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In Memoriam: The Honorable Charles W. Fleming

***573 THE FIFTY-SEVENTH CLEVELAND-MARSHALL LECTURE: "THE BILL OF RIGHTS
AND
OUR POSTERITY"**

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Our Constitution's Preamble proudly proclaims an aim to "secure the Blessings of Liberty to ourselves and our Posterity." For most Americans today, the Bill of Rights and the Fourteenth Amendment shine as clear examples of the Blessings of Liberty--sparkling jewels in freedom's crown. But how can these jewels be shared with, and passed on to, "our Posterity"? That is the subject of this Lecture.

My approach to this subject will stress the importance of public education. Our Constitution was self-consciously written down to teach successive generations of Americans about their rights and responsibilities, about the Blessings of Liberty. The very words of the Bill of Rights would themselves educate Americans--indeed, the Bill was written in clean, grand phrases that could be easily memorized and internalized (like scripture, or poetry) in *574 classrooms across the Republic. As one 1788 commentator put it, a Bill of Rights "will be the first lesson of the young citizens."

We should not be surprised to learn, then, that the two men most responsible for our Bill of Rights, James Madison and Thomas Jefferson, also labored mightily to found the University of Virginia; or that Jefferson devoted important sections of his important Notes on the State of Virginia to a plan of universal public education "to diffuse knowledge generally through the mass of the people"; or that each of the first six United States Presidents urged the formation of a national university; or that in 1834, one year after publishing his monumental three volume treatise on the American Constitution, Justice Joseph Story published a slender abridgement entitled "The Constitutional Class Book" designed "for the use of the higher classes in common schools" and dedicated to "the schoolmasters of the United States"; or that Thaddeus Stevens, who helped shepard the Fourteenth Amendment into the constitutional fold, mightily championed public education; or that in our own century, *Brown v. Board of Education* proclaimed that education is "the very foundation of good citizenship."

Inspired by our constitutional forebears, and conscious of my responsibilities to our constitutional posterity, I took pen in hand two summers ago to write a series of short essays on our Bill of Rights and the Fourteenth Amendment. These essays were written for public high school students, as part of an interactive multimedia project on the Bill of Rights, designed by IBM and various consultants. My task was a daunting one: to make our Bill of Rights and Fourteenth Amendment alive and real for youngsters--to teach the "Blessings of Liberty" to "our posterity," and to invite them into the ongoing American conversation about what rights, what liberties, they in turn should want to pass on to their posterity.

In Part I of what follows, I would like to share with you the ten short essays I wrote for "our posterity". Each essay was designed to stand alone, but also to interlock with its companion essays--not unlike a string of short stories. After sharing these essays--these short stories--with you, I shall offer a few brief thoughts in Part II on what lessons may lie in my stories and storytelling.

I. THE STORIES

A. Story One: "The Bill of Rights"

The first ten amendments to the United States Constitution are more commonly known as "the Bill of Rights." These original amendments, proposed by the first Congress in 1789 and ratified by three-quarters of the existing states two years later, were importantly transformed by the adoption of a later constitutional amendment--the Fourteenth Amendment--in the wake of the Civil War. Thus the real Bill of Rights enjoyed by modern Americans is best understood as a joint product of the Founding and Reconstruction eras; today, our Bill of Rights includes not just the first ten amendments, but the Fourteenth too.

The idea of a written Bill of Rights was not new in 1789. Colonial Americans were steeped in a centuries-old English tradition, celebrating various "charters of liberty"--written documents specifying the rights of English subjects against the crown. These documents--including the "Magna Charta" ("great charter") *575 of 1215, the "petition of right" of 1628, the "habeas corpus act" of 1679, and "the bill of rights" of 1689 (adopted in the wake of the English "Glorious Revolution")--elaborated the historic rights of Englishmen and women. The colonists believed that many of these sacred rights were being abridged by King George III--and they said so in the 1776 Declaration of Independence, whose main purpose was to list the rights that the King had violated, thereby justifying an American glorious revolution.

In the English tradition, however, these rights existed only to constrain an unelected King or Queen, and did not limit the elected Parliament, which saw itself as sovereign, omnipotent, and illimitable by its very nature. (Thus in England, Parliament could override any bill of rights.) In post- revolutionary America, however, no hereditary crown existed; all government agents were elected (directly or indirectly) and all power derived from the people.

