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WHY HAVE A BILL OF RIGHTS?

H. L. A. Hart Lecture in Jurisprudence
and Moral Philosophy

by

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It is a joy as well as an honor to speak to you today about a subject that has been at the heart of my service on the Supreme Court. The American Bill of Rights, guaranteeing freedom of speech, religion, assembly, and the press, along with other important protections against arbitrary or oppressive government action, provides a noble expression and shield of human dignity. Together with the Civil War Amendments, outlawing slavery and involuntary servitude and ensuring all citizens equal protection of the laws and due process of law, the Bill of Rights stands as a constant guardian of individual liberty. My object this afternoon is not to argue that one or another right should be included in a catalogue of legal entitlements—that the American Bill of Rights is superior, for example, to the European Convention on Human Rights. Nor do I wish to join issue with Professor Hart, whose work has so enlightened us all, on the relation between law and morality or the extent to which legal rights, such as those enshrined in the American Constitution, have a conventional or naturalistic ground. My question is rather: why have a bill of rights, that is, some fairly general codification of civil liberties, at all?

This is a large and difficult question. Part of the problem is its woolliness. The utility of a bill of rights cannot easily be gauged before its contents are specified. And even once the rights it protects have been defined, its efficacy depends upon whether those rights are subject to elimination or amendment or suspension by the executive or the legislature; it depends upon who is charged with enforcing them; and it depends upon the speed and nature of the mechanism through which they may be vindicated. Another part of the problem is that the need for a bill of rights varies with a community's culture, history, and political structure, as well as with the problems confronting it at any given time.

Needless to say, I cannot consider all the permutations to which these considerations give rise. To make some headway, I shall therefore resort to some simplifying assumptions. First, I take as paradigmatic of a bill of rights the European Convention and the American Bill of Rights as

supplemented by the Civil War Amendments. Among the liberties protected are freedom of speech, religion, publication, and association; freedom from compulsory self-incrimination, from arbitrary searches, arrest or detention, and from cruel or unusual punishment; the right to equal treatment under law and fair procedures for imposing sanctions or conferring legal benefits. These guarantees, I further assume, are couched in *general* terms, their specification left to adjudicative bodies reviewing official conduct or legislation. So long as they are not unduly vague, as I believe the European Convention and its American counterpart are not, broad formulations of personal rights are a virtue, because they permit judges to adapt canons of right to situations not envisaged by those who framed them, thereby facilitating their evolution and preserving their vitality. As Justice Brandeis of the U. S. Supreme Court once said of the American Constitution, it "is not a strait-jacket. It is a living organism. As such it is capable of growth—of expansion and of adaptation to new conditions. . . . Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever-developing people."[1] What Justice Brandeis said of the Constitution is equally true of a bill of rights painted with a flat brush rather than etched with a jeweler's pin.

Another assumption I shall make is that the civil liberties and basic procedural safeguards contained in a bill of rights are *enforceable.* By that I mean that the legislature, executive, or other arm of government alleged to have encroached on or threatening to trammel those rights may be compelled by some independent body to make amends or refrain from acting. Without some effective means of vindication, legal rights are apt to become little more than moral claims, readily ignored when the forces of government find it convenient to do so. The French Declaration of the Rights of

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[1] Quoted in A. Bickel, *The Least Dangerous Branch* 107 (1962). This passage was part of Brandeis' draft dissent in *United States* v. *Moreland,* 258 U. S. 433, 441 (1922). At Chief Justice Taft's behest he withdrew it prior to publication.

Man, however prescient and well-motivated, proved an ineffective guarantee precisely because it instituted no mechanism to prevent or remedy infringements. The same might be said of the myriad rights specified in the Soviet Constitution or the U. N.'s Universal Declaration of Human Rights. The genius of Magna Carta, as well as its longevity, lay partly in its creation of a device for resolving grievances and compelling the Crown to abide by the committee of barons' decisions. Paper promises whose enforcement depends wholly on the promisor's good will have rarely been worth the parchment on which they were inked.

I shall make a further assumption about *the way in which* a bill of rights may be enforced. One can imagine a variety of means for redressing violations of fundamental legal rights. Individuals might appeal, for example, to some nonjudicial branch of government authorized to discipline the alleged offender—complaining to the executive about legislative overreaching, for instance, or vice versa. Alternatively, coordinate branches of government could act on their own initiative. Or proposed legislation could be reviewed by a special constitutional court or commission, such as France's Constitutional Council.[2] Or citizens themselves could initiate review by judges empowered to invalidate laws that trench upon protected rights, to halt official conduct that invades those rights, and to order relief for past injuries. In my view, America's experience confirms that the last of these alternatives is the most sensible, effective device for protecting personal liberties. This is particularly true if judges may only be removed for good cause and if their salaries may not be reduced, thus enhancing their independence of decision. It is essential to the defense of liberty that individuals be able

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[2] Simon Lee recommends the creation of a similar body if Britain adopts a bill of rights. Its members should, in his view, include nonlawyers as well as attorneys, as does France's Conseil Constitutionnel; but unlike the Conseil Constitutionnel, Lee's proposed council would lack power to invalidate legislation. *See* Lee, Bicentennial Bork, Tercentennial *Spycatcher*: Do the British Need a Bill of Rights?, 49 *U. Pitt. L. Rev.* 777, 817–18 (1988).

to bring their own claims, rather than wait on the decisions of officers or agencies that lack the same stake in the aggrieved party's freedoms. And the importance of passing judgment on the propriety of legislation or government conduct in a concrete factual setting cannot be overestimated; not all laws are meaningfully subject to challenge before they have been placed in operation and their ramifications become plain, which is all that an advisory body passing on proposed legislation could consider. I shall therefore assume that a bill of rights is to be enforced in the courts in the same way as other laws.

