate to federal treaties under the Supremacy Clause.⁸⁰ On remand, the Virginia Court refused to recognize the determination of the Supreme Court, finding not only that the case should have been decided differently under state law but that the Supreme Court could not exercise appellate jurisdiction over cases decided in state courts. The Supreme Court, of course, rejected both contentions.

In deciding *Martin v. Hunter's Lessee*, the Supreme Court referred specifically to section 25 of the Judiciary Act of 1789. Section 25 provided for Supreme Court review of decisions of the highest court in a state: (i) where a state court declares invalid a treaty or statute or an act under the authority of the United States; (ii) where a state court declares valid a state statute or an act authorized by the state over a claim of invalidity grounded in the Constitution or laws

⁷⁷ *Id.* at 87.

⁷⁸ 14 U.S. (1 Wheat.) 304 (1816).

⁷⁹ See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 628 (1813).

⁸⁰ The Supremacy Clause provides that:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

of the United States; and (iii) where a state court decides against a right, title, exemption or privilege claimed by a party under any clause of the Constitution or under a federal treaty or statute, or under a commission held under the authority of the United States. According to the Supreme Court in *Martin*:

[T]he 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution

....

It is an historical fact that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact . . . that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion.⁸¹

Section 25 also provided some support for the power to review the constitutionality of federal laws. Certainly, where a state court declared a federal statute or treaty invalid on federal constitutional grounds, and the Supreme Court exercised its appellate jurisdiction under section 25, the Supreme Court would perforce review the constitutionality of the federal statute. Although the power of judicial review is firmly established, and although it has played, and continues to play, an essential role in the protection of individual rights, there are those who regard it as a judicial usurpation, unauthorized by the Constitution or its historical antecedents. The following statement, included in a unanimous Supreme Court decision issued in 1958, has been the target of much criticism: "[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."⁸² Those who object to this characterization speak to the duty of the executive and legislative branches to exercise their own judgments as to constitutionality.⁸³ The debate goes on.⁸⁴ It is, however, a most futile debate, because the concept of judicial review long has

⁸¹ See *Martin*, 14 U.S. (1 Wheat.) at 351-52.

⁸² *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁸³ See, e.g., WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 13-15 (6th ed. 1986).

been accepted in its present form by the nation's citizens, who consider it essential to the protection of the rights they cherish.⁸⁵

The Civil War was fought over individual rights and, in its aftermath, the federal courts of necessity became more extensively involved in protecting the individual rights of the citizenry. Even during the war, individual rights clashed with presidential power, when President Lincoln suspended the writ of habeas corpus and established martial law in an area not involved in active military operations.⁸⁶ Individual rights prevailed when the Supreme Court ultimately held that martial law "can never be applied . . . where the courts are open and their process unobstructed."⁸⁷ It was the Fourteenth Amendment, however, that enlarged the individual rights that the federal courts could enforce against the states. The second of the three new constitutional amendments proposed by the Reconstruction Congress, the Fourteenth Amendment was ratified in 1868. Its language invited the courts to identify the rights of United States citizens and to protect those rights against state encroachments:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁸⁸

The federal courts were quick to accept the invitation, and the rule of *Barron v. Baltimore*⁸⁹ eventually would fall by the wayside as the Supreme Court determined that most of the rights in the Bill of Rights were incorporated in the Due Process Clause of the Fourteenth Amendment. Adding to the expansion of the role of the federal courts in the enforcement of individual rights was the vesting of general federal question jurisdiction upon the lower courts in 1875.⁹⁰

⁸⁴ See generally WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETIVE AUTHORITY (John W. Brewer ed., 1992).

⁸⁵ For a critical, Depression-era examination of the application of the power of judicial review in regard to civil liberties, see generally Osmond K. Fraenkel, *Judicial Review and Civil Liberties*, 6 BROOK. L. REV. 409 (1937). I think that the historical overview included in the article supports my contention that the Supreme Court has made extensive use of judicial review in the protection of individual rights.

⁸⁶ Article One, Section nine, Clause two of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

⁸⁷ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

⁸⁸ U.S. CONST. amend. XIV, § 1.