Were bills of rights necessary in such a system? Apparently yes; after Independence, various states quickly adopted "Bills of Rights" and "Declarations of Rights" following the lead of Virginia. These declarations however, often had little directly enforceable bite against elected state lawmakers. Often, these bills and declarations had been adopted by the state legislatures themselves, and in theory could be repealed by those very same legislatures if they ever proved inconvenient (from the legislature's point of view, of course). What's more, these bills were often phrased as "oughts" rather than "shalls" and thus were not easily enforceable by judges against a legislature bent on evasion. Their chief role seemed to be as educational maxims and mottoes, teaching ordinary citizens about their historic liberties, yet leaving elected lawmakers free to abridge these liberties whenever they saw fit.

In the Philadelphia Convention called to create a new national constitution in 1787, no separate bill of rights was created. Towards the end of the convention, George Mason, author of the influential Virginia 1776 Declaration of Rights, proposed that a similar Declaration be drafted for the federal document; but the other delegates, exhausted after months of hard deliberations, wanted to go home to their families, and rejected Mason's plan. This decision almost proved fatal, for opponents of the Constitution (the so-called "Anti-Federalists") made the absence of a Bill of Rights a leading part of their campaign against

ratification of the proposed Constitution. James Madison and his fellow supporters of the Constitution (the "Federalists") promised that, once the Constitution was safely ratified, they would consider adding a more complete bill of rights.

Madison kept his word, and introduced a bill of rights in the first Congress. His proposals borrowed heavily from English charters of liberty, from state declarations of rights, and from various Anti-Federalist suggestions from the ratification debates in the preceding year. The first Congress proposed twelve amendments, but only the last ten were ratified by the states in 1791. The special procedures by which these amendments were proposed and ratified (requiring the approval of two-thirds of each House of Congress and three-quarters of the states) made clear that this Bill of Rights could not be repealed by ordinary legislation.

Though proposed by the Federalist Madison, the original Bill of Rights reflects its Anti-Federalist parentage as well. Most importantly, it placed no ***576** judicially enforceable limits on state governments, and limited only federal officials. Anti-Federalists trusted local elected officials; but feared that federal officials would be too far removed--quite literally--from the voters. They feared that the President would come to resemble an imperial monarch; that Washington, D.C. would, like London, become an imperial city; and that Congress would be as arrogant, aloof, and out-of-touch as Parliament had been in the 1760's and 1770's. The legacy of the English tradition lived on in America, in mutated form: responsive, directly elected, local assemblies were not seen as threats to liberty and did not need a strict and binding bill of rights; but oligarchical, elite, central officials did. The original federal Bill--strictly worded, full of "shalls" rather than "oughts" and enforceable by judges (and perhaps juries)--would protect majoritarian liberty against self-interested, elitist government. Majorities of ordinary citizens would be empowered to speak, petition, assemble in conventions, and sit on juries; states' rights would be protected against central tyranny.

The Civil War and the Fourteenth Amendment modified all this. The Revolution had taught Americans to fear central, imperial authority; but the antebellum and Civil War eras proved that state and local governments could also be tyrannical (by enslaving blacks; by depriving abolitionist whites of freedom of speech and of the press; by abridging the right of free blacks and antislavery whites to bear arms; by withholding juries from alleged fugitive slaves; in short, by abridging virtually every right and freedom in the original Bill in order to prop up the slave system). As a result, the Fourteenth Amendment was worded to "incorporate" the main rights of the Bill of Rights against state and local governments. Through this process of incorporation (carried out by the Supreme Court in the twentieth century) the Bill of Rights has become a powerful weapon against government oppression. But in most of the important cases involving the "Bill of Rights," state and local, not federal, action has been at stake; the Fourteenth Amendment, as well as the original Bill, deserves the credit. What's more, the Fourteenth Amendment has refocused attention away from protecting states' rights (an important theme of the original Bill) and towards protecting rights against states; away from protecting rights of majorities against elitist government, and towards protecting rights of unpopular minorities against majority tyranny.

