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In 1789, just over two hundred and thirty years ago, James Madison drafted, and his colleagues in the House of Representatives approved, a series of amendments to the new Constitution and sent them to the Senate for consideration.[2] After some negotiations, both the House and the Senate passed twelve of the amendments by the necessary two-thirds vote, which were then sent to the states for ratification.[3] By December 1791 the requisite

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2. *Bill of Rights*, THE U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Oct. 9, 2019), https://www.archives.gov/legislative/ features/bor.

3. The documentary history of the drafting and passage of the Bill of Rights is conveniently collected in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (ed. Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford) (1991). [Hereinafter cited as CREATING THE BILL OF RIGHTS.]

three-fourths of the states (ten out of the fourteen) had ratified ten of them,[4] and they have ever after been known as the American Bill of Rights. Since its ratification in 1791, the Bill of Rights has been often lauded as one of the great documents of human liberty—providing for fair trials, prohibiting torture and other barbaric treatment of prisoners, preventing the government from arbitrarily arresting people or taking away their life, liberty, or property without due process of law, and guaranteeing that the government will not prohibit religious freedom, freedom of speech, or freedom of the press. While a few of the amendments have very little to do with fundamental liberties[5] or

4. *Articles of Amendment, as Agreed to by the Senate September 14, 1789*, reprinted in *Id.,* at 47-49. The states did not ratify the first and second proposed amendments in 1789-91. The original first amendment would have required that eventually there would be one representative for every 50,000 people in the nation. *Id.* at 48. Had this amendment passed, today the House of Representatives would have about 6,000 members. *Id.* This would clearly be unwieldly. The members of the First Congress simply could not have imagined a nation of more than three hundred million people. *See* Paul Finkelman, *Who Counted, Who Voted, and Who Could They Vote For*, 58 ST. LOUIS UNIV. L.J. 1071, 1085 (2014). Nevertheless, the insight of Madison and his colleagues that Congressional Districts should not be too large seems to have been correct. The current House is clearly too small, and unrepresentative. *Id.* In 1911 Congress set the size of the House at 435 members. Pub. L. No. 62-5, 37 Stat. 13 § 2. The law provided for 433 representatives with two more to be added when Arizona and New Mexico became states. *Id.* § 2. The number (435) became permanent in 1929. Pub. L. No. 71-13, §22(a), 46 Stat. 26 § 22(a)(2). The size has not changed, even though we have added two states (Alaska and Hawaii) since Arizona and New Mexico were admitted as states, and the U.S. population has grown from about 92,000,000 in 1910 to 309,000,000 in 2010 and will probably exceed 330,000,000 in 2020. Finkelman, *supra*, at 1082. In 1911 the average Congressional district had about 211,000 people; currently the average congressional district has more than 713,000 residents, and after 2020 districts will average 759,000 residents. *Id.* With so many people in each district, and many districts increasing in physical size through reapportionment, it is impossible for representatives to truly "know" their district or their constituents. *Id.* My own view is that we should set the average district at the population of the smallest state, which would make representation fairer and provide enough members of the House to do their jobs. *Id.* at 1084. Today, members of the House are on so many committees they cannot keep track of all their business. *Id.*
The proposed second amendment prohibited any sitting Congress from raising its own salary. *Articles of Amendment, as Agreed to by the Senate September 14, 1789*, in CREATING THE BILL OF RIGHTS, *supra* note 3, at 47. Thus, Congress could only raise the salary for future Congresses. *Id.* Over a period of over 200 years various states ratified this amendment, usually as a protest against some Congressional policy. Steven G. Calabresi and Zephyr Teachout, *The Twenty-Seventh Amendment*, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvii/interps/165. In 1992 the Secretary of State ruled that over the course of the period from 1789 to 1992 the required three-quarters of the states had ratified the Amendment and thus it became part of the Constitution on May 2, 1992, as the Twenty-seventh Amendment. *Id.* It is unlikely that in the future there will be any other dormant amendments ratified because the earliest ones are long forgotten, and newly proposed amendments have time limits for their ratification. *Id.* One important aspect of the amendment process is that once a state has officially ratified an Amendment there is no process for withdrawing that ratification at a later date. *Ratification*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu /constitution-conan/article-5/ratification (last visited Feb. 20, 2020).

5. The Second Amendment is an example of this. U.S. CONST. amend II. While spokesmen for the firearms industry and a bare majority of the Supreme Court argue that it is about a "personal right" to own a gun, District of Columbia v. Heller, 554 U.S. 570, 636 (2008), few serious historians and other Founding period scholars accept this claim. The Amendment was clearly designed to preserve the right of the states to maintain militias, as the text of the Amendment shows: "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." U.S. CONST. amend II. In 1990 Chief Justice Warren E. Burger explained, the Amendment

are seen as mostly irrelevant to the modern world,[6] most of the amendments embody many of the basic principles of a free society, fundamental justice, and human rights.

This article looks at the American Bill of Rights in the context of when it was written—230 years ago—and in the context of our own times.[7] This article notes that the Bill of Rights must be read in part as a document mostly designed to place limits on government rather than as a document that directly contains specific grants of liberty.[8] The most prominent provision of the Bill

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"must be read as though the word 'because' was the opening word." Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 350 (2000). He later argued that the claim that the Amendment provided an individual right to own a weapon, was "one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime." *MacNeil/Lehrer NewsHour by Charlayne Hunter-Gault* (PBS television broadcast Dec. 16, 1991). It is worth recalling the Burger was a conservative Republican put on the Court by President Richard M. Nixon. *Warren E. Burger*, OYEZ, https://www.oyez.org/justices/warren_e_burger (last visited Feb 20, 2020). The overwhelming majority of historical scholarship supports this understanding. MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY xiii (2014). For example, Nathan Kozuskanich shows that between 1763 and 1791 the use of the term to "bear arms," almost always was in the context of the military. Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?* 10 U. PA. J. CONST. L. 413, 416 (2008). Kozuskanich's research shows that in newspapers, pamphlets, and published political debates in Congress and other elected found bodies, the term "bear arms" is found 267 times, and in 256 of those uses the term is "in an explicitly collective or military context." *Id.*; *see also* SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 214 (2006); THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS 119 (Carl Bogus ed., 2000); Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective,*76 CHI.-KENT L. REV. 195, 226 (2000). Until 2008 the Supreme Court had consistently held that the Amendment only applied to the militia. Heller, 554 U.S. at 638-39. The Court now says it applies to the personal ownership of firearms. *Id.* at 579-80. However, the historical and linguistic support for this argument is weak. Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and a Very Confused Court*, 37 CARDOZO L. REV. 623, 624 (2015); Paul Finkelman*, It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 277-78 (2008).

6. For example, the Seventh Amendment requires that in civil lawsuits in federal courts valued at more than twenty dollars the parties shall have a right to a jury trial. U.S. CONST. amend VII. However, under the Judiciary Act of 1789 – passed after the Bill of Rights had been sent to the states for ratification – Congress required that suits in federal courts had to be for amounts of at least $100. Judiciary Act of 1789, 1 Stat. 73. Thus, even before it was ratified, the Seventh Amendment was obsolete. Today civil suits in federal courts must be for more than $75,000. 28 U.S.C. § 1332 (2011). Thus, the minimum dollar amount in the Seventh Amendment has no relevance today. U.S. CONST. amend VII. Furthermore, the cost of civil litigation has become so high that most cases are settled without trial or taken to arbitration. *What Percentage of Lawsuits Settle Before Trial? What Are Some Statistics on Personal Injury Settlements?*, THE LAW DICTIONARY, https://thelawdictionary.org/article/what-percentage-of-lawsuits-settle-before-trial-what-are-some-statistics-on-personal-injury-settlements/ (last visited Feb. 20, 2020).

7. *See* discussion *infra* Part I.

8. Some amendments in fact do contain positive rights. U.S. CONST. amend VI. The Sixth Amendment declares that in any trial the "accused shall enjoy the right to a speedy and public trial, by an impartial jury" and "to have the Assistance of Counsel for his defence." *Id.* These are positive rights, rather than "negative" limitations on the government. *Id.* In the eighteenth century English law did not guarantee that a criminal defendant could even have counsel at trial. *Absolute Right to Counsel at Trial*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution-conan/amendment-6/absolute-right-to-counsel-at-trial (last visited Feb. 20, 2020). Indeed, England did not guarantee that defendants could have counsel (if they could afford them), until the passage of the

of Rights, the First Amendment, illustrates this.[9] Known to give everyone within the jurisdiction of the United States the right to freedom of speech, press, and assembly, as well as the right to freedom of religious practice, the language does not directly authorize these rights.[10] Rather, the Amendment says that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."[11]

This structure was self-conscious on the part of James Madison, the "Father of the Bill of Rights," who, in part, believed that Americans already had certain liberties.[12] In a constitutional sense, these rights were inherent in a self-governing society. In this context, the First Amendment might be seen as a recognition of "unalienable" political and due process rights, just as the Declaration of Independence recognized certain "truths" which were "self-evident:" "[T]hat all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."[13] The Declaration did not "give" these "unalienable rights of life, liberty, and the pursuit of happiness" to the people, because the rights were preexisting–"self-evident"–and already belonged to the people. Similarly, Madison saw certain political and due process rights–such as freedom of religious practice, freedom of the press, or the right to due process of law–as fundamental to a free society.[14] Thus, the Bill of Rights could not "give" these rights to the people because these rights already belonged to the people in a self-governing nation.[15] Thus, the Bill of Rights guaranteed that the government could not trample on these rights.

"Prisoner's Counsel Act" in 1836. Cerian Charlotte Griffiths, *The Prisoners' Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial*, 2 LAW, CRIME AND HISTORY 28 (2014). Thus, this Amendment provided a *new* right, not previously understood to be available to all defendants. *Id.* The modern right to counsel, created in Powell v. Alabama, 287 U.S. 45, 73 (1932) and Gideon v. Wainwright, 372 U.S. 335, 343 (1963), developed in conjunction with the Sixth Amendment and the due process clauses in the Fifth and Fourteenth Amendments.

9. U.S. CONST. amend I.

10. *Id.*

11. *Id.*

12. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 302 (1991). For a first-rate single volume biography of Madison, see the older but still very useful, RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY (1971). See also ROBERT RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 (1955).

13. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

14. *See* Finkelman, *supra* note 12, at 311-12.

15. Some Federalists opposed the addition of a Bill of Rights precisely on this issue. Finkelman, *supra* note 12, at 312-13. Three future Supreme Court Justices made this argument during the ratification debates. *Id.* at 309. Oliver Ellsworth, of Connecticut, writing under the *nom de plume* "Landholder," argued that the theory of the Constitution itself precluded the need for a bill of rights. A Landholder [Oliver Ellsworth], No. VI, 10 December 1787, reprinted in 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT 487, 489 (ed. Merrill Jensen) (1978). He asserted that a bill of rights was something that the people wrested from the king, thus in America a bill of rights was "insignificant since

In this respect, the structure of the Bill of Rights reflected the profound change in America brought about by the Revolution. In the late seventeenth century, the British parliament had passed the English Bill of Rights[16] to take power away from the monarchy and provide explicit protections of rights for the people of Great Britain.[17] In 1689, in order for Prince William of Orange to become King William III of England, he had to sign the law enacting the English Bill of Rights.[18] In effect the new king *gave* rights to his people. But in America, where there was no king, the people already had rights. Thus, much of the American Bill of Rights is not about giving rights to the people but rather restraining the government from trampling on those rights. This is an important aspect of the American Bill of Rights.

It is also important to note that the Bill of Rights constitutionalized and protected the rights of the minority against the power of the majority.[19] Because Congress (and under modern applications of the Fourteenth Amendment, the states and all local governments by extension) cannot pass laws "abridging the freedom of speech, or of the press,"[20] a speaker may speak and an author may write whatever she or he wishes, even if a majority of the people, or a majority of a legislature, or some national, state, or local executive, object to the sentiments of the speaker or author.[21] Those in power

government is considered as originating from the people, and all the power government now has is a grant *from the people.*" *Id.* In other words, since the people already had these rights, the Constitution could not "give them" to the people. *Id.* Similarly, Pennsylvania's James Wilson argued that "it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested." *James Wilson's State House Yard Speech*, October 6, 1787, reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: PENNSYLVANIA 167, 168 (ed. Merrill Jensen) (1976). James Iredell of North Carolina argued that in England a bill of rights was necessary because of the Crown's "usurpations" of the people's liberties. Marcus [James Iredell], *Answer to Mr. Mason's Objections to the New Constitution*, 20 February 1788, reprinted in 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 163 (eds. John P. Kaminski and Gaspare J. Saladino) (1986). But, under the new Constitution the people delegated power to the national government, and thus Iredell argued that such usurpations by the national government were impossible. *Id.* Iredell asserted that under the Constitution the government could no more "impose a King upon America" than "go one step in any other respect beyond the terms of their institution." *Id.* at 163-64.

