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# A Living Constitution and a Living Bill of Rights

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WILLIAM V. DUNLAP

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*A Living Constitution  
and a Living Bill of Rights*

Two hundred and eighteen years ago last week, fifty-five members of the Continental Congress met for one last time to sign a document that was originally supposed to have been a few proposed amendments to the Articles of Confederation. Instead, the delegates had drafted a whole new Constitution, four handwritten pages that would serve as a blueprint for a government the likes of which the world had never seen. Four years later, the new Congress and the states added ten amendments to that Constitution. Nine were designed to protect individual rights and liberties against government intrusion, and the tenth was to protect the fledgling federal system, to clarify the line between national and state authority. Again, the world had never seen anything like it.<sup>1</sup>

This year, for the first time, Constitution Day is being observed around the country, at every college and university, to help instill in students and faculty alike the significance of those events of 1787 and the impact that they still carry today. I am pleased and honored to be invited back to Sacred Heart University to speak at this first Constitution Day lecture. I was here three years ago to talk about the Patriot Act in your excellent series of discussions on Democracy and the War on Terror, and was truly impressed by the level of interest and the quality of the student involvement. The fact that

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this university has just created a new Department of Government and Politics, which is sponsoring this program, shows that the interest of three years ago was not just a flash in the pan and that enough students are interested and involved in the important fields of government and politics and political science to justify the new department and support its programs. It speaks well for the future of American civil society that students are willing to devote their university years to studying and staying aware of the important issues of the day.

The Constitution that we celebrate today is a living Constitution, and by that I mean two very different things. First, when I say that we have a living Constitution, I mean to take sides in a fundamentally confused—and confusing—debate swirling around the widely misunderstood concepts of original intent and judicial activism. I also mean that, whatever side you may take in that debate and whatever you may think of the outcome of individual cases in our judicial system, the Constitution is living in the sense that it is at the core of daily debates and decisions at every level of every branch of government, that it is intertwined in our daily lives in ways that most people never notice.

The first part of this talk will discuss the often acrimonious debate today over original intent and the living Constitution. The second part will be a very brief survey of the Bill of Rights—a small but crucially important part of the Constitution—and the central role it continues to play in today's civic society.

### *The Living Constitution*

The question of the Living Constitution versus Original Intent is an acrimonious and often unenlightening debate that appears daily on AM talk radio (both the left and right varieties), on the Fox News Network, and, during confirmation hearings on Supreme Court nominations, everywhere you look. In short, the debate (if there is one) is between those who say that we have a living Constitution, one that must endure for the ages and therefore be

flexible and responsive to changing times and conditions, and those who argue that we have an amendment process to deal with changing times and conditions and that the task of judges is to interpret and apply the Constitution, until it is formally amended, in light of the intent of the framers or the original meaning of the text. In reality, though, no one today really wants to go back to the original intent or meaning to decide cases in today's federal courts.

This is not to say that there are no originalists around, people who take the language and meaning of the Constitution seriously. Most of them will admit, and do admit, however, that searching for the intent of the framers is a fundamentally misguided and ultimately an impossible task. Furthermore, those few who may still claim to follow original intent can be seen to stray off that path when it suits their purposes.

One of the ironies of the debate is that the framers apparently intended ours to be a living, adaptable constitution. How else can one explain the presence in the Bill of Rights of such open-ended and relativist phrases as “due process of law,” “unreasonable searches and seizures,” and “cruel and unusual punishment.”

That aside, why do I say a search for original intent is impossible? First of all, how can we know the intent of people who drafted this document more than two centuries ago? Second, how can a group of people—or in this case, many groups of people—have an intent? And which people do we mean? Do we examine the intent of those who drafted the language at the Constitutional Convention in Philadelphia? Or the intent of those who debated and ratified the Constitution in the several state legislatures? Do we have reason to believe that any two of them had precisely the same intent? And what of the dissenters? Do we consider their intent as well? Who are, or were, “We the People,” who ordained and established the Constitution in the first place?

There is a strong tendency to rely on the famous and still influential *Federalist Papers*, drafted by James Madison, Alexander Hamilton, and John Jay, as evidence of the intent of the framers.<sup>2</sup>

Many seem to forget that these were written as part of a very public debate on whether to ratify the Constitution, and that they represented one side of that debate. The fact that their side prevailed, in the adoption of the new Constitution, does not necessarily mean that the states ratified it for the reasons Madison, Hamilton, and Jay pressed forward.

Justice Antonin Scalia and Professor Randy Barnett of Boston College Law School are probably the two staunchest originalists today, and both agree that a search for original intent is impossible. They would turn instead to original meaning—how a provision would have been understood at the time it was drafted and ratified. This is a somewhat more practical enterprise, but it still has problems; courts often have difficulty ascertaining what Congress or a state legislature meant by a word or phrase just a year or so earlier. As Justice Scalia described originalism: “It’s not always easy to figure out what the provision meant when it was adopted. I don’t say its perfect. I just say it’s better than anything else.”<sup>3</sup>

This is where many would disagree. Lets look at where a true originalist approach would lead us. *Brown v. Board of Education*,<sup>4</sup> which declared racially segregated school systems to be unconstitutional, clearly went against both the original intent and the original meaning of the Fourteenth Amendment’s equal protection clause, but does anyone seriously believe today that the Constitution allows racially segregated schools? Or that *Brown v. Board* should be overruled? Take *Bolling v. Sharpe*,<sup>5</sup> the companion case to *Brown* that held that the due process clause of the Fifth Amendment, which applies to the federal government, prohibited segregated schools in the District of Columbia. This decision is probably even further from the original intent and meaning than *Brown*, yet it is so obviously correct that no one seriously questions it today.<sup>6</sup> *Baker v. Carr*<sup>7</sup> and *Reynolds v. Sims*<sup>8</sup> brought us the *one person, one vote* rule that did away with perennially imbalanced state legislatures which, after the migration from farm to factory in the early twentieth century, gave residents of rural counties in some cases twenty times the representation of city dwellers in the state

legislature, along with (and this was the real Catch-22) the power to prevent the imbalance from ever being corrected. The courts stepped in to correct the imbalance, using the equal protection clause in a way never contemplated by its framers. *Loving v. Virginia* struck down a law that prohibited marriage between races. If the drafters of the equal protection clause did not intend or mean that—and they did not—was *Loving* wrongly decided? Should it be overruled? It is true that we have a procedure for amending the Constitution, but when a small minority can prevent an overwhelming majority from amending the Constitution to integrate schools or to assure democratic legislatures or to allow interracial marriage, are the courts wrong to interpret the equal protection clause more broadly than its drafters and adopters may have contemplated?