B. Story Two: "Freedom of Speech and of the Press"

Freedom of speech and of the press is vital in a democracy. How can the people rule themselves if incumbent government officials are free to punish citizens who speak out against government officials and policies, urging fellow-citizens to "throw the rascals out"? In England, members of Parliament traditionally enjoyed "freedom of speech and debate" on the Parliament floor-- freedom to speak out (even against the King's policies!) in an effort to persuade fellow members of Parliament. So too, Article I of the U.S. Constitution protects a similar freedom of "speech or debate." But in America, legislatures and Parliaments are not sovereign; the People are. We the People ultimately (though indirectly) decide policy by voting in elections, and so We the People must be free to speak and print on issues of public policy.

All this suggests that the words of the First Amendment must be read broadly. Even if the Amendment did not exist, We the People, as sovereign and *577 as voters, would be free under the Constitution to criticize government officials and to speak out on the issues of the day. Though the First Amendment speaks explicitly only of "Congress," a federal court may not imprison a citizen who speaks out against the judges; nor may the President put news reporters in jail if they publish things he doesn't like. (That was the issue in the 1971 Pentagon Papers case.)

Of course, like the rest of the original Bill of Rights, the First Amendment as originally conceived limited only the federal government (the government created by the new Constitution) and not the pre-existing state governments. But in other places, the Constitution does require that state governments be democracies (technically, that they maintain a "Republican Form of Government," in the words of Article IV); and as we have seen, democracy requires a large dose of freedom of speech, and of the press. Various slave states in the mid- 1800's failed to understand this, and tried to put abolitionists and other critics of slavery in jail for expressing their political views.

In response, the framers of the Fourteenth Amendment, adopted after the Civil War, made clear that no state or local government could censor political expression. (Indeed, they intentionally adapted the precise words of the First Amendment--"Congress shall make no law abridging" the freedom of speech, or of the press--as follows: "No state shall make any law which shall abridge" various freedoms of citizens, including speech and press.)

In "incorporating" the rights of speech and press against states, the Fourteenth Amendment changed the accent of the original First. Originally, the core speaker to be protected was someone like the famous New York publisher in the 1730's, John Peter Zenger: a local and popular publisher criticizing relatively unpopular government officials. By the time of the Fourteenth Amendment, the image of the speaker needing protection had shifted to abolitionists like Harriet Beecher Stowe (author of the controversial antislavery novel, Uncle Tom's Cabin) and Frederick Douglass (an escaped slave). These speakers were often geographic outsiders rather than local (Yankees criticizing a Southern system); preaching extremely unpopular views (at least in the South, where censorship of their views was attempted); and critical not just of government policy, but social customs (like racism and sexism).

Many of the important twentieth century First Amendment cases have followed the Fourteenth Amendment pattern involving state action and unpopular speakers (Communists, Jehovah's Witnesses,

and the civil rights movement of the 1960's led by Martin Luther King, Jr.). But the key lesson of the abolitionist experiences is that today's unpopular minority (like abolitionists in the 1830's) may legitimately become tomorrow's mainstream (like Lincoln's Republican Party in the 1860's)--but for this to happen, we must allow the group to speak and print in an effort to peacefully change the minds of fellow citizens. To safeguard popular self-government (in the long term), we must protect even (currently) unpopular expression.

C. Story Three: "The Right of the People to Assemble and Petition"

In a democracy, citizens must be allowed to meet together (to peacefully "assemble") to exchange political ideas, to criticize government policies, and make their criticisms known to government officials and fellow citizens (to "petition" for a "redress" of "grievances"). Any effort by the government to ***578** prevent this would threaten not simply individual liberty, but popular self-government.

The First Amendment explicitly protects these rights. The Amendment speaks of "the people"--the same "We the People" of the Preamble who "ordained and established" the Constitution. And indeed, the way in which "We the People" ordained and established that document is a classic example of "the right of the people peaceably to assemble"; in 1787-88 We the People "assembled" in various ratifying conventions, selected by special elections, to decide whether to adopt the Constitution prepared by the Federalists. The Constitution was thus created in part through peaceable assemblies, and could be amended by We the People today, if we likewise chose to assemble in properly organized, peaceful conventions. (The First Amendment in this respect is thus an important reminder of the people's right, proclaimed in the Declaration of Independence, to amend their Constitution, if they wish--to "alter or abolish" our existing government.)

