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Stephen Wermiel

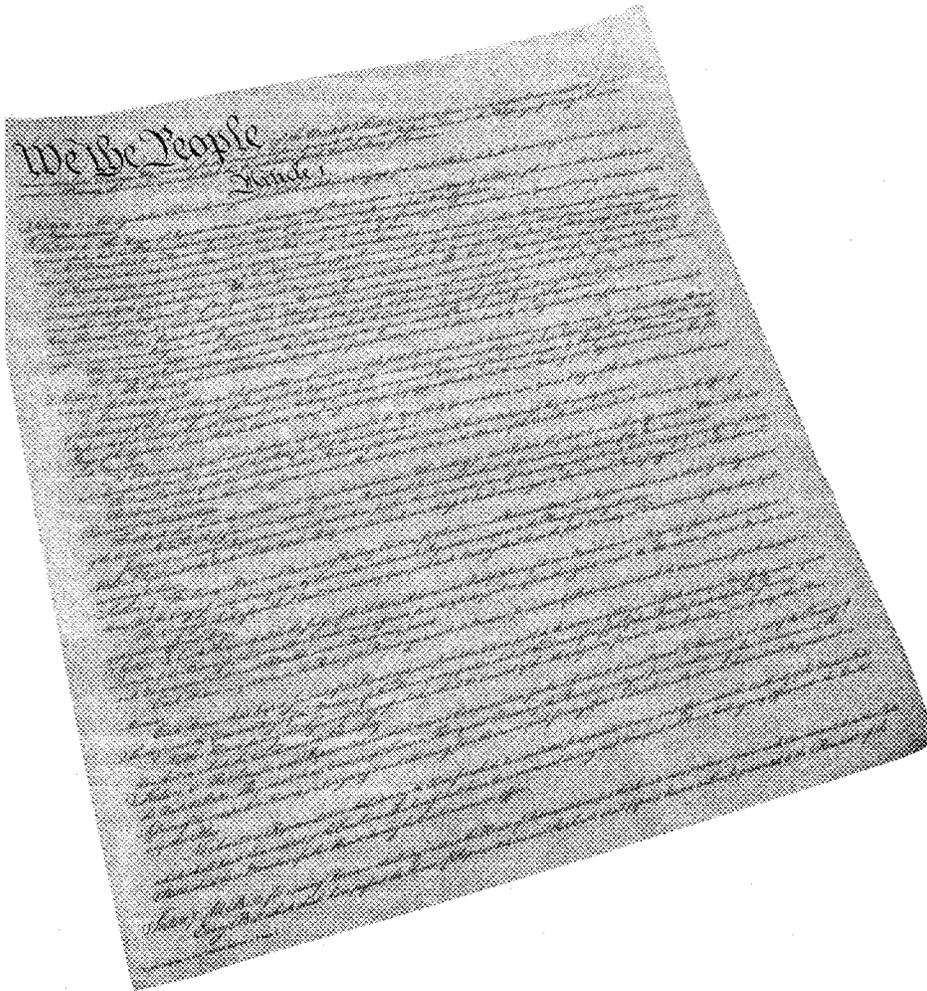
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The Bill of Rights and the Constitution: Facing the Challenge of the Future

By Stephen J. Wermiel



In a corner of the ground floor in the majestic U.S. Supreme Court building, a small theater regularly plays a short film on the Court, which includes the following exchange between Associate Justices Anthony M. Kennedy and Antonin Scalia about the meaning of the Constitution and the Bill of Rights:

Justice Anthony M. Kennedy: *We have an advantage that John Marshall did not. We have 200 years of history, of detachment in which we can see the folly of some ideas, the wisdom of others. The fact that we're interpreting a document that's 200 years old is not just a disadvantage; it's in a way also an advantage.*

Justice Antonin Scalia: *Don't sign me up for that. I don't think the Constitution has become any more clear or means anything different from what it originally meant. I guess that's just a difference in interpretive philosophy.*

This remarkably frank exchange between two sitting U.S. Supreme Court Justices captures much of the challenge that the Constitution and the Bill of Rights face for the new millennium. The fundamental question is how the Constitution will continue to adapt to a changing world in which new issues and rapid technological advances threaten to outpace conventional constitutional wisdom. Thomas Jefferson envisioned this problem when he wrote in a letter in 1816 "that laws and institutions must go hand in hand with the progress of the human mind."