When Justice Scalia and Professor Barnett and Justice Clarence Thomas talk of originalism, they are engaged in a legitimate and good faith search for principles of constitutional and statutory interpretation. Without principles, judicial decision-making is just political lawmaking by unelected judges. These originalists want—as everyone, I think, wants—principled restraints on judicial discretion. Originalism, they would argue, provides not only a legitimate theory of interpretation but also, perhaps more important, restraint, because it limits a judge's discretion. Living Constitutionists, they might say, are free to choose from any number of current trends or philosophies or even laws of other countries in deciding what the Constitution means, while originalists are bound by the original text or intent or meaning. The difficulty with this is not only that original meaning is far vaguer and more elusive than most originalists would admit, but that so-called originalist judges are as good as living Constitutionists at picking and choosing. They are cafeteria originalists, one might say. Justice Scalia has consistently argued for First Amendment protection for commercial speech in the absence of any evidence of which I am aware that the framers intended this or that any of them thought that this was what freedom of speech meant. Personally, I

do not object to reading the First Amendment broadly and protecting speech today that the framers might not have intended to protect, but shouldn't Justice Scalia object?

The Constitution has two due process clauses. One, in the Fifth Amendment and applicable to the federal government, became part of the Constitution in 1791.<sup>9</sup> The other, in the Fourteenth Amendment, became part of the Constitution in 1868.<sup>10</sup> They use the same language to describe the rights protected, yet is there any reason to believe that the drafters of the Fourteenth Amendment meant in 1868 precisely what the drafters of the Fifth Amendment meant in 1791? If we were to discover that they had somewhat, or radically, different views of what due process meant, would we then apply different standards depending on which clause was at issue? Can the 1791 drafters control what their successors meant in 1868? Surely we could not apply the 1868 view to an earlier generation. Would it make any sense in today's world to treat the two due process clauses as though they mean different things? Should they both mean what due process of law means today?

Here's the other problem. Scholars and judges aside, the phrase original intent, like the phrase "activist judges" when used pejoratively in talk shows and newspaper columns, is not a theory or a principle. It has become a political code phrase to indicate decisions or judges that go against a particular political viewpoint. After the United States Supreme Court, in *Bush v. Gore*,<sup>11</sup> interfered with a recount ordered by the *state* Supreme Court in Florida by using the equal protection clause in a way that the framers of clause certainly never contemplated, I never heard any of the usual original intent or original meaning advocates, including Justices Scalia and Thomas, who helped decide that case take the Supreme Court, or themselves, to task for a brand new reading of that venerable clause.

So the principle isn't really that much of a principle, the practical argument fails in practice, and I know of no originalists who would want to live with the results of a *true* originalist application of, say, the equal protection clause.

*The Living Bill of Rights*

Let us turn our attention now our living Bill of Rights, to sketch a few of the issues and controversies in America today that have been, or soon will be, decided—probably only temporarily—with the help of the Bill of Rights. This is not intended to be a definitive discussion of the Bill of Rights—just a reminder that it still plays a significant role in our daily lives.

Before we talk about the first ten amendments, perhaps we should start with the fourteenth, without which the Bill of Rights would be a much weaker document.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

\* \* \* \* \*

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

When the Bill of Rights was adopted, and for many decades afterward, it applied only to the national government, not to the states. It did not have to be this way. Only the First Amendment makes any reference to either level of government: “*Congress shall make no law . . .*” The others declare that individuals have rights and liberties that may not be infringed but do not specify who, or what, may not infringe them. Before this issue had been clarified, a



Baltimore dock owner sued the city for damages allegedly inflicted on his dock by a harbor improvement project. The Supreme Court, in 1833, in a case called *Barron v. Baltimore*,<sup>12</sup> held that the Fifth Amendments takings clause, and by implication the other provisions of the Bill of Rights, applied only to the national government, not to state and local governments.

Then in 1868, Congress and the states amended the Constitution once again, with the Fourteenth Amendment. This was the second of three known as the Civil War, or post-Civil War, amendments. The Thirteenth, in 1865, prohibited slavery and involuntary servitude (except as punishment for a crime).<sup>13</sup> When this did not end racial discrimination in the former Confederacy, the Fourteenth Amendment declared that all persons born in the United States, which included nearly every former slave, were citizens of the United States and of the state in which they resided. It also included three clauses designed to protect individual rights and liberties from abuse by the states. These were the due process clause, identical to one in the Fifth Amendment; the privileges or immunities clause, to protect citizens of the United States against abuse by the states; and the equal protection clause, originally to protect former slaves against discrimination but now interpreted far more broadly to prevent many forms of discrimination. (The third Civil War amendment was the Fifteenth,<sup>14</sup> which prohibited racial discrimination in voting.)

Eventually, the court began to use these clauses to apply various provisions of the Bill of Rights to the states. In 1897, the right to just compensation was found to be protected by the due process clause of the Fourteenth Amendment.<sup>15</sup> In 1927, the free speech clause was applied to the states.<sup>16</sup> Then came freedom of the press,<sup>17</sup> freedom of assembly,<sup>18</sup> assistance of counsel in capital cases,<sup>19</sup> later in all felony cases,<sup>20</sup> protection against unreasonable searches and seizures,<sup>21</sup> self-incrimination,<sup>22</sup> and double jeopardy,<sup>23</sup> until by the end of the 1970s, the Supreme Court had incorporated into the Fourteenth Amendment virtually every provision of the Bill of Rights, so that they applied similarly to the state and federal governments.