The right to petition is also an important part of democracy. A petition is simply a piece of paper, signed by one citizen or many, identifying a problem (a "grievance"), and asking government officials--whether judges, legislators, or executive officials--to fix ("redress") the problem. If citizens try to do this, government officials must not be allowed to hinder or punish them. Petitions are not always targeted only at government officials (their immediate audience); sometimes they are also efforts to educate and persuade fellow citizens that a problem exists, and needs to be fixed.

Before the Civil War, various abolitionists tried to use petitions to focus attention on the national disgrace of slavery, but pro-slavery forces often responded by banning these petitions and attempting to punish their sponsors. After the Civil War, the Fourteenth Amendment framers reaffirmed the importance of petitions and assemblies--and here too expanded the scope of the original Bill of Rights. The Fourteenth Amendment experience stressed the rights not just of political assemblies (like conventions) but also of religious assemblies--like black churches, which Southern slave states had tried to ban. The Fourteenth Amendment framers likewise respected the petition rights not only of voters but of nonvoters as well--of women like Susan B. Anthony and Elizabeth Cady Stanton, and of African Americans like Frederick Douglass. (Blacks and women were not constitutionally guaranteed the vote until 1870 and 1920 in the Fifteenth and Nineteenth Amendments, respectively.)

D. Story Four: "Freedom of Religion"

America is and always has been a religiously diverse nation--and religious liberty is among the most prized jewels of the American Constitution.

Though the range of religious traditions prominent at the Founding was more narrow than exists today, it was still broad: Congregationalists populated New England; Pennsylvania was a Quaker stronghold; Catholics concentrated in Maryland; Virginia featured large numbers of both Anglican and Baptists; and so on. How could so many different religious fragments come together to form a single nation?

In large part, because--despite their religious differences, or perhaps because of them--most Americans could agree on the importance of protecting freedom of conscience and freedom to worship God, rights explicitly *579 guaranteed in many state constitutions and statutes. In New England, however, toleration of religious dissenters coexisted with official state support for the dominant Congregational religion. Other states believed in a more complete separation of church and state. The original First Amendment responded to this diversity by refusing to take sides: Congress and the federal government would not touch religion, leaving the issue to be resolved state-by- state. Thus, Congress was prohibited from trying to establish a new national church--but it was also prohibited from trying to dis-establish the state- established churches of New England. (Any attempted dis-establishment would also be a Congressional law "respecting the establishment of religion," and thus forbidden.)

After the Civil War, this original First Amendment policy of deferring to states was no longer viable. Many states had violated religious rights-- especially of blacks (who were prevented from worshipping together) and of abolitionist preachers and printers (whose anti-slavery expressions had been suppressed). In response, the framers of the Fourteenth Amendment reaffirmed the importance of protecting religious liberty and religious equality--against not just the federal government, but also the states.

The Fourteenth Amendment also underscored the importance of religious speech, above and beyond political speech. Many of the most important "free speech" cases of the twentieth century have involved religious speakers, like the Jehovah's Witnesses and the Krishnas. And in keeping with "incorporating" (i.e., applying) the key rights of the original Bill against states, most of the leading modern cases involving the free exercise and nonestablishment principles have not involved "Congress" (the explicit target of the original First Amendment) but state and local governments--especially public schools.

E. Story Five: "The Right to Keep and Bear Arms"

The right to keep and bear arms is an oddity in our Bill of Rights, for it is one of the few rights of the original Bill that the Supreme Court has (thus far) refused to apply--to "incorporate"--against state and local governments.

At the Founding, this right was in fact importantly connected with rights of state and local governments. The Preamble of the original Second Amendment speaks of the importance of a

"well-regulated militia." This militia was organized by state and local governments, and typically consisted of all adult white men. These men were ordinary citizens--farmers, merchants, artisans, and so on--who would regularly practice and drill with their muskets on the town square. One of the main purposes of this militia of ordinary local citizens was to deter the national government from trying to use a dreaded standing army-- paid professional soldiers (perhaps even foreign mercenaries)--to impose tyranny. Just as the Minutemen farmers of Lexington and Concord had stood up to paid soldiers of the English crown at the beginning of the Revolutionary War, so local militias under the Constitution would prevent the new federal government from attempting any similar scheme of military intimidation. The original spirit of the Amendment might be summed up as follows: "When guns are outlawed, only the central government will have guns!"