Finally, let me say a word about the susceptibility of a bill of rights to amendment and its legal force as against routine legislation. In my view, it is crucial to the durability and efficacy of a charter of personal liberties that it not be subject to easy alteration or suspension. Whether those rights are rendered immune from change or even temporary withdrawal, as they are by Germany's Basic Law, or whether they may only be amended by supermajoritarian procedures, as is true of those rights contained in America's Constitution, the key point is that they enjoy special status, and may not be brushed aside whenever a legislative majority deems them dispensable. Of course, there exists a spectrum of lesser protections a bill of rights might enjoy. In Canada, for example, freedoms protected by the rights must be respected and enforced unless legislation explicitly overrides them. Another possibility is simply to codify fundamental rights on the publicly recognized understanding that those rights would ordinarily be honored and legislation construed consistently with them, even if they could not legally be enforced in the face of contrary legislation.[3] Some protection is better than none, of course, and these schemes may be beneficial

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[3] *See* ch. 44 of the 1960 Canadian Bill of Rights and § 33 of the 1982 Charter of Rights and Freedoms. These proposals have also been made in discussions of Britain's possible adoption of a bill of rights because of the difficulty or impossibility of entrenching such protections. *See, e. g.*, Fitzgerald, An English Bill of Rights? Some Observations from Her Majesty's Former Colonies in America, 70 *Geo. L. J.* 1229, 1254–64 (1982).

halfway houses if better safeguards are politically unavailable. But robust entrenchment forbidding compromise or requiring supermajoritarian approval for amendments seems to me best. Accordingly, I shall assume that a bill of rights has more authority than ordinary legislation. My question, therefore, is whether an entrenched bill of rights, enforceable against government by individuals in courts of law, is worth having.

This question, as I said, cannot be considered in a vacuum. Its answer turns on a nation's traditions of governance; its cultural, political, racial, religious, and ethnic homogeneity; the threats facing it from without as well as from within; the degree of centralization or federalism that prevails; and a host of less important factors peculiar to that country. Before attempting to make even limited generalizations about the need for a bill of rights, it is therefore instructive to review its successes and failings in a concrete setting. The example most familiar to me, of course, is the United States.

For the past year, we have been celebrating the 200th anniversary of our Constitution. Yet for 150 of those 200 years, the American Bill of Rights could hardly boast a glorious history. Indeed, not only was it not part of our original Constitution, even though most states had adopted bills of rights by 1787 and the federal government itself included one in the Northwest Ordinance of that year: a proposal to incorporate a bill of rights into the Constitution, made just before the Convention adjourned, did not garner a single vote. We need not speculate whether the initial omission of a bill of rights stemmed from the belief that one was unnecessary, because the federal government possessed only narrowly circumscribed powers and the states afforded ample protections to their citizens.[4] Or whether its omission was due to the delegates' fatigue or their sense of what was politically possible at the time. Or whether the Framers were less enam-

[4] Hamilton so justified the omission of a bill of rights in Federalist 84. He further argued that the inclusion of a bill of rights would be dangerous, because it might suggest that the national government had more sweeping authority than the Framers intended.

ored of restrictions on government authority now that they held the reins of power. Whatever the reasons for its initial omission, within two years the Bill of Rights was ratified in the form of ten amendments to the Constitution, as a quid pro quo for states' acceptance of the remainder of the Constitution a short time earlier.[5]

It then entered a long period of hibernation. Although the Supreme Court's decision in *Marbury* v. *Madison*[6] established the federal courts' power to strike down Acts of Congress as contrary to the Constitution, the Supreme Court itself did not use that power to vindicate any of the rights guaranteed in the first eight Amendments until 1857—another 54 years.[7] True, the Supreme Court cannot act until a case is presented to it, and no cases reached it during that time. But the total absence in the Supreme Court of challenges grounded in the Bill of Rights, and their extreme rarity in the lower federal courts, cannot be ascribed wholly to a lack of obnoxious federal restrictions on civil liberties in the first half of the 19th century. Social and judicial hostility to fledgling civil rights litigation, as well as the inexperience and timidity of citizens in invoking their rights, are at least equally to blame. For example, the Sedition Act of 1798 made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing . . . against the government of the United States," either house of Congress, or the President, with intent to "defame" them or to bring them "into contempt or disrepute."[8] President Adams used the Sedition Act ruthlessly to squelch his political opponents, prompting Thomas Jefferson to describe the prosecutions as

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[5] *See* B. Schwartz, *The Great Rights of Mankind* ch. 5 (1977). Two proposed amendments were not ratified by the states. One dealt with the ratio of the population to representatives in Congress, the other with representatives' compensation. *See id.*, at 187.