16. "An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown," 1 William & Mary Sess 2 c 2. (Act of 16 December 1689). For a transcript of the text, see *English Bill of Rights 1689*, THE AVALON PROJECT, https://avalon.law.yale.edu/ seventeenth century/england.asp (last visited Mar. 19, 2020).

17. See generally, LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689 (1981); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (1999); AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

18. Schwoerer, *supra* note 17.

19. THE FEDERALIST NO. 51 (Alexander Hamilton).

20. U.S. CONST. amend. I.

21. There are some exceptions to this for direct advocacy of violence, crimes that are verbal in nature (like threats or solicitation of bribes), and child pornography. *What Does Free Speech Mean*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does (last visited Feb. 20, 2020). There is also a line of cases

cannot censor the ideas and arrest the messenger.[22] Similarly, members of an overwhelming majority that represents one particular religious faith cannot force others to believe, pray, or support their religion.

In this article I also consider the problem of language–how do we understand, interpret, or apply language that is very old and written for a different time and a different world.[23] In other words, how do we apply eighteenth century language and concepts to our own world? Three examples illustrate this: The application of concepts of the language of the First Amendment and the meaning of freedom of speech and press in the late eighteenth century and today, the meaning of a search and seizure then and now, and the meaning of "cruel and unusual punishments" in 1789 and 2020.[24]

Consider the language of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech or of the press."[25] How do we apply that language to radio, television, or the internet? Is the "internet" the press? Do television programs or the movies constitute "speech" or "the press" or both?[26] "Speech" in the eighteenth century was limited to the power of a speaker's voice and literally disappeared when the speaker sat down.[27] At best, before the invention of shorthand (and long before there were recording devices), someone in the audience may have taken notes, or the speaker might have kept a prepared text. But otherwise, the content of a speech ended with the speech itself. The speaker was visible to the listener and almost always the listener knew who was speaking. If television, radio, movies, YouTube videos, internet chat rooms, or Facebook postings constitute "speech" then

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where speech is restricted because it creates a public threat or a threat of public disturbance. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Feiner v. New York, 340 U.S. 315, 321 (1951).

22. *First Amendment*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution/first_amendment (last visited Feb. 20, 2020).

23. *See* discussion *infra* Part I.

24. Jonathan Kim, *Fourth Amendment*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE (June 2017), https://www.law.cornell.edu /wex/fourth_amendment; Bryan Stevenson & John Stinneford, *The Eighth Amendment*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103 (last visited Feb. 19, 2020).

25. U.S. CONST. amend I.

26. *Cable Television*, JUSTIA, https://law.justia.com/constitution/us/amendment-01/15-cable-television.html (last visited Mar. 19, 2020).

27. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004); Justin Marceau & Alan Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1000 (2016). Print media in the seventeenth and eighteenth centuries was often anonymous. In Britain this was necessary because of licensing laws, before 1694, and the use of seditious libel to prosecute critics of the government. In the early national period, many commentators used pseudonyms or a nom de plume to hide their identity, not because of fear of government reprisal but because the political culture at the time led many commentators and thinkers to believe that the force of the argument, rather than the fame (or lack of fame) of the author, was what mattered. A prime example of this was the publication of THE FEDERALIST PAPERS, written anonymously by Alexander Hamilton, James Madison, and John Jay, but always signed as "Publius."

speech now reaches into every corner of the globe and the words may last forever. Moreover, the listener may not see the speaker or even know who the speaker is.[28] A posting on social media may come from the person claiming to post it, but the poster may be an imposter, a liar, a criminal in disguise, a terrorist under an assumed name, a foreign agent trying to influence a democratic election, or even a police official attempting to entrap someone who has not committed a crime.[29] In an age when the speaker can be anonymous or fraudulent, should there be some regulation of speech?[30] I am not advocating for this outcome; rather I am merely trying to illustrate the problem of applying language and concepts from two centuries ago to the modern world.[31]

Similarly, one common exception to free speech is direct incitement to criminal behavior.[32] The Court has created a high bar for any prosecutions of this crime,[33] holding that such incitement must be to imminent violence, and not some distant threat that might have been influenced by a speaker.[34] Without arguing in favor of applying more lenient applications of this doctrine, it is not unreasonable to ask if the internet, Facebook, and Twitter require a reexamination of the relationship between advocacy of illegal behavior through electronic media, and imminent illegal behavior.[35]

The Fourth Amendment proclaims that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[36] In 1789 this provision required that government officials obtain a warrant before entering someone's property—a house, a business, a warehouse—and rummaging around to find evidence of criminal activity.[37] The whole notion of the Fourth Amendment was to prevent the use of general warrants, which the British had used against American colonists. The Amendment requires that a search can only be

28. *Anonymity*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/anonymity (last visited Feb. 20, 2020).

29. CONGRESSIONAL RESEARCH SERVICE, TERRORISM, VIOLENT EXTREMISM, AND THE INTERNET: FREE SPEECH CONSIDERATIONS (May 6, 2019).

30. *Anonymity*, *supra* note 28.

31. Jeffrey Toobin, *Our Broken Constitution*, THE NEW YORKER (Dec. 2, 2013), https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution.

32. *Brandenburg Test*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/brandenburg_test (last visited Feb. 20, 2020).

33. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

34. "These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447.

35. CONGRESSIONAL RESEARCH SERVICE, *supra* note 29.

36. U.S. CONST. amend IV.

37. William H. Cuddihy, *The Fourth Amendment (Historical Origins)*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (ed. Leonard W. Levy) (1986) 761-63;

conducted based on information that is likely to come from people who know the alleged wrongdoer and are likely to be familiar with the location of the evidence on the premises to be searched.[38] But, at least since the first wiretap case in 1928, *Olmstead v. United States*,[39] courts and legislatures have struggled to determine what a "search" means in the modern world.[40]

The struggle is infinitely more complicated today.[41] Today, searches can be done remotely, through wiretaps, heat sensing devices, long range cameras, from an airplane,[42] or from a hovering helicopter.[43] A remote search of someone's computer files can be done without entering the premises of someone's house or business, and the files can be downloaded and thus "taken" from the owner, even though the files also remain in the owner's possession.[44] Remote searches based on electronic data also raise the likelihood that searches, even with warrants, will be conducted on innocent people, and often on the wrong people.[45] These are issues that modern courts and legislatures face as they try to apply eighteenth century notions of privacy, criminal investigations, and technology to the electronic world of the twenty-first century.[46]

Similarly, consider the Eighth Amendment's prohibition on "cruel and unusual punishments."[47] Should this Amendment apply to only what was cruel and unusual in 1789 when the Amendment was written, or should it apply to it what is considered "cruel" or "unusual" today?[48] The application of the death penalty illustrates this dilemma. In 1789 the death penalty was common, the method of execution was slow strangulation through hanging, and death could take a significant amount of time and be excruciatingly

38. MAURICE HENRY SMITH, THE WRITS OF ASSISTANCE CASES (1978); Raymond Shih Ray Ku, *The Founder's Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1332-40 (2002).

39. 277 U.S. 438, 459-60 (1928). Such searches are quite different than the eighteenth century understanding that a "search" would be conducted in person, almost always by someone who knew the person being searched.

40. Abraham R. Wagner & Paul Finkelman, *Security, Privacy, and Technology Development: The Impact on National Security*, 2 TEX. A&M L. REV. 597, 621-622 (2015).

41. *See id.* at 598 (illustrating how these issues affect national security).

42. California v. Ciraolo, 476 U.S. 207, 215 (1986).

43. Florida v. Riley, 488 U.S. 445, 451 (1989). *See* Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1413-15 (1993), for a discussion of *Riley* and *Ciraolo.*

44. *See* Susan E. Brenner, *Fourth Amendment Future: Remote Computer Searches and the Use of Virtual Force,* 81 MISS L.J. 1229, 1241 (2012).

45. Jason Tashea, *Net Search and Seizure: Inaccurate Leads from IP Addresses Prompt Police to Serve Warrants on Innocent People*, 103 A.B.A. J. 18, 19 (2017).

46. *See e.g.*, United States v. Jones, 565 U.S. 400, 402 (2012) (presenting the issue of whether using GPS tracking devices violates the Fourth Amendment prohibition on warrantless searches).

47. U.S. CONST. amend. VIII.

48. *See* Pamela A. Nagy, *Hang by the Neck Until Dead, The Resurgence of Cruel and Unusual Punishment in the 1990s*, 26 PAC. L.J. 85, 94 (1994).

painful.[49] Today almost every truly democratic society has abolished capital punishment.[50] The United States, Japan, South Korea, and India are the most prominent exceptions among democracies.[51] Thus, would it be reasonable, indeed necessary, for the U.S. Supreme Court to declare that all executions are "unusual" among modern democracies, as well as needlessly cruel, and therefore are unconstitutional?[52] The courts have not (yet) adopted this position for all executions, although the Supreme Court has applied it to anyone who committed a capital offence under the age of eighteen.[53]

I: THE BILL OF RIGHTS AND FUNDAMENTAL LIBERTIES: AN OVERVIEW

The first ten amendments affect a myriad of rights and liberties that are seen as central to a democratic and free society. The idea of a bill of rights—although not necessarily its successful implementation—has been accepted throughout much of the world.[54] Many of the rights in the U.S. Bill of Rights are encapsulated in the Universal Declaration of Human Rights, promulgated

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49. *See generally* LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 3-5 (1989). The slang for a hanging was "stretching the neck," which literally took place as a person dangled from a rope. The hangman's noose, which if properly used, would break a prisoner's neck and kill the prisoner quickly, was not invented until the mid-nineteenth century. For a popular history of hangings, see JACK SHULER, THE THIRTEENTH TURN: A HISTORY OF THE NOOSE 19 (2014). A useful and compelling review of this book is found at: Gerald Early, *Book Review: 'The Thirteenth Turn: A History of the Noose,' by Jack Shuler*, WASHINGTON POST, (Aug. 29, 2014), https://www.washingtonpost.com/opinions/book-review-the-thirteenth-turn-a-history-of-the-noose-by-jack-shuler/2014/08/27/ cfab51d4-0b68-11e4-b8e5-d0de80767fc2_story.html.

50. *See* Roger Hood, *Capital Punishment: A Global Perspective*, 3 PUNISHMENT & SOCIETY 331, 334 (2001).

51. Oliver Smith, *Mapped: The 53 Places That Still Have the Death Penalty – Including Japan,* THE TELEGRAPH (Jul. 6, 2018), https://www.telegraph.co.uk/travel/maps-and-graphics/countries-that-still-have-the-death-penalty/ (skewing figures, by unreported executions in some countries, particularly totalitarian and quasi-totalitarian regimes) ("Excluding China [which has the most executions], 84 per cent of all reported executions took place in just four countries – Iran, Saudi Arabia, Iraq and Pakistan."). *See* T*he Republic of Korea's Compliance with the Convention on the Rights of the Child Alternative Report About the Rights of Children Whose Parents are Sentenced to Death or Executed*, ADVOCATES FOR HUMAN RIGHTS AND THE WORLD COALITION AGAINST THE DEATH PENALTY 2 (Aug. 15, 2019), https://www.theadvocatesforhumanrights.org/uploads/south_korea_crc_death_penalty_final.pdf (noting that "[i]n 1998 South Korean President Kim Dae-Jung established a de facto moratorium on the death penalty" but there have not been any steps taken since then to abolish it by law and there are still 61 people on death row). *But see The Death Penalty Around the World*, FRANCE DIPLOMATIE (Oct. 2019), https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/death-penalty/the-death-penalty-around-the-world/ (South Korea is currently on the list of countries that have abolished the Death Penalty *de facto* because it has not been carried out in over ten years).

52. JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION (2017).

53. The Court rested its opinion in part on "evolving standards of decency," which implies that executing people for crimes committed when they were minors was "unusual." Roper v. Simmons, 543 U.S. 551, 560-61, 568 (2005).