⁸⁹ 32 U.S. (7 Pet.) 243 (1833).

⁹⁰ Act of March 3, 1875, ch. 137, 18 Stat. 470.

At first, the Supreme Court enforced various rights enumerated in the Bill of Rights on the authority of the Fourteenth Amendment itself and without referring to the Bill of Rights.⁹¹ In an 1897 case, for example, the Court dealt with the requirement for just compensation in eminent domain takings on the basis of the Fourteenth Amendment Due Process Clause rather than the Fifth Amendment provision.⁹² It was not until 1925 that the Supreme Court first imported a right from the Bill of Rights into the Due Process Clause of the Fourteenth Amendment for application to the states. The imported right was the free speech guaranty of the First Amendment.⁹³ Other rights similarly were imported, and the federal courts vigorously pursued their duty to enforce them. By 1934, some perceived that the federal courts had changed functions to the extent that their primary function had become the enforcement of the Bill of Rights. As one commentator noted:

[T]he Bill of Rights seems about to become the most important part of the Constitution. To it alone may the individual appeal against the action of executives, boards and commissions, which sometimes by a single stroke of the pen attempt to abolish the rights once deemed sacrosanct. It is his sole refuge against the tyranny of the majority which that acute and sympathetic critic of our institutions, Lord Bryce, once said would become our greatest danger — a tyranny which Edmund Burke declared is greater than the tyranny of a monarch because it is a multiplied tyranny. But of this Bill of Rights the Federal Courts are the natural guardians.⁹⁴

This author went on to indicate that the “lower Federal Courts” could perform their functions in regard to the Bill of Rights “only if their power is constantly expanded and their prestige maintained undimmed.”⁹⁵

The question of what provisions of the Bill of Rights were intended to be incorporated in the Fourteenth Amendment has been answered by the Supreme Court with tests grounded in generalities, including: i) whether the provision in question is so fundamental as to be “implicit in the concept of ordered liberty;”⁹⁶ ii) whether to ignore the right is to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as funda-

⁹¹ JOHN E. NOWAK, ET AL., *CONSTITUTIONAL LAW* 411 (2d ed. 1983).

⁹² *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

⁹³ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁹⁴ Walter P. Armstrong, *The Changing Function of the Federal Courts*, 20 A.B.A. J. 441, 443 (1934).

⁹⁵ *Id.*

⁹⁶ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

mental;"⁹⁷ and iii) whether the provision is "fundamental to the American scheme of justice."⁹⁸ In any event, the Supreme Court has applied to the states over the years most of the provisions of the first eight amendments. The unincorporated provisions include: the Second Amendment right to bear arms; the Third Amendment prohibition on the quartering of troops in private homes; the Fifth Amendment requirement of indictment by grand jury; the Seventh Amendment right to a jury trial in civil cases; and the Eighth Amendment protections against excessive fines and bail.⁹⁹ The debate continues over the question of the incorporation of the Bill of Rights and whether the framers of the Fourteenth Amendment really intended the Bill of Rights to be enforced against the states.¹⁰⁰ That debate also is a futile one, as even Robert Bork concedes: "The controversy over the legitimacy of incorporation continues to this day, although as a matter of judicial practice the issue is settled."¹⁰¹

The Tenth Amendment, of course, could never be applied as a restriction on the states, inasmuch as it provides that "[t]he 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."¹⁰² The Ninth Amendment is quite another thing, however, even though it never has been applied to restrict the states from infringing any individual rights. The Amendment declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁰³

It will be remembered that one of the arguments against a national Bill of Rights was based on the notion that rights not specified might be considered unprotected against the depredations of the federal government. It seems certain that the Ninth Amendment was proposed to meet that argument. In *Griswold v. Connecticut*,¹⁰⁴ Justice Goldberg concluded that the Ninth Amendment authorized the courts to identify rights not specified in the Constitution, by relying on "the traditions and conscience"¹⁰⁵ of the citizenry. Accord-

⁹⁷ *Id.*

⁹⁸ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

⁹⁹ *Wermiel, supra* note 5, at 129.