So we see that the due process clause, through which most of these provisions were incorporated against the states, has been most influential. The privileges or immunities clause, which could have been very useful in protecting the rights of citizens against state abuse, was very quickly gutted by the Supreme Court and restricted to protecting a few rights guaranteed by the United Constitution to United States citizens—rights that states were seldom inclined to infringe in the first place, such as the right to travel freely from state to state or to petition Congress.<sup>24</sup> A few years ago, in a case involving California's lower welfare payments to new state residents, the court, most unusually, relied on this privileges and immunities clause to strike down the California law, possibly breathing new life into the clause.<sup>25</sup>

The third—the equal protection clause—has revolutionized civil society in America. It has not come even close to undoing racial and gender inequities in many aspects of life, but it has done away with legally segregated schools, buses, restrooms, restaurants, water fountains, and swimming pools, and paved the way for congressional legislating prohibiting racial discrimination in employment and places of public accommodation. Even though the framers of the Fourteenth Amendment may not have intended so, the equal protection clause has also prohibited official gender discrimination and some state-imposed disabilities on aliens and children born out of wedlock. The clause, along with its counterparts in various state constitutions, also plays a role in the current debate over gender orientation and same-sex marriage.

So today, as we talk about the Bill of Rights, keep in mind how much we owe to the Fourteenth Amendment for the protections we enjoy under the first ten.

### *Establishment of Religion*

The very first clause of the Bill of Rights is at the heart of three of the most contentious disputes of the day: whether crèches and the Ten Commandments may be displayed on public property,

whether the pledge of allegiance, with the phrase “under God,” may be mandated in public schools, and whether the teaching of evolution in science classes may be banned or regulated.

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

“*Congress shall make no law respecting an establishment of religion . . .*” This is much more than a simple ban on an official religion or church, such as the Church of England, from which many of the early American settlers had fled. The establishment clause is said to erect a wall of separation between church and state, to avoid excessive entanglement between church and state,<sup>26</sup> and has been used to prevent public funding of church-related schools,<sup>27</sup> public prayer at high school football games,<sup>28</sup> and the display of religious symbols in public buildings.<sup>29</sup>

*The Pledge of Allegiance.* Not long ago, a federal judge in California ordered a school district to stop requiring students to recite the Pledge of Allegiance each morning in school.<sup>30</sup> He did not, despite numerous press reports to the contrary, declare the Pledge, or the congressional act that inserted the words “under God” into it, unconstitutional. He found that to force students who did not believe in God to choose between reciting the words, standing silently by, or leaving the room put them in a position of either professing something they did not believe or appearing to be unpatriotic. Reciting the Pledge is, after all, essentially a patriotic, not a religious, exercise, an unconstitutional entanglement of church and state, say the plaintiffs in the *Newdow* cases. This case has already been to the United States Supreme Court,<sup>31</sup> which dismissed it on a procedural issue: that the father bringing the suit

on behalf of his daughter was not the custodial parent and so did not have standing. This time, the same father—who happens to be a lawyer—brought the case on behalf of other school children; the court found that they did have standing and proceeded to rule in their favor on the principal issues. The Court of Appeals for the Ninth Circuit has already ruled against the school board once.<sup>32</sup> If it does so again, the Supreme Court will not have to hear the appeal—it has almost total control over its docket and can decline to hear most cases without providing a reason—but because another Court of Appeals, the Fourth Circuit, has ruled the other way in a virtually identical Virginia case,<sup>33</sup> this split among the circuits would ordinarily assure that the Supreme Court would take the case to avoid a situation in which the United States Constitution is being interpreted and applied differently in different parts of the country.

*The Ten Commandments.* Just last spring, the Supreme Court handed down a split decision on the Ten Commandments, allowing a public display in Texas to stand but finding that one in Kentucky violated the establishment clause. The court, Justice Breyer in particular, was criticized, even ridiculed, by many media commentators for not being able to decide whether the Constitution permits displays of the Ten Commandments. Upon closer analysis, however, Justice Breyer's reasoned opinions and the eventual outcome in the Court should make perfect sense, even to those who disagree with the outcome of one or the other of the cases, as most people appear to do. Sometimes—when the commandments are displayed as part of a larger display of social, historical, philosophical, and cultural values—they do not constitute an establishment of religion. When they are displayed on government property in an effort to promote or celebrate the Judeo-Christian tradition, however, this entangles government too closely with religion and is forbidden. Rather than say that all displays are permitted, or that all displays are prohibited, the court looked at the individual circumstances of each display to make a case-by-case determination. That is what courts do best, and it is a sure sign of an evolving Constitution and a living Bill of Rights.

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*Speaking of evolving.* The third contentious establishment clause issue today is the conflict over the teaching of human evolution in the public schools. The political agenda of the anti-evolution movement is to take it out of the First Amendment arena by trying to disguise the fact this is largely a religious effort with scriptural roots. We seldom hear the word “creationism” any more. The new program is “intelligent design,” a pseudo-science packaged as science, so that critics of evolution can try to justify requiring science teachers to present it alongside evolution in public school classrooms. At the moment this is a political issue, just beginning to work its way through the courts. Eventually it will probably reach the United States Supreme Court, and this—along with the abortion issue—is one of the reasons that evangelical Christians, among others, have made the selection of federal judges, especially justices of the Supreme Court, such a high priority in their political agenda.

And that’s just the first clause of the First Amendment. The amendment also contains the free exercise clause, which is now in the courts through cases as disparate as whether prison inmates have a right to special diets and to chaplains from their own sect of Islam, and whether Congress has the power to exempt churches from the municipal planning and zoning laws that regulate land use by homes and businesses.

*Freedom of Speech*

Laws punishing flag burning violate the free speech clause, the Supreme Court has held. So now a Flag Burning Amendment, the latest of many, has been introduced in Congress, to overrule the Court and to take burning the American flag outside the protection of the First Amendment. This is just one of many free speech cases in the courts today.