[6] 5 U. S. (1 Cranch) 137 (1803).

[7] *See* Wright, The Bill of Rights in Britain and America: A Not Quite Full Circle, 55 *Tulane L. Rev.* 291, 307 (1981).

[8] Act of July 14, 1798, 1 Stat. 596.

a Federalist "reign of witches."[9] There is no doubt that the Supreme Court would today find such legislation an unconstitutional abridgment of free speech and a free press.[10] But the legality of the Sedition Act was never clearly challenged in the courts, although three Supreme Court Justices, sitting on circuit, apparently thought it above reproach.[11] In the end, it was the electorate, not the courts, that rescued First Amendment freedoms by throwing the Federalists out of office in the election of 1800.

The Supreme Court's role after mid-century in protecting the Bill of Rights was discouraging. The first case successfully invoking one of the first eight Amendments was the notorious *Dred Scott* decision. The Missouri Compromise outlawed slavery in certain territories of the United States while permitting it in others. The Court invalidated the law, in the case of a slaveowner who took his slave into a non-slave state before bringing him into a territory where slavery was permitted, because it deprived a slaveholder "of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States."[12]

To be sure, some happier precedents followed. Shortly after the Civil War, the Court upheld a decision by a circuit court in one of the non-Confederate states granting a writ of habeas corpus because a state citizen had been wrongfully

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[9] Quoted in J. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 184 (1956).

[10] The Supreme Court has since said: "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines . . . . The invalidity of the Act has also been assumed by Justices of this Court. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 276 (1964) (opinion for the Court by Brennan, J.) (citations omitted).

[11] *See* 1 T. Emerson, D. Haber, & N. Dorsen, *Political and Civil Rights in the United States* 37–39 (3d ed. 1967); B. Schwartz, *supra* note 5, at 206.

[12] *Scott* v. *Sandford*, 60 U. S. (19 How.) 393, 450 (1857).

tried by a military tribunal.[13] And shortly thereafter it struck down (under a constitutional provision other than the Bill of Rights) state laws barring persons from voting, holding certain offices, and pursuing certain professions because of their former association with the rebel states.[14] A little over a decade later the Court ruled that states could not prevent blacks from sitting on grand juries,[15] and held that Chinese nationals had been denied the equal protection of the laws when municipal authorities had arbitrarily prevented them, but not their white competitors, from operating laundries.[16]

These were notable achievements. But the debits outweigh the credits. Interpreting the Fourteenth Amendment's command that "[n]o State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States," the Court rejected a challenge to a slaughter house monopoly because, in the Court's view, the asserted right to compete on equal terms was not a privilege of American citizenship.[17] Then, relying on that decision, the Court declared that the right to vote in state elections and to practice law are also not protected prerogatives of United States citizenship, because so to hold would mean that states could not bar women from voting or practicing law[18]—too radical an intention, the Court thought, to attribute to the authors of the Fourteenth Amendment. Moreover, the Court refused to read the Civil War Amendments to prevent, or even to enable Congress to legislate against, numerous forms of blatant racial discrimination and

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[13] Ex parte *Milligan*, 71 U. S. (4 Wall.) 2 (1866).

[14] Ex parte *Garland*, 71 U. S. (4 Wall.) 333 (1867); *Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277 (1867).

[15] *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); Ex parte *Virginia*, 100 U. S. 339 (1880); *Virginia* v. *Rives*, 100 U. S. 313 (1880).

[16] *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

[17] *Slaughter-House Cases*, 83 U. S. (16 Wall.) 36 (1873).

[18] *Minor* v. *Happersett*, 88 U. S. (21 Wall.) 162 (1875) (voting); *Bradwell* v. *Illinois*, 83 U. S. (16 Wall.) 130 (1873) (law practice).

segregation.[19] And not until much later was the Bill of Rights held to protect individuals against actions by the states, as well as actions by the federal government, through the Fourteenth Amendment's command that no state deprive any person of life, liberty, or property without due process of law.

Indeed, judging solely from the decisions they handed down, the federal courts played only a negligible role in protecting civil liberties until almost a century later, in the 1930s, and most of the progress we have made in America was accomplished within the last four decades. It was only then, when the Supreme Court at last held that most of the protections secured by the Bill of Rights apply equally against the states and the federal government, that the courts added their muscle to help stamp out racial and gender-based discrimination, enlarge freedom of speech and publication, protect individuals acting from sincere religious beliefs against state sanctions, open a salutary distance between church and state, and ensure that persons suspected of or charged with crimes are afforded a fair chance to defend themselves against the formidable machinery of the prosecution.

The story of the last forty years is familiar, and it would not appreciably advance my purposes this afternoon to retell it in any detail. I would leave you with an unbalanced portrait of the Court's work, however, if I failed to supply at least a few examples of its pathbreaking civil rights decisions, for the story of the Court's recent rulings in this area is beyond peradventure a story of success. In the landmark case of *Brown* v. *Board of Education*,[20] decided in 1954, the Court declared "separate but equal" educations for blacks and whites to be inherently unequal. Since then, it has lent its weight to school desegregation[21] and, despite some re-

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[19] *See Plessy* v. *Ferguson*, 163 U. S. 537 (1896); *Civil Rights Cases*, 109 U. S. 3 (1883); *United States* v. *Cruikshank*, 92 U. S. 542 (1875).