Jefferson's comment was focused on the need for occasional revision of the Constitution, but amendment has proved to be only one part of the process of shaping the

nation's understanding of rights. In the nearly 209 years since the Bill of Rights was ratified by eleven states on December 15, 1791, individual controversies have also played a major role in defining the scope of liberty for the country.

Now new controversies are beginning to shape and redefine the meaning of liberty for the new millennium. How will the Fourth Amendment's protections against unreasonable searches and seizures adapt to thermal imaging, database searches, or other new technology that does not require a physical entry of a premises? How will equal protection rulings on race and other diversity issues develop and interact with other civil liberties? What role will due process and other rights guarantees play in the criminal justice system of the future? How will claims of religious freedom be reconciled with conflicting civil rights? Will the responsibility to protect rights shift increasingly to the states as principles of federalism continue to rise?

Thermal imaging technology, used to detect drug activity, has challenged traditional notions of what constitutes a search under the Fourth Amendment.

These questions and many other issues are the focus of a series of six panels organized by the Section of Individual Rights and Responsibilities as part of a Presidential Showcase series for the 2000 Annual Meeting in New York. The program is called "To Secure the Blessings of Liberty: The Bill of Rights and Core Constitutional Guarantees in the New Millennium." The panels are scheduled for July 8 and 9, 2000, and will be anchored by a number of scholarly papers that will be published in the *Journal of Law and Contemporary Problems* of Duke University Law School.

The question of how the Bill of Rights will adapt to the new millennium raises many important concerns. University of Virginia historian Robert Allen Rutland offered a hopeful answer in the 1991 preface to the Bill of Rights Bicentennial reissue of his classic book, *The Birth of*

the Bill of Rights. Said Rutland, "We will always be involved in the process of learning how to be free, and paying a high price to maintain our freedom."

Perhaps the learning curve is greatest when advances in new technology clash with the basic principles of the Bill of Rights. "New technologies should lead us to look more closely at just what values the Constitution seeks to preserve," wrote Harvard Law School Professor Laurence H. Tribe in a 1991 article.

The development of thermal imaging technology, used to detect drug activity, has challenged traditional notions of what constitutes a search under the Fourth Amendment. The thermal imaging device operates outside a building to detect excess heat inside the premises. State and federal courts are divided over whether this high-tech scan is a search that requires a warrant under the Fourth Amendment. In a dissenting opinion equating thermal imaging to a warrantless search, Judge John T. Noonan, Jr., of the U.S. Court of Appeals for the Ninth

Circuit observed, "The first reaction . . . is to think of George Orwell's *1984*. Although the dread date has passed, no one wants to live in a world of Orwellian surveillance." (*U.S. v. Kyllo*, 190 F.3d 1041, 1050 (9th Cir. 1999).)

The rapid growth of computer usage and Internet access has also presented new challenges for the Bill of Rights. Courts have found limited privacy rights in online chat rooms because they are open to many participants, and judges have afforded law enforcement broad access to workplace computers at government agencies that have usage and monitoring policies. Many problems remain unsettled, including application to computer technology of the rule that search warrants must specify the precise location and objects to be searched; this can be difficult when the object of a search is part of a network server with more than one location. Other questions

involve government access to personal information in computer databases held by Internet service providers. U.S. District Judge James H. Michael, Jr., observed in a recent decision that the Supreme Court's Fourth Amendment focus on whether there is a reasonable expectation of privacy "makes the work of the courts difficult when analyzing previously unadjudicated situations in the world of cyberspace." (*U.S. v. Hambrick*, 55 F. Supp. 2d 504, 508 (W.D. Va. (1999).)

The issue of racial justice and the guarantee of "equal protection of the laws" under the Fourteenth Amendment is another constitutional focal point that will face many tests in the new millennium. The long struggle for racial justice in this nation has helped to shape many other rights; the breadth of the First Amendment guarantees of freedom of speech and freedom of association developed in part out of the civil rights movement.

Today, some of the issues in the continuing drive for racial justice divide traditional civil rights and civil liberties coalitions. The debate continues over the value of racial diversity and the role of affirmative action across a wide range of government programs, from admissions to public schools and colleges to government contracting. The Supreme Court has curtailed but has not definitively resolved in all contexts the constitutionally acceptable uses of racial diversity.