Once again, however, the Fourteenth Amendment modified this Founding vision. The leaders who framed the Fourteenth Amendment were not bitterly *580 opposed to a federal standing army, for they needed to use this army to reorganize--to reconstruct--oppressive state governments in the South in the wake of the Civil War. The Fourteenth Amendment thus downplayed the role of local militias and instead emphasized a slightly different vision of arms-bearing: all citizens--even those who were not militiamen (for example, women and blacks)--should be allowed to have guns to protect themselves and their homes against private violence and thuggery. It was especially important to allow blacks to own guns to protect their homes against attacks by the Ku Klux Klan. It was after the Civil War that the National Rifle Association (N.R.A.) was founded, by a group of ex-Union Army officers. And the motto of the N.R.A. today reflects its Reconstruction roots, emphasizing private, rather than public (militia) arms-bearing to protect against private violence (outlaws) rather than public tyranny (a central standing army): "When guns are outlawed, only outlaws will have guns!"

Of course, even if the Second and Fourteenth Amendments prohibit "outlawing" of guns, the Constitution may well allow reasonable "regulation." (Even the militia was explicitly described as "well-regulated".) Such regulation could probably include permit requirements, registration, waiting periods, mandatory education in gun use and responsibility, and stiff penalties for those who improperly use guns to threaten others.

F. Story Six: "The Right Against Quartering Troops"

In 1774, the British government decided to punish the town of Boston for its political defiance by forcing Boston families to "quarter" British soldiers-- that is, to allow those soldiers to live in their homes. The Third Amendment was designed to prevent the new central government from repeating such a hateful policy in the absence of a real emergency.

The Third Amendment gets little attention today, and has rarely been raised in courts. But it does have interesting connections to the Amendments that immediately precede and follow it. And like its neighbors (the Second and Fourth Amendments) the Third has undergone an interesting evolution over the last two centuries.

At the Founding, the Amendment was always paired with its predecessor Second Amendment; and

both were seen as anti-standing army provisions. Both reflected fear of abuse that might be perpetrated by an undemocratic central elite trying to rule through coercion and intimidation, propped up by a powerful army of professional soldiers on the government payroll. The Third was thus an anti- military Amendment, reflecting fear of what we today would label "a military- industrial complex."

More modern cases, however, have stressed the Amendment's connection to the Fourth Amendment. Note how both explicitly protect "houses" against intrusion; and remember that, after the Civil War and the Fourteenth Amendment, the Second Amendment has likewise been linked to protecting one's home against intruders. Thus, the Third Amendment today is seen less as an anti-military amendment, and more as a pro-privacy amendment (though the explicit word "privacy" does not appear in either this amendment or anywhere else in the Constitution).

***581 G. Story Seven: "The Right Against Unreasonable Searches and Seizures"**

In 1763, a famous case was heard in England. John Wilkes was a member of Parliament and a critic of King George III and his ministers. When an anti- crown essay was anonymously published, ministers ordered their henchmen to break into Wilkes' house to try to find evidence that Wilkes had authored the essay.

Wilkes brought a suit for damages against the henchmen and won. The search, the judge and jury decided, was unreasonable and illegal. Americans cheered the result, for they too felt victimized by an abusive ministry--and Wilkes was a great champion of American liberty. (South Carolina and New Jersey each named a city in honor of the judge in the Wilkes case, Lord Camden; and Pennsylvania named Wilkes-Barre in honor of the great Parliament spokesman. Indeed so famous was Wilkes that many Americans named their children after him--including a child who would grow up to kill President Lincoln: John Wilkes Booth!)

With the 1763 Wilkes case firmly in mind, Americans in 1789 drafted the Fourth Amendment to prevent unreasonable government searches--and searches were especially unreasonable if targeted at citizens (like Wilkes) who had criticized the government. Like most of the original Bill of Rights, the Fourth Amendment now applies against states via the Fourteenth Amendment. This makes especially good sense in light of a main purpose of the Fourteenth Amendment: the protection of former slaves from tyrannical state governments. Before the Civil War, many slave states had authorized unreasonable "seizures"-- kidnapping, really--of free blacks accused (often incorrectly) of being runaway slaves.