[20] 347 U. S. 483 (1954).

[21] *See, e. g., Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U. S. 1 (1971); *Keyes* v. *School Dist. No. 1*, 413 U. S. 189 (1973).

trenchment this year, affirmative action.[22] Laws classifying people on the basis of sex or alienage now receive more exacting scrutiny.[23] The right to make highly personal, intimate decisions about how to live one's life has been vindicated numerous times, in cases involving, for example, the sale of contraceptives,[24] childbearing,[25] and the sharing of a house by members of an extended family.[26] In the area of criminal law, the Court has championed an indigent's right to counsel if he is unable to afford a lawyer to defend himself.[27] It has laid down a broad rule that evidence acquired illegally may not be used against a criminal defendant at trial,[28] and in the famous case of *Miranda* v. *Arizona*[29] we held that the police must inform a person subjected to custodial interrogation of his right to remain silent, his right to a lawyer, and the fact that anything he says may be used against him, on pain of not being able to use his statements in a subsequent prosecution. The Court's protection of freedom of the press has been unstinting. In *New York Times Co.* v. *Sullivan*,[30] for example, the Court held that public officials may collect damages for libel only if they can prove that a defamatory statement was made in the knowledge that it was false or with reckless disregard for its truth or falsity. And the Pentagon Papers

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[22] *See Regents of the Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978) (permitting race to be considered in choosing among applicants to educational program receiving federal financial assistance). The Court's decision this Term in *Richmond* v. *J. A. Croson Co.*, 109 S. Ct. 706 (1989), striking down a city program that set aside 30% of the subcontracting on city contracts for minority-owned businesses, in my view signals a retreat from the Court's commitment to eradicating race-based inequalities.

[23] *See, e. g., Plyler* v. *Doe*, 457 U. S. 202 (1982) (alienage); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973) (gender).

[24] *See Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

[25] *See Roe* v. *Wade*, 410 U. S. 113 (1973).

[26] *See Moore* v. *City of East Cleveland*, 431 U. S. 494 (1977).

[27] *See, e. g., Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (felony cases); *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972) (misdemeanor defendants facing possible jail terms).

[28] *See Mapp* v. *Ohio*, 367 U. S. 643 (1961).

[29] 384 U. S. 436 (1966).

[30] 376 U. S. 254, 276 (1964).

case[31] preserved the press's almost absolute freedom from prior restraints on publication. The speech of individuals has also been protected, as the Court has consistently invalidated restrictions based on the content of speech except in certain narrowly defined circumstances, such as obscene speech or speech posing an imminent danger of provoking lawless action or violence.[32] In other areas, the Court has frustrated politicians' efforts to gerrymander voting districts, insisting on uniform application of the principle of one person-one vote,[33] and it has steadfastly guaranteed the free exercise of religion by preventing governments from denying people benefits to which they would otherwise be entitled because they refused to work at certain times or at certain occupations on account of their sincere religious beliefs.[34] Although these cases represent a small sampling of what the Supreme Court has accomplished, they illustrate, I think, the enormous strides the Court has taken in enforcing the Bill of Rights and Civil War Amendments.

Not that the Court's record is free from blemishes. In anyone's view, the Supreme Court has made its share of errors. It has long been my opinion, for example, that the Eighth Amendment's ban on cruel and unusual punishments precludes, in our day and age, imposition of the death penalty. And I have been disappointed at the recent erosion of the protections enjoyed by ordinary citizens and suspected criminals against unreasonable searches and seizures under the Fourth Amendment and compelled self-incrimination under the Fifth Amendment, by new inroads on the right to privacy, and by the Court's disturbing reluctance to allow states and municipalities to take affirmative steps to make

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[31] *New York Times Co.* v. *United States*, 403 U. S. 713 (1971).

[32] *See, e. g., Miller* v. *California*, 413 U. S. 15 (1973); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (speech likely to produce imminent lawless action).

[33] *See, e. g., Baker* v. *Carr*, 369 U. S. 186 (1962); *Reynolds* v. *Simms*, 377 U. S. 533 (1964).

[34] *See, e. g., Hobbie* v. *Unemployment Compensation Appeals Comm'n*, 480 U. S. 136 (1987); *Thomas* v. *Review Board*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

ours a truly colorblind society. Many of the Court's decisions, moreover, have been controversial. The pivotal school desegregation ruling in *Brown* v. *Board of Education* met with determined resistance 35 years ago, despite its almost universal acceptance today. And the Court's decision in *Roe* v. *Wade*,[35] establishing a woman's fundamental right to choose whether to bear a child—a right that cannot be overridden by a state's asserted interest in protecting potential life—still meets with determined opposition. But with few exceptions, the Court's decisions of the last few decades have been respected by both Congress and the state legislatures.