¹⁰⁰ See, e.g., Earl Maltz, Book Review, 5 *LAW & HIST. REV.* 296 (1987); Michael Zuckert, *The Fourteenth Amendment and the Bill of Rights*, 8 *CONST. COMMENTARY* 149 (1991) (book review).

¹⁰¹ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 94 (1990).

¹⁰² U.S. CONST. amend. X.

¹⁰³ U.S. CONST. amend. IX.

¹⁰⁴ 381 U.S. 479 (1965).

¹⁰⁵ *Id.* at 487 (Goldberg, J., concurring).

ingly, the Justice found in the Ninth Amendment a right of privacy. His formulation was a vague one, and the Ninth Amendment has faded into obscurity as far the federal courts are concerned. There are those who argue that the Ninth Amendment meant little or nothing in the first place,¹⁰⁶ and there are others who argue that the Ninth Amendment merely serves to direct the federal courts "to adopt a broad view and liberal construction of the first eight amendments and to regard the personal liberties *enumerated* there as deserving the most meticulous, fastidious, and expansive protection."¹⁰⁷ There are few who give the Ninth Amendment the sweeping construction given by Justice Goldberg. I predict that a future Supreme Court will reassess the Ninth Amendment in connection with the identification of unenumerated rights.

The identification and enforcement by the federal courts of individual rights not listed in the Constitution have given rise to bitter debates over the years.¹⁰⁸ What is certain is that courts have identified and enforced certain fundamental rights not explicitly provided for in the Constitution: freedom of association; voting and participation in the electoral process; interstate travel; fairness in the criminal process; privacy; and "fairness in procedures concerning individual claims against governmental deprivations of life, liberty, or property."¹⁰⁹ The references to life, liberty and property in the Fifth and Fourteenth Amendments surely provide some basis for the identification of the foregoing fundamental, albeit unlisted, rights. The problem has been to define what is meant by "fundamental," a vague and ambiguous term at best in this context. As one commentator has observed, "[o]ver the past half-century, jurists and scholars have sought to derive these fundamental values from a variety of sources, including natural law, tradition, the judge's own values, neutral principles, reason, and society's 'widely shared' values."¹¹⁰ The sources all are properly the subject of criticism, and many of the arguments against allowing the courts to identify nonexplicit rights ring true. The concern over judicial overreaching is not without foundation. And yet, this debate also has reached the futile stage, at least as to the nonexplicit rights already ratified as funda-

¹⁰⁶ See, e.g., Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do With the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239 (1988).

¹⁰⁷ See Morris S. Arnold, *Doing More Than Remembering the Ninth Amendment*, 64 CHI.-KENT L. REV. 265, 268 (1988) (emphasis added).

¹⁰⁸ NOWAK ET AL., *supra* note 91, at 459.

¹⁰⁹ *Id.* at 460.

¹¹⁰ Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 925 (1988).

mental. Simply put, the citizenry never will allow those rights to be taken away.

An example of the identification of a unenumerated right is the application of the Due Process Clause to establish the defense of outrageous governmental conduct in the investigation of crime. An outgrowth of the defense of entrapment, this defense originally was suggested by the Supreme Court by way of dictum in *United States v. Russell*.¹¹¹ In that case, the Court observed that there might one day arise a situation "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"¹¹² In a later case, *Hampton v. United States*,¹¹³ in which both the entrapment and due process defenses were rejected, the Supreme Court specifically recognized the availability of a defense based on outrageous governmental conduct. Although the Supreme Court never has sustained the defense, the lower courts have developed and applied the concept of governmental overreaching and governmental misconduct as a due process defense in criminal prosecutions and, in some cases, have sustained the defense.¹¹⁴ The lower federal courts continue to work through the cases in an attempt to arrive at a proper definition of the defense.¹¹⁵ The Second Circuit Court of Appeals recently remanded to the district court for further exploration of the issue a case involving the use of a sexual relationship by an agent of the Drug Enforcement Administration to further his investigation of a woman who ultimately was charged with conspiracy to traffic in narcotics.¹¹⁶ The work of the courts in identifying and enforcing the rights of the people against outrageous

¹¹¹ 411 U.S. 423 (1973).