54. *See e.g.*, U.N., Universal Declaration of Human Rights arts. I-XXX (Dec. 10, 1948), https://www.un.org/en/udhrbook/pdf/udhr_ booklet_en_web.pdf. While just a declaration, the UNDHR reflects the international community's dedication to human rights. *Id.* Additionally, it is reflective of the U.S. Bill of Rights. *Id.*

by the United Nations.[55] This document reflects the international consensus that some rights should be universal.[56] Even countries which are clearly not democratic and regularly infringe on the freedom of anyone in their jurisdiction, such as China[57] and the Russian Federation,[58] often have provisions in their constitutions which purport to protect some rights and liberties similar to those found in the U.S. Bill of Rights.

One feature of the U.S. Bill of Rights that makes it different from the fundamental law of many other nations is its applicability to all people within the United States, whether citizens, denizens, resident aliens, visitors, tourists, or visiting students or professors. Even undocumented non-citizens have these protections.[59] Search warrants, jury trials, and the right to counsel even apply to terrorists captured inside the United States.[60] This is in part because many of the protections of the Bill of Rights are actually restrictions on government activity, rather than rights and liberties "given" to the people. Thus, for example, search warrants cannot be issued "but upon probable cause, supported by Oath or affirmation, and particularly describing the place

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55. *Compare* Universal Declaration of Human Rights, art. V, Dec. 10, 1948, https://www.ohchr.org/EN/UDHR/Documents/ UDHR_Translations/eng.pdf [hereinafter UDHR] ("No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment."), *with* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). *Compare* UDHR art. IX-XI (dealing with criminal justice), *with* U.S. CONST. amend. IV-VI. *Compare* UDHR art. XVIII (protecting religious freedom) and UDHR, Preamble (enshrining the right of free speech), *with* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . .").

56. *See generally* UDHR art. I-XXX. Clearly many nations, especially those that are not democracies, regularly ignore these norms. *See* Tom Gjelten, *Boundlessly Idealistic, Universal Declaration of Human Rights is Still Resisted*, NPR (Dec. 10, 2018), https://www.npr.org/2018/12/10/675210421/its-human-rights-day-however-its-not-universally-accepted.

57. XIANFA [CONSTITUTION] arts. 33-41 (1982) (China), *available at* https://www.constituteproject.org/constitution/China_2004?lang=en.

58. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. FR] [CONSTITUTION] art. 17-64 (Russ.), *available at* http://www.constitution.ru.

59. *See* United States v. Meza-Rodriguez, 798 F.3d 664, 666 (7th Cir. 2015).

60. Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience - A History Lesson for a Post-9-11 America*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 25, 31-32, 46 (2003). The case of al-Marri v. Spagone, 555 U.S. 1220 (2009) illustrates this. The U.S. wanted to try al-Marri as an enemy combatant in a military court, even though he was a U.S. permanent resident charged with criminal behavior solely within the United States. *See* Brief for Petitioner at i, al-Marri v. Spagone, 555 U.S. 1220 (2009) (No. 08-368). Before the Supreme Court could rule on the case the United States "confessed error," accepting the argument that even though he was not a U.S. citizen, al-Marri was protected by the Sixth Amendment and other protections of the Bill of Rights. *See Al-Marri v. Gates/Al-Marri v. Spagone*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/other/al-marri-v-gates-al-marri-v-spagone (last visited Mar. 19, 2020). *See* Brief for Amici Curiae Founding-Era Historians and Experts in American Legal History in Support of Petitioner, al-Marri v. Spagone, 555 U.S. 1220 (2009) (No. 08-368), 3-34; Brief for Amicus Curiae Civil War Historians in Support of Petitioner, al-Marri v. Spagone, 555 U.S. 1220 (2009) (No. 08-368), 2-26 (noting the historical arguments). In the interest of full disclosure, I was an "amici" on both of these briefs, and worked with the team that filed them.

to be searched, and the persons or things to be seized."[61] This limitation on the government prohibits *any* search that does not conform to the constitutional requirement, without regard for the status of the person searched or the status of the owner or occupant of the place being searched.[62]

As I note below, many other democracies are not nearly as protective of non-citizens as the U.S.[63] This is in part a function of the history of the British colonies and the early United States, which accepted immigrants from many places.[64] It is also a function of the language of the amendments, and their structure, as limitations on government rather than grants of specific rights.[65] For example, the requirement of a grand jury indictment applies to all felony criminal trials without regard to the status of the defendant.[66] Before turning to this issue, it is useful to consider the content of the amendments themselves.

The First Amendment prohibits the government from interfering with religious belief and practice[67] or freedom of expression.[68] Unlike many national constitutions or the basic laws of many nations, the First Amendment also actually guarantees the right of people to complain to the government and to peaceably protest against government policies.[69] The Amendment prohibits the government from abridging the right "peaceably to assemble, and to petition the Government for a redress of grievances."[70] The Third[71] and Fifth[72] Amendments prevent the government from arbitrarily using or taking private property without due process of law and compensation. The

61. U.S. CONST. amend. IV.

62. *See id.*

63. *Infra* Part III.

64. 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 139-49 (3rd ed. 2011).

65. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

66. U.S. CONST. amend. V.

67. It is of course important to understand that courts have not always respected the right to religious practice or belief. In Reynolds v. United States, 98 U.S. 145, 166-68 (1878) and Davis v. Beason, 133 U.S. 333 (1890) the Court upheld prosecutions for religious practices (Reynolds) and belief in those practices (Beason) that violated accepted norms of the majority of Americans. In Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) the Court upheld denial of unemployment compensation for Smith, after he participated in a religious ceremony that violated his employer's rules for employees, and was then terminated when he refused to go to mandated therapy for violating the employer's rules.

68. U.S. CONST. amend. 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.").

69. *Id.*

70. *Id.*

71. U.S. CONST. amend. 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.").

72. U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

Fourth,[73] Fifth,[74] and Sixth Amendments[75] guarantee the fair administration of criminal justice. The Eighth Amendment prohibits the government from using torture, arbitrary punishments and excessive fines.[76] Arguably, in our own times the prohibition on "cruel and unusual punishment" could be read to prohibit executions.

Perhaps the most innovative of these amendments is the Ninth Amendment, which protects rights that are *not* explicitly mentioned in the Constitution—what have become known as "unenumerated rights."[77] James Madison, the primary author of the Bill of Rights, acknowledged this problem when he introduced the Bill of Rights in the House of Representatives, noting that "by enumerating particular exceptions of the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure."[78] However, he dealt with this issue in what became the Ninth Amendment.[79] He wrote this Amendment because he feared that if the Bill of Rights failed to list a specific right or liberty, the government would be able to take that right away from the people.[80] This Amendment also reflected Madison's modesty. Brilliant and exceedingly well-read,

73. U.S. CONST. amend. 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.").

74. U.S. CONST. amend. 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 offence 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.").

75. U.S. CONST. amend. 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 defence.").

76. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). In 2019 the Supreme Court applied the "excessive fines" clause to the states. *See* Timbs v. Indiana, 139 S. Ct. 682, 686-87 (2019).

77. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

78. *Speech of Madison,* 1 ANNALS OF CONGRESS, 1st Cong., 1st Sess., 456. (Debate of June 8, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 3, at 66-69.

79. His original proposal read, "[t]he exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution." Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 632 (1956).

80. *Id.* at 630-31 (explaining that the Ninth Amendment was Madison's way to address the concern "that an enumeration of rights would imply that the enumeration was exhaustive." See also Finkelman, *supra* note 12.

Madison nevertheless knew that he could not think of every right that required protection.

The first appearance of the concept of an unenumerated right in formal constitutional law came in the 1920s, but it did not rely on the Ninth Amendment.[81] Rather, the Supreme Court discovered that the Liberty and Due Process Clauses of the Fourteenth Amendment protected unenumerated rights and liberties.[82] In the wake of World War I, the Nebraska legislature prohibited teaching modern foreign languages to students who had not completed the eighth grade.[83] Nebraska convicted Robert T. Meyer of teaching German to a ten-year-old student at the Zion Lutheran School.[84] At the time, many Lutherans, including Meyer, used a Bible that was translated into German in the sixteenth century by Martin Luther.[85] In overturning Meyer's conviction, the Court recognized that parents had a "liberty" to educate their children as they wished, and Meyer had a "liberty" to pursue his occupation as a German language teacher.[86] A companion case dealt with similar laws from Iowa and Ohio.[87]

At the time, the Bill of Rights was not seen as applicable to the states (although that would begin to change two years later).[88] Thus, in this case the Court used the Liberty Clause of the Fourteenth Amendment to reach this result.[89] But the outcome clearly reflected the idea of an unenumerated right—a right not explicitly stated in the Constitution, but which was

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81. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

82. *Id.*

83. *Id.* at 397.

84. *Id.* at 396-97.

85. The law allowed the teaching of classical religious languages – Hebrew, Greek, and Latin – but not German and other modern foreign languages. *Id.* at 396-97, 401.

86. *Meyer*, 262 U.S. at 400. For a history of the case *see* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 1 (1994); Paul Finkelman, *German Victims and American Oppressors: The Cultural Background and Legacy of Meyer v. Nebraska*, *in* LAW AND THE GREAT PLAINS 33-56 (ed. John R. Wunder) (1996).

87. Bartels v. Iowa, 262 U.S. 404, 409 (1923). Two cases from Ohio and one from Nebraska were also decided along with Bartels. A few years later the Supreme Court struck down a similar law in the Territory of Hawaii, aimed at prohibiting Japanese language education. Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927). The Court here acted under the Fifth Amendment because Hawaii was not a state, subject to the limitations of the Fourteenth Amendment, but a federal territory, subject to the limitations of the Fifth Amendment. *Id.* The principle was the same: That parents had a fundamental right to educate their children as they wished. *Id.*

88. *See e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925); Stromberg v. California, 283 U.S. 359, 368 (1931) (reversing a state conviction for unpopular speech on the basis of this understanding of the Fourteenth Amendment and an emerging understanding of the First Amendment.) *See infra* notes 140-49.

89. As I note below, the original Bill of Rights only applied to the national government. *See infra* Part II. At this time, 1923, the Court had not made any of the first ten amendments applicable to the states. *See e.g.*, *Meyer,* 262 U.S. at 398-99 (applying the Fourteenth Amendment). However, the Fourteenth Amendment, ratified in 1868, after the U.S. Civil War, prohibited any state from denying "any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV.

protected by the concept of the Ninth Amendment, if not yet by the actual Amendment itself.[90]

Two years later the Court reaffirmed the "liberty of parents and guardians to direct the upbringing and education of children under their control."[91] While not using the Ninth Amendment, the Court determined that under the Fourteenth Amendment the

> fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[92]

A direct application of the Ninth Amendment—and a more forthright acknowledgment of the concept of unenumerated rights—emerged in the 1960s, as the Court developed an unenumerated right to privacy that was inherent in the Bill of Rights, and emerged in connection with the "penumbras" from other amendments.[93] The Court found that this right was the logical outcome of the First Amendment, which guaranteed people freedom of association, the Third Amendment, which prohibits the government from arbitrarily commandeering private homes, the Fourth Amendment, which prohibits the government from searching a person's house without a warrant specifically articulating what the government is looking for, and the Fifth Amendment's right against self-incrimination.[94] In the landmark case of *Griswold* v. *Connecticut*, the Court found that these amendments, combined with the Ninth Amendment, created a constitutionally protected right of privacy.[95] The Court found that personal privacy—in this case marital privacy—was a fundamental right of anyone living in a civilized society, even though no one had thought to put it into the Bill of Rights.[96] This was exactly the sort of fundamental right that Madison

90. For a similar case, *see* Pierce v. Society of Sisters, 268 U.S. 510, 530-31 (1925) (involving the inherent right of parents to send their children to parochial or private schools and the right of teachers to teach in those school).

91. *Id.* at 534-35.

92. *Id.* at 535. Later in the same term the Court suddenly, without any warning or fanfare, initiated a revolution in Constitutional law by asserting that "[f]or present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow*, 268 U.S. at 666 (beginning of a century long process of making the Bill of Rights applicable to the states).

93. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

94. *Id.*

95. *Id.* at 482-84.