In these advances following a century and a half of dormancy, and in their acceptance, however grudging, lie several lessons. The first is that a bill of rights cannot by itself keep oppressive majorities or high-handed officials at bay. Official racial discrimination was rife following passage of the Civil War Amendments, but the courts found little constitutional difficulty with most government practices and legislation until the better part of a century later. Likewise, the various protections of the Bill of Rights were not made applicable to the states until long after the Fourteenth Amendment was passed, leaving citizens powerless in the meantime to redress numerous wrongs by state officials. Written guarantees are ineffectual when the will and power to enforce them is lacking.

But if America's experience demonstrates that paper protections are not a sufficient guarantor of liberty, it also suggests that they are a necessary one, particularly in times of crisis. Without a textual anchor for their decisions, judges would have to rely on some theory of natural right, or some allegedly shared standard of the ends and limits of government, to strike down invasive legislation. But an appeal to normative ideals that lack any mooring in the written law—or in common law that has so solid a foothold as to possess the same stature—would in societies like ours be suspect, because it would represent so profound an aberration from ma-

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[35] 410 U. S. 113 (1973).

joritarian principles. A judge armed only with pure reason could not stand against a scared or frenzied mob. Few would dare it, and those few who did would likely be swept aside. A text, moreover, is not only necessary to make judges' decisions efficacious: it is also helps tether their discretion. I would be the last to cabin judges' power to keep the law vital, to ensure that it remains abreast of the progress in man's intellect and sensibilities. Unbounded freedom is, however, another matter. One can imagine a system of governance that accorded judges almost unlimited discretion, but it would be one reminiscent of the rule by Platonic Guardians that Judge Learned Hand so feared.[36] It is not one, I think, that would gain allegiance in either of our countries.

A written charter of rights is therefore essential if judges are to be empowered to void legislation or curtail official conduct that strangles those liberties. Certainly the rulings of American courts vindicating civil liberties over the past forty years would not and could not have occurred in the absence of the Bill of Rights. But is that, one might ask, a persuasive argument for the retention of documented liberties, or for the adoption of a bill of rights by a nation that lacks one? Might not the existence of a bill of rights encourage legislative irresponsibility, because legislators acting on the understanding that the courts provide a backstop might be more prone to overreaching, thereby weakening the fabric of representative government? Perhaps, the thought goes, the Supreme Court's rulings over the last four decades would have been unnecessary if the United States had had a tradition of legislative supremacy, without a strong and settled practice of judicial oversight. And is it not countermajoritarian, and therefore illegitimate, to set up judges as the final arbiters of matters of individual right in a democratic society?

These are important, recurrent worries. At the risk of racing too quickly—and therefore unconvincingly—over difficult terrain, let me outline what I think the most persuasive

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[36] L. Hand, *The Spirit of Liberty* 147 (1952).

response to these doubts. The view that an active judiciary breeds a torpid or insouciant legislature is principally associated in the United States with James Bradley Thayer, whose writing at the turn of the century markedly influenced Justices Holmes and Brandeis.[37] Thayer believed that a commitment to democratic principles, together with a concern for maintaining a vigorous, responsive legislature, entailed only a modest role for judges reviewing legislation. He contended that judges could only invalidate legislation when lawmakers had made not just a mistake, but a *very clear* error—so clear, in fact, that, in Thayer's words, "it is not open to rational question."[38] I do not share this view. It would, as Felix Cohen remarked, make of our courts "lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren"[39]—a role that, in my opinion, is not only contrary to the intentions of the Framers of the American Constitution, but one that is much too crimped to be desirable in a society such as ours. The extent to which one distrusts judges reviewing legislation depends, among other things, on how one thinks judges do and ought to construe statutes and constitutional provisions, and on the latitude that technique gives them to depart from the judgments of elected officials. But even if one thinks that judges may and do consistently override the decisions of legislative majorities, it seems to me that the effect is generally the opposite of that which Thayer posited. If one conceives of a bill of rights, or more generally, a constitution, as a living, evolving document that must be read anew for our time, and if one views legislation not merely as the product of vote-swapping to advance factional interests but at least in part as an attempt to advance some notion of the collective good,

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[37] *See* Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 *Harv. L. Rev.* 129 (1893), *reprinted in* J. B. Thayer, *Legal Essays* (1908).

[38] *Id.*, at 144.

[39] *The Legal Conscience—Selected Papers of Felix S. Cohen* 44 (ed. L. K. Cohen 1960).

then an active judiciary seems to me not a burr, or a pernicious obstacle to the effectuation of majoritarian sentiments, or a deadening or too thoroughly liberating influence, but as the calmer, cooler party to a dialogue from which the community benefits over time. Michael Perry has written that "what the majority comes to believe in the long-term, after having been rebuffed by the electorally unaccountable Supreme Court in the short-term, is more likely to be morally correct than are established but untested, unreflective moral conventions."[40] To the extent that reason and reflection have any role to play in moral judgment and constitutional adjudication—and I believe that their role is considerable—the dialogue in which the courts and the legislature engage is a salutary one.