¹¹² *Id.* at 431-32.

¹¹³ 425 U.S. 484 (1976).

¹¹⁴ See, e.g., *United States v. Smith*, 802 F.2d 1119 (9th Cir. 1986) (no due process violation); *United States v. Bogart*, 783 F.2d 1428 (9th Cir.) (defendant has standing to challenge outrageousness of Government's conduct on due process grounds), *vacated sub nom.*, *United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986); *United States v. Thoma*, 726 F.2d 1191 (7th Cir.) (no due process violation), *cert. denied*, 467 U.S. 1228 (1984); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) (outrageous Government conduct violates due process); *United States v. West*, 511 F.2d 1083 (3d Cir. 1975) (same); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) (same); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (same).

¹¹⁵ See Gail M. Greaney, Note, *Crossing the Constitutional Line: Due Process and the Law Enforcement Justification*, 67 NOTRE DAME L. REV. 745, 747 (1992) ("propos[ing] a methodology for utilizing the law enforcement justification to define the contours of the due process defense").

¹¹⁶ See *United States v. Cuervelo*, 949 F.2d 559 (2d Cir. 1991).

governmental conduct is merely a continuation of the work begun over two centuries ago.

Joseph Story wrote: "In every well organized government, therefore, with reference to the security both of public rights and private rights, it is indispensable, that there should be a judicial department to ascertain, and decide rights" ¹¹⁷ Since the very beginning of the Republic, the federal courts have been engaged in the enterprise of ascertaining and deciding rights. Beginning with the few rights enumerated in the original Constitution, including individual property rights, and continuing with the Bill of Rights and the various unenumerated rights that have been identified, the federal courts have performed their assigned tasks of protecting and preserving individual rights. These tasks were not suddenly undertaken in the twentieth century but have grown and evolved over the years. Reflecting the desires of the American people themselves, the courts have found ways and means to expand the individual rights that all Americans take as their birthright. As Professor Abraham so cogently has put it: "[N]o other agency or institution of the United States government has proved itself either so capable of performing, or so willing to undertake, the necessary role of guardian of our basic rights as the judicial branch." ¹¹⁸

There are a number of reasons why the federal courts have been so capable of performing their duties as guardians of the rights of the people. ¹¹⁹ An important reason, according to Nadine Strossen, is that their "insulation from the political sphere ensures that federal courts should be able to enforce the rights of even unpopular individuals and minority groups." ¹²⁰ Whatever the reason, the work is being done, as it has been done for two hundred years, and the federal courts are performing their assigned function of "protect[ing] individual civil liberties against encroachment by either federal or state government." ¹²¹ I think that I have demonstrated that it is incorrect to say that the "entry of the Supreme Court in modern times into the review of infringements of civil liberties . . . began about 1925." ¹²² I think that I also have demonstrated that

¹¹⁷ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 818, at 582 (Carolina Academic Press photo. reprint 1987) (abr. ed. 1833).

¹¹⁸ HENRY J. ABRAHAM, FREEDOM AND THE COURT 24 (4th ed. 1982).

¹¹⁹ See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 235 (1985).

¹²⁰ Nadine Strossen, *The Supreme Court's Role: Guarantor of Individual and Minority Group Rights*, 26 U. RICH. L. REV. 467, 467 (1992).

¹²¹ Tom C. Clark, *The Court and Its Functions*, 34 ALB. L. REV. 497, 501 (1970).

¹²² John P. Frank, *The Historic Role of the Supreme Court*, 48 KY. L.J. 26, 32 (1959).

the identification, protection and preservation of individual rights has been the result of an evolutionary process — for the federal courts and for the nation's citizens as well.¹²³

Finally, I take note of a question that I often put to my law students on the first day of class: "Who has the final say about the United States Constitution?" Too many answer: "The federal courts."

¹²³ See generally JOHN BRAEMAN, *BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS* (1988).