96. *Id.* at 485-86.

wanted to protect, even though he did not articulate it.[97] Had someone raised this issue in 1789, which would have been unlikely given the nature of the culture at the time, Madison and other supporters of the Constitution would have summarily rejected the idea that the government could ever invade a man's home, which is after all "his castle," to regulate intimate family matters.[98]

During the debates over ratification, federalists, who supported the new Constitution, scoffed at what they considered the absurd fears of the antifederalists that the lack of a Bill of Rights threatened fundamental American liberties.[99] They tired of the seemingly endless complaints that there was no explicit protection of free speech or freedom of religion and thus the Constitution would allow for a theocratic autocracy. Connecticut's Oliver Ellsworth, who would later be Chief Justice of the United States, illustrates federalist disdain for the antifederalist fears of tyranny and their incessant complaints about the lack of a bill of rights in the Constitution.[100] Ellsworth thought the antifederalist complaints that the Constitution lacked a bill of rights were at best just plain silly. He answered the complaint that "[t]here is no declaration of any kind to preserve the Liberty of the press, etc." by noting, "[n]or is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that congress have no power to prohibit either, and can have no temptation."[101] In effect, Ellsworth was arguing that the United States did not need a bill of rights because the national government had no power to interfere with basic rights, whether they be about the press, marriage, or "burial of the dead."[102]

Fortunately, Madison took these sorts of complaints more seriously. In sponsoring the amendments that became the Bill of Rights after the Constitution was ratified, he recognized that he could not possibly write an amendment that would explicitly protect *every* right.[103] It is not clear if he thought some government might in the future forbid "liberty of . . . matrimony, or burial of the dead," but in the Ninth Amendment he effectively invented the concept of unenumerated rights, and provided for protection of them from government.[104] Ironically, the second Supreme Court case to deal

97. *The Right of Privacy*, EXPLORING CONSTITUTIONAL CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/ rightofprivacy.html (last visited Feb. 14, 2020).

98. 1 THE PAPERS OF JAMES MADISON, PROPERTY ch. 16, doc. 23 (William T. Hutchinson et al. eds., 1977).

99. *See* Finkelman, *supra* note 12.

100. *See e.g.* Ellsworth, *supra* note 15.

101. *Id.*

102. *Id.*

103. *See* U.S. CONST. amend. IX (establishing that unenumerated rights are not denied to the people).

104. *Id.*; Ellsworth, *supra* note 15.

with the First Amendment affirmed the right of a state to in fact interfere with the "burial of the dead."[105] At the time the Bill of Rights was not seen as applicable to the states.[106] Similarly, the nineteenth century Court allowed Congress to interfere with some marriages,[107] and even after the adoption of the Fourteenth Amendment, allowed the states to do the same.[108] On the other hand, using notions of privacy, as well as liberty and due process, the modern Supreme Court has found a very expansive protection for marriage.[109] Thus, in our own time the Court has found that no government, federal or state, may invade privacy and other "unenumerated rights" without a clearly articulated compelling state interest and fair legal process.[110]

II: APPLYING THE BILL OF RIGHTS TO THE STATES

Originally the Bill of Rights was directed at the national government, and the antebellum Supreme Court held that the amendments served only as a limitation on its powers, but did not limit the actions of the states.[111] This

105. Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. 589, 605 (1845). For a history of *Permoli*, *see* Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic,* 37 TULSA L. REV. 7, 30-42 (2001).

106. *See e.g.*, *Permoli*, 44 U.S. at 606 (holding that the First Amendment limits the power of Congress and not the states).

107. Reynolds v. United States, 98 U.S. 145, 166-68 (1878) (upholding a federal prosecution for polygamy); Davis v. Beason, 133 U.S. 333 (1890) (upholding a conviction for someone who was not a polygamist but believed in polygamy). *See generally* EDWIN BROWN FIRMAGE AND RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900 (1988) (providing additional examples of the early prosecutions against polygamy).

108. Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding an Alabama law prohibiting interracial marriages).

109. McLaughlin v. Florida, 379 U.S. 184, 184, 190, 195-96 (1964) (striking down a Florida law prohibiting interracial cohabitation but not "expressing any views about the State's prohibition of interracial marriage[,]" which is seen as the first step to striking down all prohibitions on interracial marriage); Loving v. Virginia, 388 U.S. 1, 10-11 (1967) (striking down prohibitions on interracial marriage); United States v. Windsor, 570 U.S. 744, 775 (2013) (striking down section 3 of the Defense of Marriage Act, which denied federal recognition to same-sex marriages which were legal in the states where they were performed); Obergefell v. Hodges, 135 S. Ct. 2584, 2607-08 (2015) (striking down all state and federal laws prohibiting same-sex marriages.)

110. Among other issues, this concept has been used to strike down state laws prohibiting the right of married women to use birth control (Griswold v. Connecticut, 381 U.S. 479, 485-86); the right of unmarried adults to engage in consensual sexual relations and use birth control (Eisenstadt v. Baird, 405 U.S. 438, 440-43 (1972)); the right of adults to read material in the privacy of their homes without government interference (Stanley v. Georgia, 394 U.S. 557, 565, 568 (1969)); the right of women to have privacy in their choice of medical procedures, including obtaining abortions, without unreasonable interference from the government (Roe v. Wade, 410 U.S. 113, 154-55 (1973)); and the right of adults to engage in private consensual sexual relationships with whomever they choose (Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

111. Barron v. The Mayor and City Council of Baltimore, 32 U.S. 243, 250-51 (1833) (holding that the takings clause of the Fifth Amendment did not apply to the states, and that none of the other first eight amendments applied to the states; *Permoli*, 44 U.S. at 606 (holding that the First Amendment limits the power of Congress and not the states).

was well understood at the time of its adoption, and the history of the text of the proposed amendments bears this out. In drafting the Bill of Rights, Representative Madison initially placed some limitations on the states.[112] One of the amendments he proposed provided that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[113] The House accepted these limitations on the states and sent this amendment, along with others, to the Senate.[114] However, the Senate, which saw itself as the protector of state interests, rejected this proposed amendment because it limited the power of the states.[115] The final text of the amendments provided no limitations on the states.[116]

What became the First Amendment illustrates that the limitations were only on the national government. That Amendment begins: "Congress shall make no law . . . ."[117] The Supreme Court confirmed this understanding of the Bill of Rights in 1833, in *Barron* v. *Baltimore*,[118] holding that the clause in the Fifth Amendment prohibiting the government from taking private property "for public use, without just compensation" did not apply to the states or a local government (in this case the city of Baltimore).[119] The Court reaffirmed this understanding of the Bill of Rights in *Permoli v. First Municipality of the City of New Orleans*,[120] holding that the protection of religious liberty in the First Amendment did not apply to the states.[121]

In 1866, following the U.S. Civil War, and in the wake of horrendous repression and violence directed at the newly freed slaves and their white Unionist allies in the former Confederate states,[122] Congress passed the

112. *See Speech of Madison, supra* note 78.
113. *Id.*
114. Finkelman, *supra* note 12, at 302 n.7.
115. *Id.*
116. *See* U.S. CONST. amend. I-X.
117. U.S. CONST. amend. I.
118. Barron v. The Mayor and City Council of Baltimore, 32 U.S. 243, 250-51 (1833).
119. *Barron*, 32 U.S. at 250-51. Arguably, the Court might have held that only the First Amendment was limited to the federal government, because it is the only Amendment that begins with the words "Congress shall make no law." U.S. CONST. amend. I. The Court might have reasonably concluded that because there is no mention of Congress or the national government in any of the other amendments, they were applicable to the states. Representative John Bingham, of Ohio, who drafted Section 1 of the Fourteenth Amendment believed that *Barron* was incorrectly decided, and he certainly intended the new Amendment to rectify this situation. Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause*," 36 AKRON L. REV. 617, 653 (2003).
120. *Permoli*, 44 U.S. at 606.
121. *Id.*
122. For details on the violence in the South directed at former slaves and white Unionists see REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30-39 (1866), https://babel.hathitrust.org/cgi/pt?id=pst.000014785627&view=1up&seq=2. I have discussed this very long Report and set out some of the evidence in it in, Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change*, 74 LOUISIANA L. REV. 1039, 1043-50 (2014).

Fourteenth Amendment.[123] One of the goals of this Amendment was to make most of the provisions of the Bill of Rights applicable to the states.[124] The primary author of this amendment, John Bingham, and most of its supporters, assumed that under this Amendment the states could not trample on the liberties protected by the Bill of Rights, such as freedom of speech, the right to a fair trial, the prohibition on the taking of private property without just compensation, or the ban on cruel and unusual punishments.[125] Bingham used broad language to accomplish this: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[126] Bingham and many of his colleagues had long believed the decision in *Barron v. Baltimore* was wrong, and the Bill of Rights did in fact limit the actions of the states as well as the national government.[127] This provision of the Fourteenth Amendment was designed, in part, to reverse the interpretation in *Barron* and make the states respect the protections in the Bill of Rights.[128]

However, in *The Slaughterhouse Cases*,[129] in 1873, the Supreme Court reached a very different conclusion. Here the Court effectively nullified the Privileges and Immunities Clause of the new Amendment, refusing to apply it to protect fundamental liberties from state interference.[130] Essentially the Court ruled that there were very few "privileges and immunities" of citizens of the United States, and they included almost none of the protections of the Bill of Rights.[131] Part of this ruling reflected the structure of the Bill of Rights, as mostly a series of limitations on the government—what legal scholars call negative rights—and a smaller number of positive grants of

123. Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 685-86 (2003).

124. *See id.* at 691. In *Timbs v. Indiana*, U.S. Supreme Court quoted this article on precisely this point. 139 S. Ct. at 688-89.

125. Finkelman, *supra no*te 123, at 691.

126. U.S. CONST. amend. XIV, § 1.

127. Finkelman, *"John Bingham and the Background of the Fourteenth Amendment." supra* note 123, at 679 n.42. *See also* GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT (2013); Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments,* 11 U. PA. J. OF CONST. L. 1269, 1278 (2009); Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment,* 36 AKRON L. REV. 589, 598 (2003); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 63-64 (1993); Curtis, *supra* note 119, at 647; *see also* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869 250-151 (1974).

128. Curtis, *supra* note 119, at 647, 653.

129. 83 U.S. 36 (1872).

130. *Id.* at 74-75.

131. *Id.* at 77-79, 82-83.

rights. But this ruling also reflected the very narrow thinking of the majority on the Court.[132]

For the next quarter century, the Court generally allowed the states to right roughshod over the liberties of their citizens and inhabitants. The "privileges and immunities" protected by the Fourteenth Amendment turned out to mean very little. However, starting in the early part of the twentieth century, the Court began to read a different sentence in the Fourteenth Amendment to protect liberties.[133] Immediately after the "privileges and immunities" provision, the Amendment declares "nor shall any state deprive any person of life, liberty, or property, without due process of law."[134] In 1905, in *Lochner v. New York*,[135] the Court held that the "liberty" provision in this clause limited the right of the states to regulate labor contracts.[136] This decision was roundly denounced by progressives as favoring big business at the expense of workers.[137] Following *Lochner*, the Court upheld laws that limited labor unions while striking down laws requiring minimum wages or in other ways protecting workers.[138] "Liberty of contract" became a code word for protecting employers and corporations at the expense of workers and average people.[139]

However, the concept of "liberty" that the Court articulated in these decisions eventually came to protect individual freedoms—the kinds found in the Bill of Rights.[140] Starting with *Gitlow v. New York*,[141] in 1925, the

132. Leonard W. Levy, *Incorporation Doctrine*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 970-73 (ed. Leonard W. Levy) (1986); Harold M. Hyman, *Slaughterhouse Cases*, in *Id.*, 1687-89; Lawrence G. Salzman, *Slaughterhouse Cases*, in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 1481-82 (ed. Paul Finkelman) (2006).

133. *See e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905).

134. U.S. CONST. amend XIV, § 1.

135. *Lochner*, 198 U.S. at 45.

136. *Id.* at 53.

137. 2 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 627-30 (3rd ed. 2011). *See* David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L. REV. 1469, 1470-1471 (2005) (discussing criticisms of the *Lochner* holding).

138. Some of these cases limited the power of Congress, such as The Employers' Liability Cases, Howard v. Illinois Cent. R. Co., 207 U.S. 463, 497-98 (1908); Adair v. United States, 208 U.S. 161, 171-73 (1908); Loewe v. Lawlor, 208 U.S. 274, 283 (1908); Hammer v. Dagenhart, 247 U.S. 251, 269-70 (1918); and some limited the states under the Fourteenth Amendment's "liberty" clause: Coppage v. Kansas, 236 U.S. 1, 13-15 (1915); Adkins v. Children's Hospital, 261 U.S. 525, 560-62 (1923). Some interpreted federal laws to limit the rights of workers to organize, even though they were clearly not passed for that purpose. *See Loewe*, 208 U.S. at 306-09. For a succinct history of this period, *see* 2 UROFSKY & FINKELMAN, *supra* note 137, at 615-668.