Today, judges often enforce the Fourth Amendment through a controversial doctrine known as the "exclusionary rule." If, for example, the government finds a murder weapon, but the search that uncovered that weapon was illegal, the government may not generally use that weapon as evidence against the murderer at trial; the evidence is excluded. This, however, was not the rule when either the Fourth or the Fourteenth Amendment was adopted. Rather, evidence of guilt could be admitted; but any citizen whose house or other property had been unreasonably searched could, like Wilkes, sue for damages.

H. Story Eight: "The Criminal Procedure Amendments"

The Fifth, Sixth, Seventh, and Eighth Amendments all deal chiefly with courtroom procedure. The Fifth, Sixth and Eighth focus mainly on procedures before and during a criminal trial; while the Seventh focuses on civil (that is, noncriminal) trials--contract cases, property disputes between neighbors, and so on.

The most important unifying theme of these amendments is the importance of juries. The Fifth Amendment protects an institution known as a "grand jury" which decides whether a criminal defendant should be forced to stand trial. If the grand jury decides "yes" (by issuing documents known as "indictments" or "presentments"), then the Sixth Amendment is triggered, guaranteeing that the defendant will be tried by a smaller, "petit" jury of 12 persons (in contrast to the nearly two dozen persons who typically serve on a "grand" jury). If the defendant is tried and found not guilty by the Sixth Amendment petit jury, the *582 Fifth Amendment again comes into play: the government may not evade the petit jury's verdict through a second prosecution of the same defendant for the same crime. (This is the rule against double "jeopardy.") The Seventh Amendment contains a similar guarantee of trial by jury in civil cases; and even the Eighth Amendment--though it does not mention juries by name--reflects the high value placed on juries. When judges set "bail" (deciding what conditions must be imposed on a criminal defendant to ensure that the defendant will show up at his trial) and impose "fines" and "punishments" after trial, these judges are typically acting alone--without juries. In part because these actions occur without a jury, the Eighth Amendment imposes special restrictions: fines and bail shall not be "excessive," and punishments shall not be "cruel and unusual."

Why did the Bill of Rights emphasize juries so strongly, featuring the jury in so many provisions? In part because the jury perfectly embodied the original vision of the Anti-Federalist supporters of a Bill of Rights. Like the militia celebrated by the Second Amendment, juries were local, democratic bodies, composed of ordinary citizens not on the government payroll. These citizens would thwart any oppressive policies that paid officials of central government might attempt. If, for example, the central government tried to trump up charges against citizens who spoke out against the government, a grand jury would refuse to indict, or a petit jury would refuse to convict. If the central government ordered its henchmen to conduct unreasonable searches, the victims of these searches could bring civil suits for damages against these henchmen, and a civil jury would decide the case.

But juries were important not only to protect citizens who were parties to lawsuits; jury service would also benefit the jurors themselves. Juries would give ordinary citizens a chance to participate in government, and to learn about their rights and duties under the laws. One famous observer of American democracy, Alexis de Tocqueville, likened juries to free public schools, always open: through jury service, Americans would learn democracy by doing democracy.

Beyond the jury, Amendments Five through Eight also protect several other rights.

The Fifth Amendment prevents government from depriving persons of life, liberty, or property "without due process of law." This phrase has generated considerable controversy. Some lawyers try to limit the clause to procedural issues; the government can punish persons so long as fair courtroom

procedures (like jury trials) are followed. Under this "procedural due process" approach, for example, the government, if it so decided, could punish doctors for prescribing birth control pills, so long as the doctors had proper trials. Other lawyers, however, believe in the more controversial doctrine of "substantive due process"; they would argue, for example, that the legislature should not be allowed to criminalize birth control, and that any law that tried to do so was not really "due process". Precisely because many courts have followed a "substantive due process" approach over the last 200 years, this clause is today much more important than it was in 1789.

Another substantive provision of the Fifth Amendment requires that when a government takes a person's property, the government must provide "just compensation." Under this rule, the government may, for example, require a *583 landowner to give her land to the government so that a public road may be built over it; but the government must pay her a fair price (determined by a court) for the land. This power is also known as "eminent domain".