*Freedom of the Press*

Even though the press has its own clause, the Court has never granted it significant protections that the public does not already enjoy through its freedom of speech. Judith Miller of the *New York*

*Times* was sent to federal jail for refusing to divulge the name of her source of information about Valerie Plame, the CIA covert operative whose identity was outed by the White House and former CNN commentator Robert Novak in retaliation for her husband's criticism of President Bush's Iraq policy.<sup>34</sup>

Press shield laws pose a truly difficult balancing of interests and values. Press advocates regard access to information about how government or large corporations actually go about their business as a cornerstone of a free and effective press, and they fear that if reporters have no privilege to protect confidential sources their information will dry up. Prosecutors argue that the reporters frequently have information relating to the commission of a crime and that reporters, like everyone else, have a legal obligation to assist prosecutors. Sometimes it even becomes a clash of constitutional rights. Even if you agree that reporters should have a privilege to protect confidential sources, suppose the information being withheld would assist a defendant in a criminal case. Then we have a direct conflict between the reporters' First Amendment claim and the defendant's right to a fair trial, specifically the Sixth Amendment right to compel witnesses to testify.

In the face of such a conflict, one occasionally hears the argument that the First Amendment should prevail over any other, that it is in first place because the framers obviously considered freedom of speech and the other rights related to expression to be the most important. In fact, what we call the First Amendment was actually third in a list of twelve articles of amendment submitted by Congress to the states in 1789. The first, a technical formula for determining the number of representatives, was never ratified.<sup>35</sup> The second, prohibiting senators and representatives from raising their own salaries, took more than two hundred years to gain the necessary ratifications, becoming the Twenty-Seventh Amendment in 1992.<sup>36</sup> Thus the amendment's position in the Constitution is no evidence whatsoever of Congress's view of its importance, and given the complexities of the amendment process, it can hardly be regarded as evidence of how the states regarded it either.

## Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The Second Amendment is one of the few provisions of the Bill of Rights that has not been incorporated against the states. As a result, it does not protect citizens against state gun-control laws, only federal. It has not come before the Supreme Court very often, but when it does the court has upheld Congress's authority to regulate the ownership and sales of firearms.

One well-known case that struck down a federal gun-control law had nothing to do with the Second Amendment. *United States v. Lopez*,<sup>37</sup> the 1999 case that invalidated the federal Guns in School Act, involved a question of Congress's power to regulate interstate commerce. The court held that possession of a gun in a school zone was not interstate commerce, and that it did not have a substantial effect on interstate commerce, and therefore was beyond the power of Congress to regulate. If that case had anything to do with the Bill of Rights, it was in the Court's reliance on the Tenth Amendment in finding that the federal law making it a crime to possess a gun in a school zone infringed upon the power of the states to determine what conduct is criminal within its own boundaries.

There is considerable debate over the meaning of the Second Amendment and whether it confers any individual rights or whether it simply grants states an immunity from federal gun control laws. One Court of Appeals, the Fifth Circuit, has concluded, in language that was utterly irrelevant to the outcome of the case and therefore not part of the holding, that the amendment confers an individual right.<sup>38</sup> Another circuit, the Tenth, focusing on the amendment's introductory language, has held that the right is a collective one and that to violate it a federal law would have to impair the states ability to maintain a militia.<sup>39</sup>

Original intent is a major tool in crafting arguments about the scope of the Second Amendment, but one might want to ask: When the framers, in 1791, spoke of the right to keep and bear arms, did they mean automatic rifles, assault weapons, rocket launchers, and hand grenades?

So far, the Supreme Court has never held that the Second Amendment creates or finds an individual right to keep and bear arms, but we can be reasonably certain that it will remain a contentious issue into the foreseeable future.

### Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

The Third Amendment too has never been incorporated by the Supreme Court to apply against the states. If such a case were ever to come before it, the court would surely find, as one Court of Appeals has done, that the amendment covers the state militia as well as the United States Army.<sup>40</sup>

### Amendment IV

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

The Fourth Amendment protects against unreasonable searches and seizures and imposes fairly strict requirements for the issuance of a search warrant. It is a constant source of litigation, particularly since the development of the exclusionary rule that prohibits



prosecutors from using evidence unconstitutionally obtained,<sup>41</sup> and *Mapp v. Ohio*,<sup>42</sup> which extended the exclusionary rule to the states as well as to the federal government. The history of the Fourth Amendment since then has been one of a constant struggle between defense lawyers and prosecutors as the courts try to define probable cause and fine-tune the exceptions to the rule—such as when an honest mistake by the police will justify using evidence ordinarily excludable. If you learned your criminal procedure the same way I did—by watching *Law & Order*—you are already familiar with defense challenges to the admissibility of evidence because the police failed to follow judicially established procedures for obtaining warrants based on probable cause that a crime has been committed.

Fourth Amendment cases are an instructive example of the problem with original intent as opposed to a living, developing Bill of Rights. The Fourth Amendment speaks of protecting persons, houses, papers, and effects. It says nothing of telephone conversations, e-mail, or electronic eavesdropping on face-to-face conversations. The omission is hardly surprising, as the founding fathers had no inkling of the technology that would begin to revolutionize communications just a few decades after the Bill of Rights was adopted.

The USA Patriot Act, particularly the current negotiations in Congress over renewing the sunset provisions, has brought search and seizure and the Fourth Amendment into the public consciousness as never before.<sup>43</sup> Among the controversial provisions are statutory authorization for trap and trace technology,<sup>44</sup> pen registers,<sup>45</sup> and roving wiretaps<sup>46</sup> that allow investigators to follow an individual from phone to phone, instead of having to obtain a new warrant every time a person under investigation changes telephones—a much more common practice in the age of disposable cellular phones. These all raise serious Fourth Amendment issues, but many people would probably be surprised how long some of these practices have been going on, long before the Patriot Act brought them to public attention.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment deals with a broad range of rights, most of them concerning defendants in criminal cases. The most famous is probably the right against self-incrimination. We popularly call it “taking the Fifth,” and someone invokes it every evening on some television police show. This right, and the relatively recent obligation of the police to inform suspects of it at the time of arrest—“You have a right to remain silent. Anything you say may be used against you in a court of law.”—is one of the most important rights that American citizens have against their law-enforcement agencies.