139. 2 UROFSKY & FINKELMAN, *supra* note 137, at 618-30, 649-51. For a contrarian view, see DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

140. *See* Nathan S. Chapman & Kenji Yoshino, *Common Interpretation – The Fourteenth Amendment Due Process Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701.

141. Gitlow v. New York, 268 U.S. 652 (1925).

Court began to apply the limitations on the federal government in the Bill of Rights to the states. In *Gitlow* the Court held that the states had to respect the Free Speech Clause of the First Amendment because the "liberty" of free speech was part of the liberty protection in the Fourteenth Amendment.[142] In what can only be described as a major revolution in Constitutional interpretation and theory, the *Gitlow* Court asserted, with little fanfare and not even a citation or footnote: "For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States."[143]

A few years later Justice Brandeis articulated this change clearly: "it is settled that the Due Process Clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights."[144]

Ever since these cases this has been known as the doctrine of "incorporation," even though that term is not actually used in the opinion in *Gitlow*.[145] Thus, the doctrine of *Gitlow* is that the Free Speech Clause of the First Amendment was one of the liberties "incorporated" into the Due Process Clause of the Fourteenth Amendment (1868), which provides that no "state [shall] deprive any person of life, liberty, or property, without due process of law."[146] The Court did not immediately apply all of the provisions of the Bill

142. *Id.* at 666. While determining that the First Amendment applied to the states, the Court nevertheless upheld New York's conviction of Gitlow for his radical speech, under the theory that his speech constituted a "clear and present danger" to society. *Id.* Today, under modern theories of freedom of speech, Gitlow would have won.

143. *Id*. at 666.

144. Whitney v. California, 274 U.S. 357, 373 (Brandeis, J. concurring).

145. The Court's first use of the term "incorporate" in connection to the Bill of Rights and the Fourteenth Amendment seems to have been in Betts v. Brady, 316 U.S. 455 (1942). Here Justice Owen Roberts articulated the language of "incorporation," while refusing to apply it to a right to counsel under the Sixth Amendment. "The Sixth Amendment of the national Constitution applies only to trials in federal courts. The Due Process Clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth." *Id*., at 461-62. In a prophetic dissent, Justice Hugo Black argued that "that the Fourteenth Amendment made the sixth applicable to the states*." Id.,* at 474. Black's view would become the majority position in two decades later in Gideon v. Wainwright, 372 U.S. 335 (1963).

146. "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

of Rights to the states through this "incorporation doctrine," but over the last century it has essentially done so.[147] As recently at 2019 the Court held, for the first time, that the "excessive fines" clause of the Eighth Amendment applies to the states through the Fourteenth Amendment.[148]

Thus, for all practical purposes today the Bill of Rights, written in 1789 and ratified in 1791, limits the actions of all governments in the United States: national, state, and local.

III: AMERICAN LIBERTY IN AN INTERNATIONAL CONTEXT

Unlike constitutions in many countries, and contrary to what some American might believe, the protections of the U.S. Bill of Rights apply to non-citizens, aliens (even those who might be "undocumented"), and visitors, as well as citizens.[149] In fact, the word "citizen" does not even appear in the Bill of Rights. Rather, the amendments refer to "the people,"[150] "person"[151] or categories of actors, such as the "owner" of a house[152] or "the accused."[153] Other amendments simply prohibit a particular government action, without regard to any specific person or kind of person.[154] The language of the Fourteenth Amendment, which made the Bill of Rights applicable to the states, reaffirms this understanding that fundamental civil rights, civil liberties, and due process protections apply to all people in the United States.[155] The first part of Section 1 of the Amendment defines citizenship, but the last part of this section limits the actions of states towards anyone: "[N]or 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

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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." U.S. CONST. amend. XIV, § 1; *Gitlow*, 268 U.S. at 666-671.

147. Leonard W. Levy, *Incorporation Doctrine*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 970-73 (ed. Leonard W. Levy) (1986); Robert E. Dreschsel, *Incorporation Doctrine and Free Speech*, in ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 804 (ed. Paul Finkelman) (2006).

148. *Timbs*, 139 S. Ct. at 686-87.

149. Even foreign terrorists are protected by the Bill of Rights, and afforded trials according the protections in that document. *See* United States v. Moussaoui, 382 F.3d 453, 464 (4th Cir. 2004) (finding that the custodians of enemy combatant witnesses in U.S. custody abroad could be issued a writ of habeas corpus *ad testificandum* under the Compulsory Process Clause of the Sixth Amendment for the purpose of testifying on behalf of a citizen of France who was tried in a U.S. District Court and eventually pleaded guilty to terrorist acts).

150. U.S. CONST. amends. II, IV, IX, and X.

151. U.S. CONST. amend. V.

152. U.S. CONST. amend. III.

153. U.S. CONST. amend. VI.

154. U.S. CONST. amends. IV, V, VII, and VIII.

155. Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring)) (discussing Justice Black's belief in "total incorporation" of the Bill of Rights).

protection of the laws."[156] The words "any person" are critical, as they apply the protection of the Amendment to anyone, and not just to citizens.[157]

The implications of this language, as well as the structure of the Bill of Rights is really quite remarkable. The "Privileges and Immunities" Clause of the Fourteenth Amendment prohibited the states from passing or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States."[158] While not technically limited to "citizens," the provision might easily have been interpreted that way.[159] But the "liberty" clause is clearly different.[160] It explicitly and unambiguously applies to "any person" within the jurisdiction of a state.[161] Thus, no state can deny "any person" "life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[162]

This broader protection is similar to the language of the Bill of Rights. None of the protections in the Bill of Rights are limited to citizens, and in fact the word "citizen" does not appear in any of the first ten amendments.[163] The liberties, rights, and protections in the Bill of Rights are available for all people in the United States. This is in part true because many of the amendments limit the actions of the government, rather than granting specific rights to people.[164] The First Amendment does not "give" freedom of speech to people in the United States, but rather prohibits Congress—and under the Fourteenth Amendment the states—from "abridging" freedom of speech.[165] Those amendments which contain explicit grants of rights such those in the Sixth Amendment which gives anyone arrested the "right to a speedy and public trial" and the right "to have the assistance of counsel" are also unambiguously written to apply to anyone—"the accused"—who is arrested or tried in the United States, without regard to the status of the accused or the nature of the alleged crime.[166] Thus, in the United States under the Bill of Rights and the Fourteenth Amendment all people—citizens, non-citizen residents, visitors, tourists, and undocumented aliens—generally have the same constitutionally protected rights.[167]

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156. U.S. CONST. amend. XIV, § 1

157. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?* 25 T. JEFFERSON L. REV. 367, 370 (2003).

158. U.S. CONST. amend. XIV, § 1

159. *Id.* However, this is not a necessary interpretation, since the clause itself was not limited to citizens.

160. *Id.*

161. *Id.*; Cole, *supra* note 157, at 370.

162. U.S. CONST. amend. XIV, § 1.

163. *See* U.S. CONST. amends. I-X.

164. U.S. CONST. amends. IV, V, VII, and VIII.

165. U.S. CONST. amend. I; *see* Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

166. U.S. CONST. amend. VI.

167. *See* Cole, *supra* note 157, at 388.

The expansive protection of liberty to all people in the Bill of Rights—which was written in 1789—contrasts with another iconic document of liberty written the same year: The French "Declaration of the Rights of Man and of the Citizen" of 1789 (*Déclaration des droits de l'homme et du citoyen de 1789*).[168] Article XI of this famous document provides that "The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law."[169] The French revolutionaries recognized that freedom of expression should be a universal right—"one of the most precious rights of man."[170] But the language here is instructive in two ways. First, the provision only applies to "any citizen," while the American provision protects any speaker by prohibiting Congressional limitations on speech and the press.[171] Second, the French document provides for exceptions and abridgments as "determined by law."[172] This is in stark contrast to the American First Amendment which says, "Congress shall make *no* law."[173] A visitor in Revolutionary France could not claim the protection of the Declaration of Rights to assert a right to freedom of speech. On the other hand, after December 1791, a French visitor to the United States would have had that right under the newly ratified Bill of Rights.

It is of course clear that even in the U.S. some kinds of speech can be prohibited, such as direct incitement to criminal behavior, treasonable acts in the form of communication, and child pornography.[174] But, the First Amendment does not invite legislators to pass laws that are exceptions to the rule that they can "make no law."[175] On the other hand, the French Declaration of Rights does just that.[176]

To this day, in many nations a visitor, tourist, temporary worker, or even a resident alien has no constitutionally guaranteed right to speak freely, or even to openly practice a particular religious faith.[177] Non-citizens may be

168. *Declaration of the Rights of Man – 1789*, *available at* https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/ anglais/cst2.pdf.

169. *Id.*

170. *Id.*

171. *Id.*; U.S. CONST. amend. I.

172. *Declaration of the Rights of Man – 1789*, *supra* note 168.

173. U.S. CONST. amend. I (emphasis added).

174. *See e.g.*, New York v. Ferber, 458 U.S. 747, 756-57, 773-74 (1982) (finding there is a compelling interest to protect children and government has a right to prohibit child pornography).

175. U.S. CONST. amend. I; *see* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973) (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451, 461 (1952)).

176. *Declaration of the Rights of Man – 1789*, *supra* note 168 (note that the language of Article XI states that free communication is limited "as shall be defined by law").

177. *See* Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 A.J.I.L. 593, 600 (1997). See also Paul Finkelman, *School Vouchers, Thomas Jefferson, Roger Williams, and Protecting the*

subject to different applications of criminal justice, or even access to civil courts.[178] They may be prohibited from acquiring some kinds of property, especially real estate.[179] In many countries "rights," whether political, social, religious, personal, or economic, are only granted to citizens.[180] While non-citizens can purchase land and buildings in the United States,[181] vibrant democracies such as Canada and Switzerland, as well as non-democratic nations like China and Thailand, limit the rights of non-citizens to own land.[182]

Faithful: Warnings from the Eighteenth Century and the Seventeenth Century on the Danger of Establishments to Religious Communities, 2008 B.Y.U. L. REV. 525-555 (2008).

178. This is demonstrated in Saudi Arabia and the treatment of Pakistanis. *Saudi Arabia: Scant Justice for Pakistanis*, HUMAN RIGHTS WATCH (Mar. 7, 2018, 4:55 AM), http://hrw.org/news/2018/03/07/saudi-arabia-scant-justice-pakistanis.

179. Qatar provides an example of this. *Qatar Law Q&A: Property Law Overview*, SQUIRE PATTON BOGGS (May 15, 2012), http://www.squirepattonboggs.com/en/insights/publications/2012/05/qatar-law-qa-property-law-overview.

180. *See e.g.*, BUNREACHT NA HEIREANN [CONSTITUTION] art. 40 (Dec. 29, 1937) (Ireland).

181. This was not always the case. In the early twentieth century California, Washington, Oregon, Idaho, and Arizona passed legislation to prevent Japanese immigrants from entering some professions, leasing farmland, purchasing land, or engaging in certain businesses. *See generally* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 52-54, 59-60 (1998); Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61, 61-62 (1947); Paul Finkelman, *Coping with a New "Yellow Peril": Japanese Immigration, the Gentlemen's Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409, 1410 (2015); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 7-8, 22 (1947). On access to professions and business, *see In re* Yamashita, 70 P. 482, 482-83 (Wash. 1902) (denying an otherwise qualified applicant the right to practice law in Washington State on the grounds that Japanese born immigrants could not be citizens of the United States, and the State of Washington made citizenship a prerequisite for admission to the bar; not all states had such a requirement); *see also In re* Hong Yen Chang, 24 P. 156, 157 (Cal. 1890) (stating that California would not admit a Chinese immigrant to the bar even though he had been admitted to practice in New York). The U.S. Supreme Court initially upheld these laws. Terrace v. Thompson, 263 U.S. 197, 224 (1923) and Porterfield v. Webb, 263 U.S. 225, 231-33 (1923). In 1943, California prohibited Japanese immigrants from obtaining commercial fishing licenses. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 413 (1948). In *Takahashi*, the Court overturned the California law denying commercial fishing licenses to "persons ineligible for citizenship," which applied almost entirely to Japanese born aliens). *Id.* at 413, 422. The State of Washington prohibited aliens who had not declared their intention to become citizens—which meant Asian immigrants who could not become naturalized citizens under existing federal law—from owning firearms, obtaining hunting licenses, becoming public school teachers, or engaging in commercial fishing. Paul Finkelman, *Coping with a New "Yellow Peril": Japanese Immigration, The Gentlemen's Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409, 1410-11 n.5 (2015).