But of course the point of having a bill of rights supported by judicial review is not just to make lawmakers and citizens think. Its salient purpose is to remove certain rights from the daily joust of politics, to protect minorities—and we may all be in the minority at times—from the passions or fears of political majorities. It would be wrong, however, to infer (as many glibly have) that because a bill of rights denies political majorities the chance to work their will immediately, it is somehow countermajoritarian, an affront to democratic ideals. It is simply a reasonable form of collective self-restraint—one which even those who often find themselves in the majority on issues that most matter to them can unreservedly endorse. As Professor Hart pointed out, "It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live." This, he said, "is a misunderstanding of democracy which still menaces individual liberty."[41]

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[40] M. Perry, *The Constitution, The Courts, and Human Rights* 111 (1982); *see also* Michelman, Foreword: Traces of Self-Government, 100 *Harv. L. Rev.* 4, 65–66, 73, 75–76 (1986); R. Dworkin, *A Matter of Principle* 70–71 (1985); A. Bickel, *supra* note 1, at 26–28.

[41] H. L. A. Hart, *Law, Liberty, and Morality* 79 (1963).

It is a misunderstanding because it ignores a critical distinction between two orders of preference. One can desire both that a particular law be passed or a certain decision taken and, on a higher plane, that there be some limit to the freedom of majorities to translate their desires into law or official action. It is a mistake to assume that every majority vote in the face of some codified limitation on majority rule, such as a bill of rights, is a tacit rejection of any contrary provision in that bill of rights. Nor is there any contradiction in establishing bounds on legislative or executive action in the form of specially protected rights and then placing responsibility for determining whether those bounds have been exceeded in an organ of government lying outside the province of the legislature or executive. To be sure, in a democratic polity there is reason to establish some link between majority will and those who pass judgment on the consonance of legislation or state action with a bill of rights or other constitutional provision. In the United States, this is accomplished by providing that the President appoint federal judges, subject to confirmation by the Senate. But stricter accountability is not only unnecessary as a practical or as a theoretical matter: it would defeat the very purpose of consigning decision to persons less prone to act from self-interest or bias.

It goes without saying that the way in which judges are chosen becomes increasingly important as their authority grows, particularly when they are charged with interpreting entrenched, broadly characterized guarantees and thus cannot easily be reversed by a disapproving legislative majority. And it would be fatuous to deny that, so long as elected officials select judges and reasonable people disagree over the proper scope of protected rights, politics will play some part in determining who ascends the bench. But it is a further lesson of America's experience that worries or complaints about the politicization of the judiciary have, for the most part, been much exaggerated. In a nation with a long and settled legal tradition, there is widespread agreement about the qualities of intellect and temperament that judges ought to possess. And a judicial candidate's views about particular

legal topics are often difficult to predict. If judges are appointed for long terms or for life, and if they cannot be disciplined by legislators or government officials except for clear abuse of their office, then their views are free to evolve, and often do evolve, as they attempt to make abstract rights concrete in case after case. When asked about the great mistakes of his presidency, President Eisenhower—who, incidentally, appointed me—reputedly said that they were both sitting on the Supreme Court.[42] Such disappointment has not been uncommon.

In addition, the problem of politicization is mitigated by several factors. First, potential appointees cannot possibly be quizzed about their views on all the issues likely to come before them. And if they are asked about a wide range of issues, no candidate's responses are apt to be entirely satisfying, so that some compromise will be necessary. Second, in a country the size of the United States or Britain, the number of judges is very large, and the number of persons involved in their selection is also considerable. Exacting scrutiny of each appointee for political orthodoxy is impracticable, particularly when those doing the choosing cannot agree on what constitutes orthodoxy. Those considered for the highest court will be reviewed most carefully, of course, and rightly so. But all judges pass on constitutional questions, and a great many decisions are not appealed or otherwise go unreviewed by higher courts. Third, even high court judges are constrained in issuing rulings. They are limited not just by precedent and the texts they are interpreting, but also, on any attractive political and jurisprudential theory, by a decent regard for public opinion and a keen conception of institutional integrity. High court judges interpreting a bill of rights may at times lead public opinion; but in a democratic society they cannot do so often, or by very much. Sometimes that means practicing what Alexander Bickel called the "passive virtues,"[43] exercising discretion not to hear cases or

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[42] Quoted in H. Abraham, *Justices and Presidents* 263 (2d ed. 1985).

[43] A. Bickel, *supra* note 1, at ch. 4.

invoking various jurisdictional principles to postpone resolution of an issue best left undecided or best resolved by elected officials. The history of America's Supreme Court, I would suggest, provides scant reason to fear that a constitutional court will use its powers irresponsibly or wildly. Fourth, the problem of politicization may be further mitigated in a political system where, as in the United States, judicial nominees are appointed and approved by different persons, who may not be members of the same political party, following questioning and examination open to public view. The forces pressing towards a reasonable compromise are thus quite powerful. The fact that, as Tocqueville remarked, "[h]ardly any question arises in the United States that is not resolved sooner or later into a judicial question,"[44] is therefore, I think, no cause for consternation.

Nor does America's history support the claim that a bill of rights backed by judicial review is in some way enervating, an invitation to anarchy or a hindrance to resolute action in times of crisis. I agree fully with Justice Jackson when he wrote for the Court during the Second World War:

> Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.[45]

The United States has not always fulfilled the promise of Justice Jackson's words. Rights have been sacrificed—too

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[44] A. de Tocqueville, *Democracy in America* vol. 1, part 2, § 8, p. 270 (ed. J. Mayer 1969).