Today, however, we are going to mention one of the lesser-known clauses of the Fifth Amendment, the Takings Clause—“nor shall private property be taken for public use without just compensation.” By its terms, it says simply that if government takes private property it has to pay a fair price for it. By implication, however, in conjunction with the due process clause, it prohibits government from taking private property for anything other than a public use.<sup>47</sup> Taking property for private use—buying it from one person to give or sell it to another person—would be so far beyond the bounds of appropriate governmental behavior that the Constitution does not seem even to contemplate the possibility.

This is what Connecticut's famous *Kelo* case is about.<sup>48</sup> The New London Development Corporation wants to clear a large tract of land along Long Island Sound and redevelop it into a park, hotel and conference center, and other commercial and research facilities. The primary goal is to develop the area economically and to make it more desirable for one of the region's largest employers, Pfizer Pharmaceuticals, to remain in New London. Suzette Kelo and fourteen other property owners (out of 115) refused to sell, and the city invoked its power of eminent domain. Kelo challenged the city's authority, in state court and then up to the United States Supreme Court, arguing that turning her property, her home, over to a private developer was not a public use within the meaning of the Fifth Amendment. The power of eminent domain is typically used to make room for public projects—highways, schools, airports. More and more, however, municipalities have been using it to assemble parcels to allow private development, such as shopping centers and industrial parks. The courts have routinely upheld states and cities authority to do this sort of thing, but always in the context of removing slums and blight. Suzette Kelo's neighborhood was no slum. She argued that economic development, in and of itself, was not a public use that would allow government to take her property, even for a fair price. Is it fair, she essentially asked, to allow the government to turn her home over to someone else who might simply have a more profitable use for it?

The court did what most observers, I think, expected it to do: defer to the government's determination of what constitutes fair use. It did that in 1954 in *Berman v. Parker*,<sup>49</sup> where the District of Columbia was putting together a redevelopment parcel in a blighted neighborhood, and in *Midkiff v. Hawaii*,<sup>50</sup> where it allowed the state government to require the Bishop Trust, established for the benefit of the native Hawaiians, to sell its extensive holdings to tenants, in an effort to break up what the state regarded as the trust's stranglehold on the real estate market.

The United States Supreme Court's *Kelo* decision last spring triggered one of the more bizarre attacks on the court.

Commentator after commentator, particularly political conservatives, the very people who have been purporting for years to favor states' rights and oppose judicial activism, excoriated the court for not reining in state power. This case, regrettable as though the outcome may be to many, is a perfect example of judicial restraint: the Supreme Court deferring to the judgment of democratically elected officials acting under the authority of state law. If you sympathize with Suzette Kelo (and it is hard not to when you see her highly personalized house and garden, perched on a rock above Fort Trumbull and overlooking New London Harbor and Long Island Sound) and you want to look for villains (and who doesn't these days?), then the villains are the New London Development Corporation, the New London City Council that authorized the use of eminent domain, and the Connecticut Legislature, whose laws authorized the city to act in this fashion (cities in Connecticut have no authority to do anything not authorized by state law). All the United States Supreme Court did was exactly what right-wing critics have been advocating for years; *Kelo* was a case of the federal government deferring to state law, and of unelected and politically unaccountable judges deferring to democratically elected officials.

Our democratically elected officials in Hartford appear to be getting the message. The New London Development Corporation issued eviction notices shortly after the Supreme Court decision, while negotiations were still going on, and Governor Rell stepped in last week and "encouraged" the corporation to withdraw the notices. Meanwhile the Connecticut Legislature has taken up consideration of a law that would rescind the New London evictions and prohibit future takings for the purpose of "economic development." Some states have already enacted such laws in response to *Kelo*. It is, as the court reminded us, ultimately a question of state law, and ultimately a question for the legislature, not the courts.

Perhaps the most important lesson of *Kelo* is that the courts are not always the last resort in protecting individual rights. We have a

federal system in which powers are allocated between the federal and state governments, and on each of those levels complex systems of separation of powers and of checks and balances help to prevent abuse of power. Sometimes voters have as much influence in the system as lawyers do. Sometimes.

#### Amendment VI

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

It has been hard to read the Sixth Amendment since 2001 without thinking about Guantanamo Bay and the so-called “War on Terror.” Virtually every provision of the Sixth Amendment’s guarantees of a fair trial is called into question. Speedy trial? The government has made clear that many of those prisoners will remain at Guantanamo indefinitely, even after the military has conceded that some of them, perhaps many, have no connection whatever to the terrorists we are fighting. Public trial? Confronted with witnesses against him? Compulsory process for obtaining witnesses? What witnesses?

Even though one clause or another of the Sixth Amendment will be implicated at almost every stage of the Guantanamo litigation, you will not necessarily hear it mentioned that prominently. This is because the focus for some time will be not on specific protections but on whether the United States Constitution even applies to detainees in Guantanamo. It is fairly clear to me that if the empowerment provisions of the Constitution—the ones that

grant the president the power to establish a base in a foreign country and maintain a prison camp there—apply in Guantanamo, then the limitations on his power, the Bill of Rights, apply there as well. I do not believe that the government can pick and choose among the constitutional provisions it thinks should apply. Cafeteria constitutionalism. How the courts decide this, and how the president complies, will play a major role in shaping the world's view of the United States as a protector of human rights and individual liberties as well as a great military power.