182. For example, Switzerland limits the right of non-citizens to buy real estate. *Buying a House or Apartment in Switzerland as a Foreign National*, CH.CH, https://www.ch.ch/en/real-estate-foreign-national/ (last visited Mar. 19, 2020). The Canadian Charter of Rights limits the rights of non-citizens to educate their children in a particular language. CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 23, https://laws-lois.justice.gc.ca/eng/const/page-15.html. Canadian laws limit land ownership for non-citizens and Canadian tax laws discriminate against foreign owners of rental property. Kazi Stastna, *Real Estate Rules Don't Discriminate Against Foreigners*, CBC (Mar. 19, 2012, 7:00 AM), https://www.cbc.ca/news/canada/real-estate-rules-don-t-discriminate-against-foreigners-1.1216517.
Some other democracies have similar restrictions. Greater restrictions are found in non-democracies such as China and Thailand. *Id.* For a comparison of the U.S. and Canada, *see* Irene Bloemraad & Doris Marie

A cursory examination of various constitutions from around the world illustrates the expansive nature of liberty in the American Constitution. The Republic of Ireland is a vibrant democracy, but it is not clear it protects all people within its jurisdiction. The Irish Constitution declares that "[a]ll citizens shall, as human persons, be held equal before the law."[183] Only "citizens" of the Republic of Ireland are constitutionally entitled to rights which belong to all "human persons."[184] A subsequent provision in the Irish Constitution asserts that "[n]o citizen shall be deprived of his personal liberty save in accordance with law."[185] Non-citizens in Ireland may get the same legal protections as citizens under current practice and even statutory law, but should practices or statutes change, those changes would not violate the Irish Constitution and people who were not citizens (even if they were long-term residents) could not appeal to the Constitution to protect their liberty.[186] Another provision of the Irish Constitution declares that "[t]he State guarantees liberty for the exercise of the following rights, subject to public order and morality."[187] The first of these enumerated rights is "[t]he right of the citizens to express freely their convictions and opinions."[188] Other rights are also limited to "citizens." For example, article 40 of the Irish Constitution provides that "[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."[189] It is not at all clear if visitors, tourists, migrants, or unnaturalized immigrants in Ireland have freedom of speech or equality before the law. To the extent they have these rights, they are not constitutionally protected and thus vulnerable to legislative and executive whims.

Denmark, which is famously a free democracy, guarantees a right of personal liberty only to subjects of the Danish crown—that is, to citizens of Denmark: "Personal liberty shall be inviolable. No Danish subject shall in any manner whatever be deprived of his liberty because of his political or religious convictions or because of his descent."[190] Similarly, freedom of association is guaranteed only to citizens: "The citizens shall be entitled

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Provine, *Immigrants and Civil Rights in Cross-National Perspective: Lessons from North America,* 1 J. OF COMPARATIVE MIGRATION STUDIES 45, 47, 49 (2013).

183. BUNREACHT NA HEIREANN [CONSTITUTION] art. 40 (Dec. 29, 1937) (Ireland), *available at* https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitution_introduction.html.

184. *Id.* at cl. 1.

185. *Id.* at cl. 4.

186. *Id.* at cl. 6.

187. *Id.*

188. *Id*. at art. 40.

189. *Id.* at art. 40, § 3.

190. GRUNDLOVEN, LOV. NR. [CONSTITUTION] Part VIII, § 71(1) (1953) (Denmark), *available at* https://www.constituteproject.org/ constitution/Denmark_1953.pdf?lang=en.

without previous permission to form associations for any lawful purpose."[191] This is tied to religious freedom: "The citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done."[192] Legal immigrants to Denmark, or even visiting foreign students or faculty members, are not constitutionally protected if they want to form their own religious congregation.[193]

China's constitution formally guarantees various civil liberties and due process rights to "citizens," rather than to people or persons.[194] Aliens, tourists, foreign students, professors from other countries giving lectures, visiting journalists, or even immigrants are not protected under the Chinese Constitution.[195]

The constitution of the Russian Federation recognizes the "rights of man," but limits them only to citizens: "Man, his rights and freedoms shall be the supreme value. It shall be a duty of the state to recognize, respect and protect the rights and liberties of man and citizen."[196] It is not clear that the government has even a formal obligation to protect the rights and liberties of "man and [non-]citizen."[197] Similarly, the Russian Constitution provides that "[a]ny restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds shall be forbidden."[198] Citizens are guaranteed the right to own property, but this does not constitutionally extend to non-citizens.[199] Like many constitutions, the Russian Constitution guarantees freedom of speech, but then undermines this guarantee by explicitly allowing for the restriction of speech: "Propaganda or campaigning inciting social, racial, national or religious hatred and strife is impermissible. The propaganda of social, racial, national, religious or language superiority is forbidden."[200] This last clause might seem innocuous, but it takes little imagination to understand that such limitations are easily abused by governments that view any opposition as propaganda or incitement.

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191. *Id.* at Part VIII, § 78(1).
192. *Id.* at Part VII, § 67.
193. *Id.* at Part VIII, § 78.
194. For example, Article 35 of the Chinese Constitution in some ways mirrors the U.S. First Amendment, but limits these freedoms to citizens: "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." Similarly, Article 39 of the Chinese Constitution protects against unlawful or warrantless searches, in a clause similar to the American Fourth Amendment, but this protection is limited only to citizens: "The home of citizens of the People's Republic of China is inviolable. Unlawful search of, or intrusion into, a citizen's home is prohibited." *See* XIANFA [CONSTITUTION], *supra* note 57.
195. *Id.*
196. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. FR] [CONSTITUTION], *supra* note 58.
197. *Id.*
198. *Id.* at art. 19.
199. *Id.* at art. 36.
200. *Id.* at art. 29.

Other nations similarly protect liberties for "citizens" and many nations have limitations on liberty for non-citizens built into their fundamental laws.[201] The U.S. Bill of Rights and the Fourteenth Amendment are thus remarkable, in that they apply to *everyone* in the United States, without regard to citizenship, and that they are sweeping in their protections.[202] This does not mean all speech or other activities are protected in the United States, and it certainly has not prevented miscarriages of justice and denials of fundamental liberties to people who have espoused unpopular causes.[203] Often immigrants have been more vulnerable than others in times of crisis.[204] But, the aspiration of open, free exchange of ideas, and guarantees of fair trials and other fundamental rights for all people have been largely respected, especially since the 1930s.[205]

IV: SOME GENERAL CONCLUSIONS

The Bill of Rights was written in the wake of the Revolution against Great Britain and the emergence of a fragile national state under the Articles of Confederation.[206] It must be understood as an eighteenth century document. As we consider general principles and specific provisions, we must see the Bill of Rights in its own context.

The Bill of Rights is clearly an eighteenth century document in the way it expresses the goals and fears of people in a very different time and place from our own. This history of the Bill of Rights was rooted in the struggles against the British monarchy in the seventeenth century.[207] We need to remember that in the 1640s supporters of Parliament, who were also opposed to arbitrary monarchical power, successfully fought a civil war against the Crown.[208] In 1648, the leaders of Parliament tried King Charles I for treason, executing him in 1649.[209] Four decades later, in December 1688, supporters of Parliament and political liberty (who were also opponents of arbitrary

201. *See example*, 1958 CONST. 34 (Fr.).
202. *See Takahashi*, 334 U.S. at 419-20.
203. *See* United States v. Stevens, 559 U.S. 460, 468-69 (2010).
204. *See* Paul Finkelman, *The War on German Language and Culture, 1917-1925*, *in* CONFRONTATION AND COOPERATION: GERMANY AND THE UNITED STATES IN THE ERA OF WORLD WAR I, 1900-1914, 177 (ed. Hans Jürgen Schröder) (1993). For example, during World War I there was massive oppression of German immigrants. *Id.* at 195. Similarly, in World War II the government arbitrarily and without any due process incarcerated tens of thousands of elderly Japanese immigrants, who had never been able to become citizens because of racial restrictions in U.S. naturalization laws. *Id.* Reflecting the deep racism of the time, the government also incarcerated more than 70,000 United States citizens of Japanese ancestry. *Id.*; *see also* Finkelman, *supra* note 181; In *re Yamashita*, 70 P. 482; *In re Hong Yen Chang*, 24 P. 156; *Terrace*, 263 U.S. 197; *Porterfield*, 263 U.S. 225; *Takahashi*, 334 U.S. 410 (1948).
205. *See* 2 UROFSKY & FINKELMAN, *supra* note 137, at 788, 794-95, 1102-03.
206. Rutland, *supra* note 12; 1 UROFSKY & FINKELMAN, *supra* note 64, at 71, 94, 139.
207. *See* 1 UROFSKY & FINKELMAN, *supra* note 64, at 140.
208. *Id.* at 14-15.
209. *Id.*

monarchical power) led the Glorious Revolution.[210] They deposed Charles's son, King James II, forcing him to flee the country.[211] During this turbulent period, from the beginning of opposition to King Charles I until the final overthrow of King James II, people in Britain published endless numbers of pamphlets, books, and other documents expressing their opposition to the King.[212] The English people exercised freedom of expression even though they did not have an articulated notion of a free press.[213] These publications were illegal because they were published without an official license from government censors.[214] Thus, when the Americans wrote the Bill of Rights, they saw rights as something in opposition to government.

Again, the language of the First Amendment—that Congress "shall make no law . . . abridging the freedom of speech, or of the press"—illustrates this background.[215] This is not a guarantee of a free press, but only a guarantee that Congress cannot prevent a free press which at a minimum precluded the government from being able to license a publication or prosecute a publisher for opposing the government or government policies.[216] Initially, this protection was only applied to the national government, because the Amendment said "Congress shall make no law."[217] At the time, the states and local governments could suppress the press.[218] But, the Fourteenth Amendment and its modern application changed this by making the First Amendment applicable to the states and thus preventing the states from suppressing the press.[219]

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210. *Id.* at 16.

211. *Id.*

212. *See generally* FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL 296-97, 299-300 (1965) (describing the numerous types of publications used to for opposition).

213. *See id.* at 300.

214. *See generally id.* at 298.

215. U.S. CONST. amend. I.

216. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 269-70 (1985).

217. *See id.* at 268.

218. *See generally id.* ("[T]he First Amendment left the states free to act against individual expression, subject only to such restraints as might be laid down in state constitutions."). It is worth noting that Thomas Jefferson's opposition to the Sedition Act of 1798 was based on his belief that the national government had no power to suppress expression. LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 58-59 (1963). He was comfortable with the suppression of liberties by the states, and when president encouraged state governors who were his allies to prosecute his critics. *Id.* He famously told the governor of Pennsylvania "that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses." *Id.* He hoped the governor would institute a "selected" prosecution of his critics. *Id.* In Connecticut, where his opponents were in control of the state government, he allowed for the common law prosecution of his critics in federal court, brought by his own federal appointees. *Id.* at 60-66. After Jefferson left office, the U.S. Supreme Court ruled against federal common law prosecutions in United States v. Hudson & Goodwin, 11 U.S. 32 at 34 (1812).

219. *See Gitlow*, 268 U.S. at 666; Near v. Minnesota, 283 U.S. 697, 735, 737-38 (1931); New York Times Co. v. United States, 403 U.S. 713, 717 (1971).

In considering the Bill of Rights we also have to be aware of changes in language. Words we commonly use today had different meanings in the eighteenth century.[220] The meaning of words from the eighteenth century have also been altered by changes in politics and technology.[221] For example, the First Amendment protects the right to freedom of the press.[222] In the eighteenth century the "press" was a printing press, manually operated, limited in its scope, with a product equally limited in its speed and range of distribution.[223] There were few economic barriers to entering the "market" for the press, other than owning the equipment and knowing how to use it.[224]

Today we all accept that "the press" includes television, radio, movies, and the internet. But we also understand that there are huge barriers to entry for radio and television. The costs to create a television or radio station are large, and there are a limited number of stations available across the nation and in any given market.[225] It is also expensive and time consuming to apply for and receive a license from the FCC for a station.[226] Licenses are necessary due to limitations on available frequencies and limits in technology.[227] All players in electronic media understand this, and accept it.

