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Our Bill of Rights

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Thank you, President Sandy D'Alemberte, for inviting me to address the ABA Bill of Rights Conference. The Conference draws together several of my interests — the ABA, Colonial Williamsburg, and of course the Bill of Rights. I thus am happy to take part in your celebration.

The topic assigned to me is: "If I Were Writing the Bill of Rights Today." At the outset let me note that, in accepting this invitation, I did not assume the task of rewriting the Great Bill. I am quite satisfied with the one we have: It is one of the great documents of western civilization. Furthermore, I did not retire from active service on the Court, where I was asked "merely" to interpret the Bill of Rights, to take on the task of rewriting it.

In speaking to this subject, then, I will discuss several developments during the last 200 years that a *hypothetical* drafter of a "modern" Bill might wish to consider.

Chief Justice John Marshall, in *Marbury v. Madison*,[1] laid the groundwork for broad application of the Bill of Rights. Judicial review — the power to determine the constitutionality of legislative acts — permits a life-tenured federal judiciary to operate as a bulwark against democratic excesses. It also has permitted the judiciary, though lacking the power of purse or sword, to play an essential role in our tri-partite system of checks and balances.

A second important development has been the application of the Bill of Rights to the states. Today it is easy to forget that the Bill originally operated as a check only on the federal government. It might have been otherwise.

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1. 1 Cranch 137 (1803).

You may remember that James Madison, in drafting the original amendments, proposed several restrictions on the states. These were defeated. States' rights, not those of the individual, dominated the Constitutional debates. The states jealously guarded local prerogatives, seeking to prevent what were perceived to be efforts to aggrandize federal authority. Individual liberties, it also was thought, would be protected by preserving the sovereignty of the states.

At another period early in our Nation's history, the Bill might have been applied to the states. In 1833, the Supreme Court considered whether the "takings clause" of the Fifth Amendment applied to the states. In *Barron v. Baltimore*,[2] the Court concluded that the Bill restricted the federal government, not the states. Chief Justice Marshall wrote for the Court: "These amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments."[3]

Experience, to be sure, demonstrated that the states were not immune from abridging individual rights. The threat of "overbearing majorities," to use Madison's expression, manifested itself equally at the local and federal level. In spite of this experience, application of the first eight amendments to the states did not occur until after the ratification of the Fourteenth Amendment in 1868.

By the end of the nineteenth century, the Supreme Court had applied certain property rights provisions to the states. Not until the 1920s, however, did the Court apply to the states what we think of as the primary civil liberties contained in the Bill. In 1925 the Court observed in *Gitlow v. New York*,[4] that First Amendment freedoms "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[5]

Additional time was required for the Court to decide what rights in the Bill were "fundamental." In 1937, Justice Cardozo wrote in *Palko v. Connecticut*,[6] that some "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."[7]

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2. 32 U.S. 243 (1833).
3. *Id.* at 250.
4. 268 U.S. 652 (1925).
5. *Id.* at 666.
6. 302 U.S. 319 (1937).
7. *Id.* at 324-25.

By 1947, Justice Black took the view that each of the first eight amendments was absorbed into the Fourteenth Amendment. In his dissent in *Adamson v. California*,[8] he observed that the Bill of Rights was designed to restrain "the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many."[9] Justice Black concluded that the Court should adhere to what he "believe[d] was the original purpose of the 14th Amendment — to extend to all the people of the nation the complete protection of the Bill of Rights."[10]

This broadly-stated view did not gain the support of a Court majority. By the later years of the Warren Court, however, the result that Justice Black favored had largely been achieved: namely, the principal free thought and criminal procedure protections had been made applicable to the states. Today, these provisions curb the authority of presidents and governors, Congress and state legislatures, and federal and state judges.

A further development of interest has been the content that the Supreme Court has read into several of the amendments. The fear that the amendments would prove to be little more than "parchment barriers" was realized during much of the nineteenth century. Not until after World War I were the liberty interests inherent in the Bill of Rights fully recognized.

Consider for instance the transformation of perhaps the most important freedom protected by the Bill of Rights: the right to think and speak freely. I emphasize this provision because, in a system like ours in which citizens are sovereign, only an *informed* public can be trusted to make democracy work.

The promises of freedom of speech and thought that the First Amendment provides — and that Madison envisioned — were not entirely fulfilled for many years. As recently as 1919, the Supreme Court upheld federal convictions of Socialist Party members who protested conscription.[11] Punishment of political protests of this sort seems improbable today. Contrast, for instance, what the First Amendment permitted the government to punish during the World War I era and what it required the government to tolerate during the post-Vietnam War era. The difference is telling. It provides one measure of the increasing rigor with which the free speech guarantee has been enforced.