“You have a right to an attorney. If you cannot afford an attorney, one will be provided for you by the court.” The Miranda warning. You've heard it a hundred times on television. Not that often in person, I hope. This derives from the Sixth Amendment: “The accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

Right to counsel is the only affirmative right in the Bill of Rights, or in the whole Constitution, for that matter. All the others are negative rights, or what legal philosophers would call privileges. Take the freedom of speech, for example. We have the right, loosely speaking, to use public places like parks and sidewalks for public expression. The government may be able to place reasonable time, place, and manner restrictions on this expression—no bullhorns in a residential area after 9 P.M. (Just the day before yesterday, Cindy Sheehan's antiwar rally in New York City was broken up by police, and her local organizer was charged with using a loudspeaker without a permit.<sup>51</sup>) But government may not exclude all expression from traditional public forums, and it may not discriminate on the basis of content—allowing speech of which it approves and prohibiting or restricting speech of which it disapproves or which may be unpopular. So, to use a classic example, if you want to set up a soap box in the park or on the street corner, you have that right. But if you don't have your own soapbox and you can't afford one, government has no obligation to provide you with one. You're on your own

A soapbox may seem a trivial example, but this question of rights and privileges is what the media critic A.J. Liebling had in mind when he said that freedom of the press belongs to those who own one.<sup>52</sup> Very true in the days when mass communication required a press or a transmitter. Today, the Internet and listservs and particularly blogs allow almost anyone in this country—or for that matter in the developed world—to create a media presence and get a point of view before the world. More than ever, we truly have a marketplace of ideas, and the competition is intense. As in any other marketplace, some of the goods are truly shoddy. The rule—actually the practice, because there are no rules—is *caveat emptor* (let the buyer beware), and those cruising the net for ideas have an obligation to themselves and to society to develop critical faculties—the critical thinking skills that will allow them to travel this unmapped information superhighway without crashing and burning. So freedom of speech and freedom of the press are what we would call negative rights, or privileges. We may engage in them if we want, and government has no authority to prevent us, but it also has no obligation to help us out.

Abortion is another example. The case of *Roe v. Wade*<sup>53</sup> found in 1973 that the due process clause of the Fourteenth Amendment contained a right to privacy that included what popularly became known as a right to an abortion. A few years later, the state of Connecticut refused to pay, through Medicaid, for elective abortions, those not indicated for medical reasons. An expectant mother who was receiving Medicaid benefits and could not afford an abortion sued, arguing that this refusal violated her right under *Roe v. Wade* to an abortion. The court rejected this argument, invoking the right/privilege distinction and finding that *Roe*, as its language had always made clear, merely established a right or privilege for a woman, in consultation with her physician and without undue governmental interference, to choose to have an abortion. The state had no obligation to provide or pay for one.

Affirmative rights, on the other hand, are those that government has a correlative duty to provide. In a strict analysis of

rights, privileges, and duties, no one has a right unless someone else—in our discussion, the government—has a duty to provide it. If what you enjoy is merely a freedom to do something—such as speak, or exercise your religion, or choose to have an abortion—then it is not a right but a privilege, with which government may not interfere. The Sixth Amendment's right to counsel is a true right. The government has a duty to provide legal assistance, and this actually costs the government money, because those lawyers have to be paid.

Until relatively recently, the right to counsel was only a negative right as well. If a defendant wanted to be represented by a lawyer, the government could not prevent it. Only since the notorious Scottsboro Boys case in 1932 have states been required to provide lawyers in capital cases.<sup>54</sup> In 1963, it was extended, in *Gideon v. Wainwright*, to all state felony trials.<sup>55</sup> Today it is a well recognized right that we mostly take for granted.

Our Constitution is loaded with negative rights and virtually lacking affirmative rights. One of the things you might want to think about or discuss is why that should be so.<sup>56</sup>

#### Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

This is another of the few Bill of Rights provisions not incorporated into the Fourteenth Amendment, leaving the states free to alter the rules and experiment with civil trials. We inherited our legal system from England at the time of the War of Independence and the adoption of the Constitution. Our system has changed dramatically since then, and so has England's, often in different directions. It has been years now since England did away



with jury trials in civil matters, with the exception of libel cases and a few others. England made that change by statute. In this country, it would take a constitutional amendment on the federal level, but by not incorporating the Seventh Amendment, the Constitution leaves the states free to experiment as England has done, looking for ways to achieve social justice in more efficient ways.

### Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

There is a good chance that we will be hearing a great deal about the Eighth Amendment in the next few years in the wake of Michael Ross's execution. In May 2005, Connecticut became the first New England state in forty years to impose capital punishment. Opponents of capital punishment tried to persuade the legislature to intervene and repeal the death penalty before the execution could occur, but this was politically unrealistic. Michael Ross's crimes were so horrendous that many people normally opposed to capital punishment sat this one out. The fact that he was a well-educated, middle-class white man removed the case from the usual argument that the death penalty is disproportionately imposed on blacks, other racial minorities, and the poor. The fact that he admitted his guilt in the face of incontrovertible evidence eliminated the perennial concern about caprice and mistake.

Now that the execution is over, it is quite likely that in a few years the Legislature will look at the issue again. It is unlikely to raise any Eighth Amendment or due process issues, because the federal constitutional standards are spelled out clearly enough that any state legislature not making a conscious effort to push the boundaries will have no problem meeting constitutional requirements. In the meantime, death penalty litigants will continue to push their attacks in the courts. So far the Supreme Court has held that states may not execute the mentally retarded,<sup>57</sup> or those who were under sixteen

when they committed the crime.<sup>58</sup> Eventually, many hope, the court will prohibit capital punishment altogether.

#### Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Ninth Amendment sounds totally innocuous, but it has an interesting history and a stormy present. Its future may well lie with John Roberts, the new chief justice of the United States.

While the Constitution was being drafted, there was an intense debate over whether there should even be a Bill of Rights to protect individual liberties against governmental oppression. Some thought it essential. Some opposed it, for either of two reasons: that the national government was a government of limited powers, restricted to matters of nationwide concern; and that there was nothing in its delegated powers that would allow it to infringe on individual liberties. In this view, it was the states, which possessed the police power and regulated the daily lives of individuals, that should be constrained by Bills of Rights, as they were. In the other view, having a Bill of Rights, especially an unnecessary one, could actually have the effect of repressing individual liberties. This was the eighteenth century, and the framers were infected with the liberalism of that era—that people are endowed by their creator with certain unalienable rights, and that among these are life, liberty, and the pursuit of happiness. To them, rights and liberties were not granted by government; they were part and parcel of being human. Among these framers were those who feared that a Bill of Rights that specified, or enumerated, certain specific rights would become the basis of an argument that any right not listed was not a right at all. Knowing that it would be impossible to cover every

contingency, they argued that it would be better not to have any Bill of Rights at all.