Nevertheless, the very idea of a license for the "press" runs counter to the constitutional protection of a free press.[228] Before 1694, publications in Britain had to be licensed by the government.[229] Ending the licensing system was a great step forward in the history of freedom of expression. While there has often been debate over what Madison and his colleagues meant by "freedom of the press," no scholars doubt it meant, at a minimum, there could be no licensing or "prior restraint" of the press by the government.[230] The Supreme Court made this clear in its first important free press case *Near v.*

220. Roy Peter Clark, *Change in the Meaning of Words Demands Care in the Use of Language*, POYNTER (Nov. 18, 2009), https://www.poynter.org/reporting-editing/2009/change-in-the-meaning-of-words-demands-care-in-the-use-of-language/.

221. *Id.*

222. U.S. CONST. amend. I.

223. *See generally Printer and Binder*, COLONIAL WILLIAMSBURG, https://www.history.org/almanack/life/trades/tradepri.cfm (last visited Feb. 16, 2020) (describing the process involved with the printing press).

224. *See id.* (describing the process and steps in working a printing press and equipment).

225. *See Application Processing Fees*, FEDERAL COMMUNICATIONS COMMISSION, https://www.fcc.gov/licensing-databases/fees/application-processing-fees (last visited Feb. 16, 2020); *Obtaining a License*, FEDERAL COMMUNICATIONS COMMISSIONS, https://www.fcc.gov/obtaining-license (last visited Feb. 16, 2020).

226. *See Application Processing Fees*, *supra* note 225; *Obtaining a License*, *supra* note 225.

227. *See How to Apply for a Radio or Television Broadcast Station*, FEDERAL COMMUNICATIONS COMMISSION, https://www.fcc.gov/ media/radio/how-to-apply (last visited Feb. 16, 2020).

228. *See* Lovell v. Griffin, 303 U.S. 444, 451-52 (1938).

229. *See* SIEBERT, *supra* note 212, at 301.

230. *See* LEVY, *supra* note 216, at 269-70.

Minnesota.[231] This doctrine was emphatically reaffirmed in The Pentagon Papers case in 1971.[232] Thus, the very notion that the "press"—in the form of a radio or television station—needs a license from the federal government to operate, illustrates the complexity of applying eighteenth century language and concepts to the electronic age. Due to technical limitations on broadcast spectrums there has to be some process for the allocation of stations. Conversely, there is always a potential for political abuse of licensing the electronic media,[233] which changes the discussion from technical allocations of the right to speech to issues that run afoul of the First Amendment.[234]

At the same time, the internet provides access that has even fewer barriers to entry than the eighteenth century press faced. However, whether the government should secure a level playing field for all participants, known as "net neutrality," once again raises questions about the meaning of freedom of the press in the modern world.[235] Furthermore, as I have already noted, the internet raises issues surrounding the actions of "bad actors" that can threaten

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231. 283 U.S. at 716 (explaining "[t]he exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship").

232. *New York Times Co*., 403 U.S. at 722-23.

233. For example, in March 2020 President Donald. J. Trump's reelection campaign threatened television stations running advertisements critical of the President's handling of the Covid 19 pandemic. A letter from the Trump campaign warned the stations that broadcasting these advertisements "could put your station's [FCC] license in jeopardy." Sean Neumann, *Donald Trump's Re-Election Campaign Threatens TV Stations to Pull Anti-Trump Coronavirus Ad*, MSN.COM (March 27, 2020), https://www.msn.com/en-us/news/politics/donald-trump-s-re-election-campaign-threatens-tv-stations-to-pull-anti-trump-coronavirus-ad/ar-BB11OiZn. The obvious threat here is that the President could use his powers to pressure the FCC to attempt to take licenses away from stations running advertisements that oppose Trump's policies. This attack can also be seen as a threat to all electronic news media running stories that the President does not like. This strategy is reminiscent of one employed by Thomas Jefferson, in response to newspapers that criticized him. The notoriously thin-skinned Jefferson urged his political ally, Governor Thomas McKean of Pennsylvania, to use state laws to prosecute anti-Jeffersonian newspapers. At the time the First Amendment did not apply to the states, and thus states were free, subject to their own laws and constitutions, to prosecute newspapers for seditions libel. Jefferson told Governor McKean, "I have therefore long thought that a few prosecutions of the most eminent offenders would have a wholsome [sic] effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution: but a selected one." *Thomas Jefferson to Thomas McKean, February 19, 1803*, NATIONAL ARCHIVES, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-39-02-0461 (last visited April 24, 2020). Jefferson's allies in Pennsylvania and New York did his bidding, securing state indictments against editors who opposed Jefferson. Levy, *supra* note 218, at 58-60. In Connecticut, where the state government was controlled by opponents of Jefferson, federal officials brought common law indictments against the opposition press, with Jefferson's acquiescence. *Id*. 61-67. This ultimately led to the Supreme Court rejecting the use of federal common law prosecutions in United States v. Hudson & Goodwin, 11 U.S. 32, at 34 (1812).

234. *See, e.g.*, *Columbia Broad. Sys., Inc.*, 412 U.S. at 120; Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969). While dated in terms of constitutional law, these issues were brilliantly explored in FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT xiv (1976).

235. *See* Camille Fassett, *Protecting Net Neutrality is an Important Press Freedom Issue*, FREEDOM OF THE PRESS FOUNDATION (Nov. 22, 2017), https://freedom.press/news/protecting-net-neutrality-important-press-freedom-issue/.

democracy and elections.[236] New technologies clearly affect how constitutional provisions are interpreted.[237]

Similarly, the words of the Fourth Amendment, dealing with search warrants, illustrate changing meanings of language and the impact of technology on our eighteenth century Bill of Rights.[238] In the late eighteenth century a "search" was conducted by individual law enforcement officers, entering the premises of a suspect.[239] The Fourth Amendment was designed to prevent abuse of such behavior:

> 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.[240]

This Amendment was in part a rejection of the pre-revolutionary British policy of issuing "general warrants" that allowed English customs officers to search the premises of patriots for anything, without a specific charge or any clear evidence of criminal activity.[241]

The Fourth Amendment obviously contemplates a physical entry into a building or a physical search of a person.[242] But in the electronic age a "search" takes on a new meaning.[243] Starting with the invention of the telephone, technology has complicated what was once a fairly straightforward process.[244] Courts have struggled to determine what lines to draw with electronic eavesdropping and searches, as well as searches with cameras from a distance, the use of planes, helicopters, and drones for

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236. *See* discussion *supra* Part I.

237. *See e.g.*, Kyllo v. United States, 533 U.S. 27, 31, 33-34 (2001) (noting effect of technology on the degree of privacy provided by the Fourth Amendment).

238. U.S. CONST. amend. IV.

239. *Olmstead*, 277 U.S. at 463.

240. U.S. CONST. amend. IV.

241. *See* 1 UROFSKY & FINKELMAN, *supra* note 64, at 49. Such writs had been used in Britain, but starting in 1761, colonists began to resist them. *Id.* Appearing before the Massachusetts Superior Court, in what is known as the Writs of Assistance Case, James Otis argued that such writs violated the fundamental rights of all Englishmen. *Id.* at 50. A young John Adams, who witnessed this argument described Otis's presentation as "a flame on fire," and long afterwards asserted that Otis's argument in court was "the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there, the child Independence was born." *Id.* at 49-50. Leonard Levy correctly argues that "a straight line of progression runs from Otis's argument in 1761 . . . to Madison's introduction of the proposal that became the Fourth Amendment." *Id.* at 50 (quoting LEONARD W. LEVY, THE ORIGINS OF THE BILL OF RIGHTS (2001).

242. *See Olmstead*, 277 U.S. at 464.

243. *See Kyllo*, 533 U.S. at 31, 33-34.

244. Wagner & Finkelman, *supra* note 40. For a somewhat different view of this issue, but one which illuminates many of the technology issues, see Raymond Shih Ray Ku, *The Founder's Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1325 (2002).

surveillance, GPS systems, heat sensing devices, x-ray technology, emerging scanning devices, and other sorts of technology.[245]

In its first wiretap case, *Olmstead v. United States*,[246] the Supreme Court held that a wiretap was not "a search" within the meaning of the Fourth Amendment, because the wiretap had been placed outside of the premises where the phone was, and thus there was no search of any particular place.[247] Chief Justice William Howard Taft noted,

> [t]he Amendment itself shows that the search is to be of material things – the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.[248]

But, Taft found no entry to any place and asserted that nothing had been "seized."[249] He concluded, "[t]he Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."[250] A more creative mind, or a judge who was more fearful of excessive government power, might either have gone to the "spirit" of the Amendment, or concluded that the wiretap had actually "entered" the telephone conversation.[251] A Justice might even have concluded that through the wiretap the government had "seized" sound and words.[252] But Taft was neither creative nor particularly concerned about government overreaching on civil liberties.

Justice Louis D. Brandeis vigorously and prophetically dissented, arguing that in interpreting the Amendment the Court must go to the overriding principle, and not the words, which in this case were outdated.[253] He argued, "[t]herefore a principle to be vital must be capable of wider

245. Wagner & Finkelman, *supra* note 40. *See* Katz v. United States, 389 U.S. 347, 348 (1967) (examining the use of electronic listening devices to eavesdrop on a phone conversation); Dow Chemical Co. v. United States, 476 U.S. 227, 279 (1986) (examining the use of aerial photography without a warrant); *Ciraolo*, 476 U.S. at 209 (examining the use of a plane to obtain information for a search warrant); *Riley*, 488 U.S. at 448-49 (examining the use of observations from a helicopter to obtain a warrant); *Jones*, 565 U.S. at 400 (examining the use of GPS to obtain an indictment outside the confines of a warrant); *Kyllo*, 533 U.S. at 29 (examining the use of thermal-imagining device aimed at a home to detect heat from inside the home); United States v. Montoya de Hernandez, 473 U.S. 531, 534-35 (1985) (examining the use of x-ray without a warrant to determine if suspect was a "balloon swallower").

246. 277 U.S. 438 (1928).

247. *Olmstead*, 277 U.S. at 466.

248. *Id.* at 464.

249. *Id.*

250. *Id.*

251. *See id.* at 487-88 (Butler, J., dissenting).

252. *Id.*

253. *Id.* at 473 (Brandeis, J., dissenting).

application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions."[254] Today all courts—as well as the Congress—understand that a wiretap is indeed a "search" under the Fourth Amendment, even though in using a wiretap the government has not actually entered the premises of the suspect or physically seized any property.[255] The *Olmstead* case and the issues it raised almost a century ago illustrate the way in which the larger principles of the Bill of Rights are easily and properly expanded beyond the narrow language of the eighteenth century. The internet, other electronic media, cloud storage, and cell phone technology will necessarily lead to new considerations of what constitutes a search.

One illustration of the complexity of applying the Fourth Amendment can be found in *United States v. Jones*,[256] which involved a criminal conviction based on evidence gathered after police had attached a GPS to a drug dealer's vehicle without first securing a search warrant.[257] The police would not have needed a search warrant to follow the vehicle because no one in a vehicle on public roads can have an expectation of not being observed or seen by the police or anyone else.[258] But the Court held that the reasonable expectation of privacy did apply to the police actually attaching something to the physical property of the car.[259] Thus, placing a GPS tracker on the vehicle in effect constituted an unlawful search, even though it was on the outside of the car, and the police had not actually physically entered the vehicle.[260] Obviously, as technology changes, so too must our understanding of how to apply the physical notion of a search in the Fourth Amendment to the virtual notion of physical space today.

Economic and social conditions were also very different when the Bill of Rights was written. Consider this dumbly simple example. The Seventh Amendment guarantees that "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[261] Today no one could imagine a suit at common law—a private legal action in federal court between two individuals—for just $20.01, or even $2,001. The cost of filing the suit and the cost of the first few minutes of the attorney's time would exceed the value of the suit. While a small

254. *Id.*

255. For some considerations of these issues in the context of national security, *see* Wagner & Finkelman, *supra* note 40, at 609-11, 613.

256. 132 S. Ct. 945 (2012).

257. *Jones*, 565 U.S. at 403-04.

258. *Id.* at 403.

259. *Id.* at 404-05.

260. *Id.* at 404; *see also* Wagner & Finkelman, *supra* note 40, at 598 (illustrating how these issues affect national security).