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8. 332 U.S. 46 (1947).
9. *Id.* at 89 (Black, J., dissenting).
10. *Id.*
11. *See* Schenck v. United States, 249 U.S. 47 (1919). *See also* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).

Other guarantees in the Bill of Rights have undergone similar transformations. For example, the Fourth Amendment protection from unreasonable searches and seizures was fortified by the Court's decision in *Mapp v. Ohio*,[12] making the exclusionary rule applicable to state as well as federal authorities. The Fifth Amendment protection from self-incrimination was strengthened by the Court's decision in *Miranda v. Arizona*.[13] And the Sixth Amendment right to counsel was fortified by *Gideon v. Wainwright*,[14] which guaranteed indigents the right to counsel in state felony prosecutions.

Another development of great importance has been the application of these guarantees to minorities. Later constitutional amendments, though not part of the Bill of Rights, provided further protections to individual liberties.

I am thinking of the Civil War amendments, particularly the equal protection clause, and the nineteenth amendment, guaranteeing women the right to vote. Landmark Supreme Court decisions gave them effect. *Brown v. Board of Education*,[15] for instance, declared that "[s]eparate educational facilities are inherently unequal."[16] And *Baker v. Carr*[17] and *Reynolds v. Sims*,[18] together established the principle of one person, one vote.

Other provisions of the Constitution, it bears note, also have protected civil liberties. The text of the original Constitution prevents religious tests for public office, bars the suspension of habeas corpus, prohibits *ex post facto* laws and Bills of Attainder, and establishes a two-witness requirement for treason prosecutions. The structure of limited government that the Constitution imposes further protects freedom by dispersing power (i) between the state and national governments and (ii) among the three branches of federal authority.

Nor does the federal Constitution stand alone in protecting individual rights. The constitution of the fifty states may provide different — and sometimes more far-reaching — protections from the federal Constitution. For example, some state supreme courts, responding to restrictive interpretations of certain guarantees by the Supreme Court of the United States, recently have construed similar guarantees in their own constitutions more broadly. Federalism, in this context, can be a two-way street. Though the Constitution sets a national floor, the states may

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12. 367 U.S. 643 (1961).
13. 384 U.S. 436 (1966).
14. 372 U.S. 335 (1963).
15. 347 U.S. 483 (1954).
16. *Id.* at 495.
17. 369 U.S. 186 (1962).
18. 377 U.S. 533 (1964).

extend protections further, giving their citizens protections not afforded by the federal charter.

One listening to what I have said so far might assume that some of these developments indicate flaws in the original Bill of Rights. That is not my point. While the changes were important ones, it is doubtful that any of them could have been included in the original Bill — either because the need for them was unforeseeable, or because inclusion of them was not politically feasible. What Justice Cardozo once said of Magna Carta may largely be true of the Bill of Rights: "[W]hat lives in the Charter today is the myth that has gathered around it — the things that it has come to stand for in the thought of successive generations — not the pristine core within, but the incrustations that have formed without."[19]

The Bill of Rights was written in a way that permitted the evolution I have highlighted.[20] In drafting the Bill, Madison relied principally on Virginia's Declaration of Rights. The Virginia Declaration, written by George Mason, itself invoked the language of earlier charters, such as the English Bill of Rights of 1689 and the Magna Carta, which was written in 1215. Drawing on these historic documents, Madison drafted broadly-worded, forward-looking guarantees — guarantees that could be applied to other generations, experiencing variations of age-old conflicts between majority and minority, between security and liberty. As such, the Bill of Rights became more than a symbol of American freedom; it became a powerful instrument in achieving and preserving it.

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In concluding, let me say that I know of no better form of government than our own. One of the principal reasons for its success, in my view, is the presence of the first ten amendments. They have constrained, in a way that no other declaration of human rights has, the excesses of zealous majorities and over-eager government officials.

And yet they have allowed us to retain a commitment both to individual freedom on the one hand, and the supremacy of law on the other.

It has been appropriate to have this Conference in Williamsburg, Virginia.

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19. *Selected Legal Writings of Benjamin Nathan Cardozo* 104 (1947).

20. The Bill of Rights was ratified on December 16, 1791, when Virginia became the eleventh state to approve the amendments.