[45] *West Va. State Bd. of Educ.* v. *Barnette*, 319 U. S. 624, 636–37 (1943).

readily, one must in hindsight acknowledge—when the nation's security seemed imperiled, despite the existence of the Bill of Rights and a firm tradition of judicial review. The courts' deference to legislative judgments and official determinations has admittedly been far from slavish. Decisions upholding the writ of habeas corpus immediately after the Civil War forcing military commanders to toe the constitutional line,[46] and the Court's invalidation of President Truman's seizure of the steel mills during the Korean War,[47] come quickly to mind. But too often judges have been gripped by the same panic as political representatives, or been too willing to compromise civil liberties when the authorities deemed it expedient to do so. The Supreme Court's decisions in free speech cases growing out of the First World War,[48] and its sanctioning curfews and evacuation orders directed exclusively at American citizens of Japanese descent during World War Two,[49] are among the least proud moments in the Court's history.

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[46] Ex parte *Milligan*, 71 U. S. (4 Wall.) 2 (1966). The Court there said, *id.*, at 120–21:

Those great and good men [who wrote the Constitution] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism . . . .

[47] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

[48] *See Schneck* v. *United States*, 249 U. S. 47 (1919); *Debs* v. *United States*, 249 U. S. 211 (1919); *Abrams* v. *United States*, 250 U. S. 616 (1919).

[49] *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944).

I mention these sadder moments, however, because they show that, in retrospect, more vigorous enforcement of the Bill of Rights during times of national security crisis would not have been damaging. Judges share many of the frailties of their fellow citizens, and have at times succumbed to the majority's weaknesses. But there is, I venture to say, a consensus that the rulings I have mentioned were mistakes—not always cowardly mistakes, perhaps, but mistakes nonetheless. A bill of rights is neither perilous nor superfluous when the nation's well-being is seriously threatened. I therefore would not welcome provisions, such as those contained in the Canadian Charter of Rights[50] and the European Convention on Human Rights,[51] permitting suspension of a bill of rights when a legislative majority deems it expedient. The danger of their abuse appears to me far graver than the likely harm from their omission. But the possibility of such exceptions, or of some doctrine of executive prerogative when the nation's life is threatened,[52] must certainly be a

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[50] In § 33 of the Canadian Charter of Rights and Freedoms.

[51] Article 15(1) of the European Convention provides: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

[52] Arthur Schlesinger defends as an unconstitutional but nevertheless legitimate exercise of executive prerogative Lincoln's suspension of the writ of habeas corpus, suppression of newspapers, arbitrary arrest and detention of perhaps fourteen thousand persons, and similar actions during the Civil War. *See* Schlesinger, War and the Constitution: Abraham Lincoln and Franklin D. Roosevelt, Fortenbaugh Lecture at Gettysburg College (1988). In Schlesinger's view, Roosevelt also acted properly, albeit unconstitutionally, when he provided assistance to Britain without congressional approval both before and after Lend-Lease. Schlesinger would confine the scope of the executive's emergency prerogative to situations where there exists a broad popular and legislative consensus that the nation's very life is gravely threatened; where time is too short to observe constitutional requirements; where policy decisions are made openly and subject to national debate; and where none of the executive's actions interfere with the political process itself.

sufficient answer to any who harbor worries that a bill of rights would become a noose in times of trouble.

Of course, for Americans these are largely academic musings. The Bill of Rights has remained an unchallenged part of our Constitution for two centuries, even if its flowering is quite recent, and there is no chance of its amendment to allow Congress to render its provisions null if it believes they jeopardize public order or national security. For Britons, however, these are current and vital concerns. The principle of parliamentary supremacy, precluding one Parliament from binding its successors by entrenching a bill of rights, is now more than three hundred years old; and the United Kingdom has, by and large, proved a faithful guardian of liberty without putting civil rights on paper and bidding judges enforce them. But recent events have prompted reconsideration of these ancient arrangements. Lord Scarman's and Anthony Lester's calls for a bill of rights some 15 and 20 years ago, motivated in part by the realization that Britain's government had become an "elective dictatorship" with the eclipse of the House of Lords and the largely ceremonial role of the monarch,[53] touched off a lively public debate. That debate was apparently fueled by the more activist approach of the European Court of Human Rights to enforcing the European Convention and Britain's relatively poor showing before the Commission and the Court. More recently, the coals have been stoked anew by the government's proposed revision of the Official Secrets Act of 1911, the draft Criminal Evidence Order for Northern Ireland weakening the privilege against self-incrimination, the *Spycatcher* affair, the *Brogan* decision from Strasbourg finding Britain's detention policy in Northern Ireland in violation of the European Convention, the flap over the BBC's documentary "Death on the Rock," and the launching of Charter

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[53] L. Scarman, *English Law—The New Dimension* (1974); A. Lester, *Democracy and Individual Rights* (1968); *see also* Q. H. Hailsham, *The Dilemma of Democracy* (1978); M. Zander, *A Bill of Rights?* (3d ed. 1985); Scarman, Bill of Rights and Law Reform, in *1688–1988 Time for a New Constitution* 107–09 (ed. R. Holme & M. Elliott 1988).