The Sixth Amendment provides those accused of a crime with various procedural protections above and beyond a jury. Perhaps the most important is the right to "have the assistance of counsel"--that is, a defense lawyer. If the defendant cannot afford a lawyer, courts have ruled that the government must provide one free of charge. Other Sixth Amendment rights of a criminal defendant include the rights to a speedy trial; to a public trial (the government may not conduct secret trials); to a local trial; to cross-examine ("confront") witnesses called by the government; and to call (through "compulsory process") witnesses who will testify for the defense.

With the exception of grand juries and civil juries, all of the rights of Amendments Five through Eight now apply against state and local governments via the Fourteenth Amendment as well as against the federal government under the original Bill of Rights.

I. Story Nine: "Unenumerated Rights"

The Bill of Rights did not merely create new rights; in many cases it simply reaffirmed--declared--old rights that Americans enjoyed under longstanding custom or natural law. But could any single list such as Amendments One through Eight possibly identify all these rights? Some framers were afraid that any list would necessarily be incomplete, and so they drafted the Ninth Amendment. This Amendment makes clear that even if a right is not explicitly mentioned in the Bill--not "enumerated" in the list--the right may nevertheless exist and should not be ignored ("denied" or "disparaged").

But how can we find these elusive rights if they are not explicitly listed? Perhaps the best place to start is by looking at the Constitution to see what rights it implicitly protects--protects, that is, without saying so in so many words. For example, even if the First Amendment did not protect freedom of speech and of the press in so many words, the democratic government created by the rest of the Constitution implicitly requires that citizens be able to express their political views to fellow citizens without fear of government punishment or censorship. So too, We the People--who ordained and established the Constitution, in the words of the Preamble--must implicitly "retain" the right to disestablish it by exercising our right (confirmed by the Declaration of Independence) to "alter or abolish"--to amend--our

existing government. We the People can exercise this right by "assembling" in peaceful conventions, just as Americans did at the Founding. So although neither the Preamble nor the First Amendment speaks explicitly about the right of the People to amend the Constitution in conventions, this right is clearly implicit, even if not "enumerated" in so many words. (Note how the Preamble, the First Amendment and the Ninth Amendment all speak of the rights of "the people.")

At the Founding, many of the rights retained by "the People" were populist, majoritarian rights--like the right of a majority to alter or abolish government. More modern lawyers and judges, however, have often stressed more individualistic rights such as the right of privacy. This right is not explicitly mentioned in the Constitution; but many men and women believe it is implicit in various Amendments--for example, in the Third and Fourth Amendment's *584 special protection of "houses" against government intrusion. (Note also that the National Rifle Association (NRA), for example, believes that the Second Amendment is also about protecting the privacy of the home from intruders; but the NRA emphasizes protection against private intruders--burglars.)

The debate about how to find unenumerated rights, and about what those rights are, has been raging ever since the Founding, and shows no sign of cooling down.

J. Story Ten: "States' Rights"

The Tenth Amendment rounds out the original Bill of Rights by re-emphasizing two of the Bill's main themes--rights of states and rights of "the people." We have already discussed rights of "the people" in connection with the First Amendment right of "the people" to "assemble" and the Ninth Amendment rights "retained by the people." Here we shall examine rights of states.

The American Constitution created a unique system dividing power between the new central government and the old state governments. This system--known as federalism--was designed to preserve liberty. We the People created both sets of governments--state and national--so that each could keep an eye on the other and help prevent the other from violating the people's rights. Instead of concentrating all government power in a single body--like the English Parliament--which might be tempted to abuse its power, Americans decided to conquer government power by dividing it. State governments would monitor federal officials, and challenge federal violations of constitutional rights; and the federal government in turn would help prevent states from becoming tyrannical. In the words of The Federalist Papers (an influential series of essays written in the 1780's to "sell" the Constitution to the people), the system of federalism would guarantee that:

the general [national] government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will [hold the balance]. If their rights are invaded by either, they can make use of the other as the instrument of redress.