The push for federal hate crimes legislation is another example of the complexity of the demand for racial justice in society. Legislation that passed the U.S. Senate last summer would strengthen the hand of federal prosecutors in pursuing bias-motivated crimes. The proposed law was subsequently dropped from an appropriations bill by a joint House-Senate committee, but it continues to be a focus of active debate. Sponsors see the proposed law as integral to ensuring equal rights for all. Yet, for some, the legislation raises concerns about free speech and regulation of information on the Internet if it is used to combat threats on Websites; for others, the proposal raises questions about the proper allocation of law enforcement authority between the federal government and the states.

The challenges of the criminal justice system pose many important issues for

the Bill of Rights in the years ahead. Controversy will certainly continue over the death penalty, and whether it is being applied fairly, whether the system is infected with racial bias, and the question of streamlining the number and duration of appeals. Significant questions also continue to be raised about balancing law enforcement needs against *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) and the scope of Fifth Amendment protections.

Still unsettled, and likely to have far-reaching consequences, is the question of whether individuals may sue states under the comprehensive Americans with Disabilities Act (ADA).

Prosecutorial discretion and potential abuse of authority are also subjects that will continue to receive scrutiny. These subjects are a major focus as plea bargaining increases in frequency and importance in the resolution of criminal cases, both in the state and federal systems.

One of the most active sources of constitutional debate is the tension between the First Amendment's guarantee of religious freedom and other rights. This tension is presented most clearly in a spate of recent disputes pitting landlords against would-be tenants. In the typical case, a landlord cites religious beliefs as a basis for refusing to rent to unmarried heterosexual or homosexual couples. The landlord relies on the "free exercise" guarantee of the First Amendment; the tenants may rely on "equal protection" or fair housing laws. Issues like this one have already arisen in Alaska, California, Massachusetts, and Michigan. Free exercise rights are also raising thorny issues in employment cases, the application of zoning ordinances, and other contexts.

In addition, there is a growing number of increasingly difficult cases pitting the First Amendment prohibition of any formal "establishment of religion" against First Amendment guarantees of "free speech" and "free exercise." This problem is arising when school policies permit student speakers at school events to decide whether to recite or lead a prayer. School-sponsored or -mandated

prayer violates the establishment clause, but student-initiated prayer may sometimes be protected by the free exercise or free speech guarantees. There is obvious tension in school settings over when student-initiated prayer takes on an air of official activity that could trigger establishment clause concerns.

Still another focus of constitutional evolution in the new millennium is the balance between state and federal power. It is impossible to contemplate all

of the ways in which this issue may arise in the future, since many of the controversies have arisen through congressional response to specific concerns, such as gender-based violence or state accommodation of religious freedom. But on the edge of transition between the old millennium and the new one, the Supreme Court seemed to be on a clear mission to breathe new life into the doctrine of federalism, especially through interpretation of the Tenth and Eleventh Amendments and the Commerce Clause.

One significant question raised by the Court's rulings is whether the federal government will cease to be the final guarantor of individual rights, with more and more of the responsibility falling to the states. It remains to be seen just how good a job the states will do. At the same time, Congress is not likely to give up eas-

ily the prerogative of responding with legislation to important problems involving education, crime, and other social issues.

A fundamental focus at the start of the new century is the scope of state sovereign immunity under the Eleventh Amendment. The Supreme Court has recently read the Eleventh Amendment to impose sharp limits on the ability of Congress to subject states to lawsuits by individuals for violations of federal laws. Still unsettled, for example, and likely to have far-reaching consequences, is the question of whether individuals may sue states under the comprehensive Americans with Disabilities Act (ADA).

The many issues discussed in this article present only those that it is possible to reasonably foresee as the new century begins. There will be many more, as yet unpredictable issues that will arise in the future and test the mettle of the Constitution and the Bill of Rights. It is, of course, impossible to foretell how the nation will respond to rights and liberties challenges as yet unknown. But the historian, Rutland, offered a clear aspiration in his 1991 book preface:

Let us pray that when the Tricentennial of the Bill of Rights is celebrated in 2091 the record will show that the American people have repeatedly passed the ultimate test and always understood what was really important about this country—the citizen's right to live in liberty under the guarantees defined and upheld under the Bill of Rights.

Stephen J. Wermiel is Associate Director of the Program on Law and Government at American University, Washington College of Law, where he teaches media law and constitutional law.

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