88. Viewed from across the Atlantic, the debate has at once been fascinating and disturbing, both in its own right and in the self-examination it has prodded. As an outsider, I would be presumptuous to intrude or offer solutions. I would like to conclude, however, by suggesting that the case I have just sketched for adopting a bill of rights is perhaps even stronger for Britain than it is for the United States.

My main reason for saying so is the absence of other checks on the majority party in Britain. In the United States, the federal government is a government of limited powers. Although quite sweeping, its authority is constrained by the Constitution and by the residual powers of state governments. Moreover, the federal legislature itself is bicameral, with the Senate and House of roughly equal stature. Different parties may command majorities in the two houses. In addition, America's major political parties lack the cohesion and discipline on the national level that Britain's parties possess. Finally, the President is elected directly, and may, as at present, belong to a different party than that dominating both houses of Congress. In Britain, however, the possibility of one house reining in the other, or of the chief executive fighting an uphill battle against either or both, is negligible, so long as the first-past-the-post electoral rule remains in place. The House of Lords now has mainly an advising and revising function. The Crown has, in practice, virtually no control over legislation. And the prime minister almost always enjoys a parliamentary majority. Thus, the party in power faces no legal or intragovernmental obstacle to the effectuation of whatever measures it wishes to introduce. And its power is generally not diluted by the weak party discipline characteristic of America's national parties. The need for protection against abuse of this power is accordingly more pressing than it is in a federal state distinguished by an elaborate separation of powers where the principal organs of government are frequently dominated by different, disunited parties.

A second reason why Britain is arguably a better candidate for a bill of rights than the United States is its membership in

the European Community and, more important, its being a party to the European Convention. Although the European Convention has not been incorporated into Community law, the European Court of Justice has issued its decisions in light of it. Because Community law is perforce domestic law in Britain, a bill of rights is already part of British law, albeit indirectly and only in a limited economic sphere. More significant, however, is Britain's commitment to abide by decisions of the European Court of Human Rights. To require litigants to exhaust their remedies in British courts, where judges are presently unable to apply the European Convention, before seeking relief from the Commission and the Court of Human Rights and then returning to Britain with a judgment Parliament is bound to honor, is in my view to create unnecessary obstacles to the vindication of rights Britain has pledged itself to respect. Both coherence and efficiency argue for incorporating the European Convention into British law.

Although, as I said, I do not presume to offer advice today by entering this national debate, I must also say that some of the arguments offered for not making the European Convention part of British law seem, to one not caught in the fray, somewhat surprising. The claim, for example, that British law already adequately protects civil liberties is hard to square with Britain's comparatively poor showing before the Court of Human Rights and the demonstrable absence in British law of numerous rights guaranteed by the Convention, such as a general right to privacy.[54]

Likewise, the contention that British judges are too "literal-minded" and "legalistic" in their approach to statutory interpretation and that they could not cope with something as open-ended as a bill of rights seems to me quite implausible.

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[54] *See* Fitzgerald, *supra* note 3, at 1243, & n. 97; Jacobs, Towards a United Kingdom Bill of Rights, 18 *U. Mich. J. L. Ref.* 1, 33–36 (1984). The right to privacy is also under siege in the United States. In *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), the Supreme Court, by a vote of 5 to 4, upheld a state statute criminalizing sodomy between consenting adults in the privacy of a bedroom.

Surely it is incredible that British jurists should be less able than their Continental counterparts. And while it may take time to hone the interpretive skills demanded by a bill of rights—as the experience of the United States attests—there is no reason to measure the success of incorporating the Convention into British law by reference to the decisions of British judges within the space of the following year. It bears mentioning that the decisions of trial judges will be open to correction on appeal, and that they will be guided by the Court of Human Rights' developing case law. In addition, if British appeals courts are initially also slow to read the European Convention with the breadth it demands, the court in Strasbourg will remain a court of final appeal to repair deficiencies. And if any bill of rights enacted by the United Kingdom were not entrenched, but backed only by the force of public opinion—as seems very likely—then decisions that seriously displeased Parliament could be corrected through legislation far more readily than they could in a country like the United States, subject, of course, to review if challenged before the Court of Human Rights. Because that court would continue to play the role of a court of last appeal, claims that the British judiciary would become overly politicized seem to me similarly exaggerated, especially when civil rights cases would for most constitute a small fraction of their docket. Whatever the danger of a politicized bench, it hardly seems sufficient to justify scrapping incorporation altogether.

At the conclusion of his elegant Reith Lectures, Lord McCluskey quoted one of the great American judges, Learned Hand: "I often wonder," Hand said, "whether we do not rest our hopes too much on constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court

to save it."[55] Perhaps Judge Hand and Lord McCluskey are right. But there has always seemed to me a wide and fertile space between Utopia and Armageddon; we have, in fact, lived our lives there. Whether liberty withers or flourishes depends not on the alignment of the planets, or the allegedly iron laws of economics or genetics. It depends on us, and the struggle is a constant one. I know of no surer weapon in that fight against our own fear and intolerance than an entrenched, enforceable bill of rights.

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[55] L. Hand, *supra* note 36, at 189–90, *quoted in* J. McCluskey, *Law, Justice and Democracy* 60 (1987).