Eventually those demanding a Bill of Rights prevailed, and the Constitution was adopted on the understanding that the protections would be added shortly. To address the concerns of the natural rights faction, the Ninth Amendment was included to preclude the argument that because a particular right—say, privacy—was not enumerated in the Bill of Rights, it was not a right retained by the people. The Ninth Amendment is a living argument for a living Constitution.

Justices Douglas and Goldberg relied heavily on it in their opinions in *Griswold v. Connecticut*,<sup>59</sup> which invalidated a Connecticut law making it a crime to prescribe or use contraceptives. They found, applying different theories but coming to the same conclusion, that the Bill of Rights contained a right of privacy that was broad enough to protect a married couple's decision to use contraceptives, whether to protect the health of the woman, or simply for family planning reasons. The rationale was soon extended to unmarried persons, and in 1973 it was expanded to cover a woman's choice to have an abortion. Last year, in a case called *Lawrence v. Texas*,<sup>60</sup> the Court overruled itself<sup>61</sup> and held that state laws criminalizing homosexual sodomy also infringe unconstitutionally on this right of privacy. Other constitutional provisions came into all these decisions, as well, but it is the Ninth Amendment that provides the underpinnings of the argument that just because the Constitution does not mention privacy does not mean that it is not a right deserving of judicial protection.

Contraceptives, abortion, homosexual sodomy. The uses to which recent courts have put the Ninth Amendment raise charges of judicial activism, a label that conservatives typically pin on judges they regard as too liberal. Judicial activism, though, is not a conservative/liberal question. The most famous era of judicial activism in the Supreme Courts history was between 1897 and 1938 and has come to be called the *Lochner* era, after a famous case in which a conservative court discovered an unenumerated freedom

to contract in the Constitution and used it to strike down health and safety laws in the workplace.<sup>62</sup> That series of cases was finally rejected during the Great Depression, only to be replaced in the 1960s by a very different kind of judicial activism, now protecting the right to privacy, rather than the freedom of the marketplace.

When conservatives complain today about activist judges, it is not the activism they deplore. It is the results of specific cases. The Rehnquist Court was arguably the most activist court in Supreme Court history. That's not a criticism. It's not a compliment. It's just a fact. It struck down more acts of Congress than any court since the *Lochner* era, to protect state power against federal intrusion and to protect executive power and judicial power against legislative intrusion. Conservatives and states rights advocates applauded many of these decisions, while continuing to call for an end to activist judicial lawmaking.

Perhaps the most breathtaking stroke of judicial activism ever was *Bush v. Gore* in 2000.<sup>63</sup> The Supreme Court stepped into a dispute over the interpretation of state law, over which it has no jurisdiction, and applied the equal protection clause in a way that it had disapproved of when people had tried to use it to challenge state laws that disadvantaged blacks. Then, recognizing the implications of this for the future of states' rights and the court's narrow view of equal protection, the court simply added a sentence saying that the case should be not used as precedent in future cases. This is a violation of the whole concept of precedent in judicial decision-making. Legislatures are political, and can base their decisions on ephemeral political values or on nothing at all. Courts are supposed to engage in principled decision-making, knowing that what they decide today must fit into the existing legal landscape while helping to reshape that landscape for future courts.

This commentary is a criticism not so much of the Rehnquist Court as of so-called commentators who latch onto a catchphrase like "activist judges" without the faintest notion of what it means, and then try to pin that label on every judge with whom they disagree.

### Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Read and applied literally, this amendment would have no effect on federalism, on states' rights, or on judicial power. In fact, it would have no effect on anything. It is, as one landmark commerce power case, *United States v. Darby*, put it in 1941, a mere truism.<sup>64</sup> It merely restates the obvious. Why obvious? Because we have a national government of limited powers. It was formed by the Constitution, and it possesses only those powers granted to it by the Constitution. The residual sovereign power in our system lies with the states, many, but not all, of whose powers and prerogatives were transferred to the national government by the Constitution. This was true, and well known to be true, before the Tenth Amendment reinforced it.

Two decades after *Darby*, Thurgood Marshall wrote in another case that the Tenth Amendment may be a truism but that it is not without significance.<sup>65</sup> Marshall's comment comports precisely with a well-established canon of interpretation that no word or phrase in a document should be read in such a way as to make it meaningless. Treating the Tenth Amendment as a truism has precisely that effect. If it adds nothing to the text of the Constitution, why was it adopted in the first place? The drafters must have intended it to mean something. The Rehnquist Court was far from the first to place great significance on the Tenth Amendment and to rely on it to invalidate acts of Congress said to infringe upon the powers reserved to the states. In this sense, the Tenth Amendment has little to do with the Bill of Rights; it merely allocates authority between the state and national governments. Nevertheless, it does have some practical implications for individual liberties.<sup>66</sup>

I hope that a brief glance at the first ten amendments and the Fourteenth (which makes most of the others applicable to the states)

makes clear that we have a living Bill of Rights, in the sense that it is in play today and every day. In the other sense of the phrase, I hope I have persuaded you that we have a Living Constitution. As Jack Balkin, a Yale law professor, told NPR's listeners just a few weeks ago, We are all Living Constitutionalsists now. But only some of us are willing to admit it."<sup>67</sup>

Like it or not, we have a Living Constitution and have had one at least since John Marshall's court decided *McCulloch v. Maryland* in 1819: "We must never forget that it is a constitution we are expounding, . . . a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."<sup>68</sup>

#### Notes

1. The Magna Carta, the English Bill of Rights, and France's Declaration of the Rights of Man and of the Citizen all preceded and to some extent inspired the American Bill of Rights but did not go nearly so far as the American Bill of Rights in protecting individual rights.

2. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classics, 2003).

3. David Gram, "Scalia Talks Up 'Originalism' in UVM Speech," *Barre Montpelier (Vermont) Times Argus*, October 9, 2004.

4. *Brown v. Board of Education*, 347 U.S. 483 (1954).

5. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

6. To be sure, the Brown and Bolling cases did inspire some serious academic debate over the role of the courts in our constitutional system. Judge Learned Hand started it with a series of lectures at Harvard Law School in 1958, in which he said he could find to legitimate basis for the *Brown* decision; see Learned Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958). Professor Herbert Wechsler of Columbia Law School then criticized the court for failing to justify the decision by reference to neutral principles, launching a debate on the legitimacy of judicial review that dominated legal scholarship for at least two decades; see Herbert Wechsler, "Toward Neutral Principles in Constitutional Law," *Harvard Law Review* 1 (1959).

7. *Baker v. Carr*, 369 U.S. 186 (1962).
8. *Reynolds v. Sims*, 377 U.S. 533 (1964).
9. “No person shall . . . be deprived of life, liberty, or property, without due process of law.” United States Constitution, Amendment V.
10. “[N]or shall any state deprive any person of life, liberty, or property, without due process of law.” United States Constitution, Amendment XIV.
11. *Bush v. Gore*, 531 U.S. 98 (2000).
12. *Barron v. Mayor and City of Baltimore*, 32 U.S. 243 (1833).
13. “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.” United States Constitution, Amendment XIII.
14. “Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.” United States Constitution, Amendment XV.
15. *Chicago Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897).
16. *Whitney v. California*, 247 U.S. 357 (1927).
17. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)
18. *De Jonge v. Oregon*, 299 U.S. 353 (1937)
19. *Powell v. Alabama* [Scottsboro Boys case], 287 U.S. 45 (1932).
20. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
21. *Wolf v. Colorado*, 338 U.S. 25 (1949).
22. *Malloy v. Hogan*, 378 U.S. 1 (1964).
23. *Benton v. Maryland*, 395 U.S. 784 (1969).
24. *The Slaughter-House Cases*, 83 U.S. 36 (1872).
25. *Saenz v. Roe*, 526 U.S. 489 (1999).
26. The Supreme Court referred to Thomas Jefferson’s “wall of separation” metaphor in *Reynolds v. United States*, 98 U.S. 145, 164 (1878).
27. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
28. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
29. *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 125 S.Ct. 2722 (2005) (prohibiting posting of Ten Commandments in court houses). A companion case, *Van Orden v. Perry*,

125 S.Ct. 2854 (2005), upheld a display of the Ten Commandment on the grounds of the Texas state capitol. Differences in the contexts of the displays and their purposes explain what many regarded as inconsistent results.

30. Dean E. Murphy, “Judge Rules Reciting Pledge in Schools Is Unconstitutional,” *New York Times*, September 15, 2005, §A, p. 25, col. 5.

31. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

32. *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002).

33. *Myers v. Loudoun County Public Schools*, 418 F.3d 395 (4th Cir. 2005).

34. Miller was released from jail on September 29, 2005, after she agreed to testify before the grand jury. Since then, a number of state legislatures have considered enacting or strengthening press shield laws.

35. “Article the First. After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.” Proposed constitutional amendment, but never ratified.

36. “Article the second. No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” Proposed constitutional amendment in 1791, ratified in 1992 to become the 27th amendment.

37. *United States v. Lopez*, 514 U.S. 549 (1995).

38. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

39. *John Lee Haney v. United States*, 264 F.3d 1161 (10th Cir. 2001).

40. A lower appellate court did find that the clause applied to state governments after a state removed some prison employees from their on-site accommodations to make room for National Guard troops during a statewide strike of corrections officers. *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982).

41. *Weeks v. United States*, 232 U.S. 383 (1914).

42. *Mapp v. Ohio* (1961).



43. USA Patriot Act, Public Law 107-56, October 26, 2001, 115 Stat. 272. Individual provisions of the act have been codified in various titles and sections of the United States Code.

44. USA Patriot Act, §206, codified at 50 U.S.C. §1805(c)(2)(B).

45. USA Patriot Act, §214, codified at 50 U.S.C. §1842-1843.

46. USA Patriot Act, §214.

47. *Missouri Pacific Ry. Co. v. State of Nebraska ex. rel. Board of Transportation*, 164 U.S. 403 (1896).

48. *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

49. *Berman v. Parker*, 348 U.S. 26 (1954).

50. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)

51. Shadi Rahimi, "An Antiwar Speech in Union Square Is Stopped by Police Citing Paperwork Rules," *New York Times*, September 20, 2005, § B, p. 5, col. 1

52. A.J. Liebling, *The Wayward Pressman* (Garden City: Doubleday, 1947), p. 265.

53. *Roe v. Wade*, 410 U.S. 113 (1973).

54. *Powell v. Alabama* [Scottsboro Boys case], 287 U.S. 45 (1932).

55. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

56. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1966); reprint of an article from the *Yale Law Journal*, 1913. Hohfeld carefully defined and distinguished the various legal interests that one might claim (right, privilege, power, immunity) and then paired them with the correlative obligation on the person (the government, in the context of this talk) against whom the claim may be exercised. (duty, no-right, liability, disability). Hohfeld's analysis has had an enormous influence on the analysis and discussion of rights ever since.

57. *Atkins v. Virginia*, 536 U.S. 304 (2002).

58. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

59. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

60. *Lawrence v. Texas*, 539 U.S. 558 (2003).

61. In an earlier case, *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court had sustained a Georgia law punishing homosexual sodomy against claims that it violated due process and equal protection.

62. *Lochner v. New York*, 198 U.S. 45 (1905).

63. *Bush v. Gore*, 531 U.S. 98 (2000).

64. *United States v. Darby*, 312 U.S. 100, 123 (1941).

65. *Fry v. United States*, 451 U.S. 542, 547 fn.7 (1975).

66. For example, see the *Lopez* case, discussed above in note 37 and the accompanying text.

67. Jack M. Balkin, “Alive and Kicking: Why No One Truly Believes in a Dead Constitution”; posted at [www.slate.com/id/2125226/](http://www.slate.com/id/2125226/).

68. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).