From 1763 through 1776, colonial governments had kept a close eye on King George III and Parliament, and had sounded political alarms and organized opposition when they saw the signs of central tyranny. After 1789, state governments were expected to do the same thing to keep the new

central government in its proper place; and the Tenth Amendment is a reminder about how the rights of "states" can help preserve the rights of "the people."

Today, many ordinary citizens do not consider the Tenth Amendment as an important part of our Bill of Rights. Perhaps one reason is that, after the Civil War and Fourteenth Amendment, the slogan of states' rights lost its luster for many citizens. And because the Tenth Amendment focuses so sharply on the rights of states, the Supreme Court has not tried to "incorporate" (apply) it against states under the Fourteenth Amendment.

The Fourteenth Amendment, however, should not be read as repealing the Tenth. Rather, taken together they reaffirm the central message of The Federalist *585 Papers: When state governments violate citizens' rights, the people can use the federal government to protect them, as the Fourteenth Amendment reminds us; but when federal officials violate the Constitution, state governments must remember their Tenth Amendment role, and stand up for the rights of "the people."

II. THE LESSONS

Thus far the readings. What are the lessons of these readings--the morals of these stories and this storytelling--for those who care about the Bill of Rights and the Blessings of Liberty? Let me close with five quick thoughts.

First, keep it simple. The Constitution was designed for a democratic society, and thus, for ordinary folks. Its basic ideas, I believe, should be comprehensible to ordinary citizens. Constitutional scholarship, I fear, is becoming too pretentious, arcane and elitist--scholars using increasingly fancy words talking to an ever smaller circle of insiders. This form of constitutional scholarship betrays its true subject--the Constitution--and its proper audience: the People. And so I urge my fellow constitutional scholars to try to keep it simple--to speak and write free of cant, in a way that others may learn from (if they agree) or clearly take issue with (if they don't). And there is no better way to force yourself to keep it simple than to write for, or speak to, youngsters--our posterity.

Second, and related, find the big idea. Underlying many constitutional provisions is a core concept or cluster of concepts. If you are writing for or speaking to youngsters, you will do well to try to find this big idea--this root insight or lesson. And in the course of explaining this big idea to our posterity, you will often come to understand it better yourself.

Third, tell a story. Behind the words and ideas of our Constitution lie stories--epic narratives of We the People that generated insights and ideas that eventually crystalized into constitutional language. These stories have constituted us as American citizens. They are what binds us together in Union-- what, for example, I, as the son of two immigrants from India, have in common with persons whose forebears came from every other part of the planet to constitute this new world called America. What's more, to tell the story is to understand better the idea, the principle, the constitutional lesson it launched. It is easier to remember an idea if it is imbedded in a real story. And it is easier to remember a constitutional story if this story connects up with names and places familiar in popular culture-- John Peter Zenger, the

Concord minutemen, Camden New Jersey, Harriet Beecher Stowe, Frederick Douglass, John Wilkes Booth, Susan B. Anthony, Martin Luther King, the N.R.A., and so on.

Fourth, connect the dots. The Constitution is not a grab bag of separate unrelated clauses--though much of our clause-bound constitutional scholarship and adjudication seems to proceed as if it were. Our Constitution is a single document, designed to cohere. We must see how its parts fit together into a constitutional whole that spans seven separate articles, twenty-seven formal amendments, countless clauses, and more than two centuries. We must connect the dots and see how our rights fit into a single Bill, and how that Bill has been reshaped later amendments, such as the Fourteenth.

***586** Finally, remember the People. Our Preamble proudly proclaims that it exists in the name of the People. It was ordained and established by the People, and can be altered or abolished by the People. It links us to our past as a people, and reminds us of our posterity. And no phrase appears in more of the first ten amendments--our original Bill of Rights--than the phrase, "the people."

[\[FNa1\]](#). Southmayd Professor, Yale Law School. The following Lecture was delivered on March 31, 1994. For much more elaboration and documentation of the ideas presented here, the interested reader should consult: Akhil Reed Amar, [The Bill of Rights as a Constitution, 100 YALE L.J. 1131 \(1991\)](#); Akhil Reed Amar, [The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193 \(1992\)](#); Akhil Reed Amar, [Fourth Amendment First Principles, 107 HARV. L. REV. 757 \(1994\)](#), and Akhil Reed Amar, [The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457 \(1994\)](#).

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