261. U.S. CONST. amend. VII.

claims court at the local level might entertain such a suit, it would be without a jury, and even then the filing fees would likely exceed the potential judgment in a twenty-dollar case. Under current law, the minimum jurisdictional amount for diversity suits in federal courts must exceed $75,000.[262] You cannot have a jury trial for a suit in federal court over $20, or even over $2000, because neither would reach the threshold for federal jurisdiction.[263]

This example, like so much else in the Bill of Rights, illustrates the complexity of applying very old text to very modern circumstances. But it also illustrates that in many ways the Bill of Rights and the American system of constitutional interpretation have led to remarkable flexibility. You can still have a jury trial in a civil lawsuit, as long as the amounts in question reach a necessary threshold, that in fact is not particularly high, given the cost of modern litigation. But, the twenty dollar amount in the Constitution is utterly meaningless today.[264]

We also need to consider the social world that led to the Bill of Rights. When the Bill of Rights was written the United States had a population of about four million, of whom about 700,000 were enslaved Africans and African Americans who were excluded from public discourse.[265] The nation was overwhelmingly Protestant.[266] There were only about 25,000 Roman Catholics[267] and perhaps 2,500 Jews in the nation.[268] There is no evidence of any practitioners of eastern religions and, except for some African-born slaves, there were virtually no Muslims in the country. Except for about 60,000 free African Americans and a smattering of Native Americans living among whites, virtually everyone in the political community was of European (white) ancestry.[269] With the exception of some German speaking settlements

262. 28 U.S.C. § 1332(a).

263. *See id.*

264. U.S. CONST. amend. VII.

265. These numbers do not include most Native Americans, living within the United States, who were not counted by the census. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990 for the United States, Regions, Divisions, and States* (Population Division, United States Census, Working Paper No. 56, 2002), Table 1, https://census.gov/content/ dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf.

266. *See* Madeline Grimes, *How Freedom of Worship Has Been Used to Restrict Freedom*, FRANKLIN D. ROOSEVELT FOUR FREEDOMS PARK (Oct. 25, 2016), https://www.fdrfourfreedomspark.org/blog/2016/10/25/freedom-of-worship.

267. *Roman Catholicism in the United States and Canada*, https://www.britannica.com/topic/Roman-Catholicism/Roman-Catholicism-in-the-United-States-and-Canada.

268. *Total Jewish Population in the United States*, JEWISH VIRTUAL LIBRARY (Jan. 31, 2017), https://www.jewishvirtuallibrary.org/jewish-population-in-the-united-states-nationally.

269. Gibson & Jung, *supra* note 265.

and a smattering of Dutch-speaking communities in New York State,[270] English was the common language everywhere. In other words, the nation had an overwhelmingly homogeneous population. Freedom of Religion mostly meant freedom for Protestants of different denominations to practice without any disturbance from other Protestants.[271]

Today, of course the United States is the most polyglot nation in the world, with residents of all races and religions, who came (or are descended from people who came) from every corner of the Earth.[272] The beauty of the eighteenth century principles embodied in the Bill of Rights is that the amendments allow these principles to be applied in the modern United States. Thus, people of all faiths have religious liberty.[273] Similarly, unlike in the past, the principles of the Constitution extend naturalization to immigrants from anywhere and provide immediate citizenship to all children born here.[274]

In 1789, when Madison wrote the amendments, political rights were granted by the states and varied from state-to-state.[275] Many states had significant property requirements—or a requirement that taxes be paid—for voting.[276] But some had few requirements. In the colonial period eight

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270. An example of this was the future president, Martin Van Buren, who was born in 1782 (after Independence) and grew up speaking Dutch in his hometown of Kinderhook, New York, and only learned English when he went to school.

271. *See* Grimes, *supra* note 266.

272. *See* Dan Keating & Laris Karklis, *The Increasingly Diverse United States of America*, THE WASHINGTON POST (Nov. 25, 2016), https://www.washingtonpost.com/graphics/national/how-diverse-is-america/. See also, WILLIAM FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA (2015).

273. The prohibition on any "religious test" for office holding is a significantly important aspect of religious liberty in the main body of the Constitution and is often overlooked or never even mentioned in constitutional law discussions. "[B]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3. (This clause prevented a de facto establishment of religion, which might have been done by limiting federal office holding to Protestants or Christians, or some specific denominations). At the Founding every state but New York and Virginia had some sort of religious test for officeholding. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 64 (1986) (noting that New York did pass test oaths to prevent Catholics from holding office); MORTON BORDEN, JEWS, TURKS, AND INFIDELS 11-12 (1984). For a short discussion of this, *see* J. Jackson Barlow, *Officeholding Clauses of Constitution and Religious Test for Officeholding*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 345 (ed. Paul Finkelman) (2000); J. Jackson Barlow, *Officeholding: Religious-Based Limitations in Eighteenth Century State Constitutions*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 346-47 (2000). The Supreme Court struck down the last of these state constitutional clauses in the mid-twentieth century, applying the Establishment Clause of the First Amendment to the state tests. Torcaso v. Watkins, 367 U.S. 488, 494-96 (1961); McDaniel v. Paty, 435 U.S. 618, 620 (1978).

274. Clearly this was not always the case. Gabriel Jack Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA. L. REV. 1, 7, 14 (1998). For another discussion of immigration and racial discrimination, *see* Finkelman, *supra* note 181, at 1409-1459.

275. Article I of the U.S. Constitution recognized this, providing that the "Electors [for the House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.

276. See generally, ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 5-7 (2000).

colonies tied voting to tax paying or property ownership,[277] but at Independence at least five did not.[278] Many states continued this liberal notion of the franchise after independence, and by 1790 sixty to seventy per cent of all adult white men in America could vote,[279] and free blacks could vote on the same basis as whites in six states.[280] Most states also had property requirements as well as a religious test—either Protestant or Christian—for office holding.[281] At the time of the ratification of the Constitution, adult white men (who met property requirements where they existed) could generally vote in every state, and free black men could vote on the same basis as white men in about half the states.[282] In New Jersey, women could vote, but few did.[283] They were disfranchised everywhere else.[284] In all other states, women had virtually no political rights.[285] However, even disfranchised people—women, non-citizens, free blacks in the North—generally had rights of freedom of expression, due process of law, and protection of their property from uncompensated taking under the Bill of Rights and under their state constitutions.

Adult male citizens voted,[286] paid taxes, served in the militia,[287] and served on juries.[288] Voting was often in public, without a "secret ballot."[289]

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277. *Id.* at 5.

278. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN THE U.S. 57-58 (1997).

279. KEYSSAR, *supra* note 276, at 6.

280. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986).

281. *Religious Tests for Officeholding (Article 6, Cl. 3)*, CIVIL LIBERTIES IN THE UNITED STATES (Aug. 24, 2012), https://uscivilliberties.org/ historical-overview/4369-religious-tests-for-officeholding-article-6-cl-3.html.

282. Free blacks could vote in New Hampshire, Massachusetts, New York, New Jersey, Pennsylvania, and North Carolina. KEYSSAR, *supra* note 276, at 338-39. Dred Scott v. Sandford, 60 U.S. 393, 572-73 (1857) (Curtis, J., dissenting) ("At the time of ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens."). There is also some evidence that free blacks voted in Connecticut and Maryland at this time. KEYSSAR, *supra* note 276, at 338-39. 1 UROFSKY & FINKELMAN, *supra* note 64, at 383.

283. Kat Eschner, *For a Few Decades in the 18th Century, Women and African-Americans Could Vote in New Jersey*, SMITHSONIANMAG.COM, (November 16, 2017), https://www.smithsonianmag.com/smart-news/why-black-people-and-women-lost-vote-new-jersey-180967186/.

284. *Id.*

285. *See generally* LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 7 (1980) (noting traditionally women were confined to the domestic world).

286. KEYSSAR, *supra* note 276, at 6. As noted above, in 1789 free blacks in at least six states were allowed to vote on the same basis as whites. *See Dred Scott*, 60 U.S. at 572-73 (Curtis, J., dissenting); 1 UROFSKY & FINKELMAN, *supra* note 64, at 383;

287. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991).

288. *See id.*

289. Jill Lepore, *Rock, Paper, Scissors*, THE NEW YORKER (Oct. 6, 2008), https://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors.

In some places adult male immigrants could vote even if they had not yet become naturalized citizens. These rights and obligations of citizenship—even for non-citizens—are reflected in the Bill of Rights, which protected religious freedom, public speech, militia service, private property, jury trials (and implicitly jury service), and due process of law.[290] For eighteenth century Americans this bundle of rights, liberties, and obligations formed the backbone of a free society, where individuals had personal liberties—like religion or speech—but also public obligations like jury service or militia duty.[291] Private property was central to the ideology of the time—but could be limited through due process and eminent domain, and could be taken by the government with just compensation, even if the owner objected.[292]

Most of all, as noted throughout this article, the Bill of Rights offered protections to all free people within the community[293] whether they were citizens, visitors, aliens, or other foreigners. Furthermore, the Bill of Rights offered two distinct, although intertwined, sets of liberties. First, were the protections from an overbearing government, which prohibited the government from doing certain things, such as "abridging the freedom of speech" and other liberties or prosecuting someone without a grand jury indictment and a petit jury at trial.[294] Second, the Bill of Rights promised certain specific positive rights, such as the right to have an attorney at trial.[295] This was new in the Anglo-American world. Finally, as noted earlier, the Bill of Rights had a certain humility to it. Madison and his colleagues did not believe they could think of every right, or list all aspects of liberty.[296] So, Madison came up with a brilliant catch-all, promising that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[297]

As we consider the U.S. Bill of Rights in its 230th year, it is worthwhile to consider its contribution to the world. The Bill of Rights is in some ways very "unmodern." As originally written (and interpreted by the Court in *Barron v. Baltimore*[298] and in *Permoli* v. *First Municipality of the City of New Orleans*[299]) it only limited the national government, leaving state and local

290. U.S. CONST. amend. I-X.

291. *See generally* Amar, *supra* note 287, at 1171, 1183, 1208.

292. *See id.* at 1181; *Eminent Domain*, LEGAL INFORMATION INSTITUTE (Nov. 2018), https://www.law.cornell.edu/wex/eminent_domain; *Due Process*, LEGAL INFORMATION INSTITUTE (Jan. 2014), https://www.law.cornell.edu/wex/due_process.

293. This would not have included slaves of course, and the southern states generally denied most of these rights to free blacks.

294. U.S. CONST. amend. I; U.S. CONST. amend. VII.

295. U.S. CONST. amend. VI.

296. U.S. CONST. amend. IX.

297. *Id.*

298. 32 U.S. 243.

299. 44 U.S. 589.

governments with the power to deny liberty and oppress minorities, which of course often happened.[300] It took a century and half to change that through a civil war, major constitutional amendments, and court decisions. The Bill of Rights does not limit individual actions that might undermine liberty the way the prohibition on slavery in the Thirteenth Amendment limits both government and private action.[301] The Bill of Rights offers no protections for people on the basis of race, religion, ethnicity, nationality, gender, sex, gender preference, gender presentation, and disability status, among others.[302] Explicit language on privacy is missing and a minority of Americans still object to the idea that the Supreme Court has found a right to privacy because the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[303] Although public opinion polls show that most Americans actually want their privacy protected even if they object to some of its implications, like the right to consult a physician, or marry who you want, the debate over privacy and the Ninth Amendment enters every national political campaign.[304] The Bill of Rights lacks the anti-discrimination principles which were added to the Constitution through the Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments.[305] Nor does the Bill of Rights protect many fundamental economic rights, beyond the protection of "property" from arbitrary takings or commandeering.[306]

But at the same time, many of the provisions of the Bill of Rights of 1789 are stunningly viable today, 230 years after they were written. It is hard to imagine a more sweeping and powerful statement about religious liberty than Madison wrote: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[307] We might wish to know what constitutes establishment—or where free exercise interferes with the rights of others—but these details are perhaps better left to judges or legislators working under the limitations of the Bill of Rights and the Constitution, and applying them to a changing world. Similarly, the idea that government "[s]hall make no law . . . abridging the freedom of speech" is a powerful and fundamental precept for a democracy.[308] The idea that no one can be forced into self-incrimination or be denied "life, liberty, or property, without due process of law" seems so fundamentally correct that it is hard to

300. *See Barron*, 32 U.S. at 250-51; *Permoli*, 44 U.S. at 609.
301. U.S. CONST. amend. XIII.
302. *See* U.S. CONST. amend. I-X.
303. *Griswold*, 381 U.S. at 484.
304. U.S. CONST. amend. IV, IX.
305. See U.S. CONST. amends. XIII-XV, XIX, XXIV.
306. *See* U.S. CONST. amend. V.
307. U.S. CONST. amend. I.
308. *Id.*

imagine anyone opposing these protections, other than an advocate of tyranny and dictatorship.[309] We can argue about what constitutes "cruel and unusual punishment," but the principle is hard to dispute.[310]

The Bill of Rights is, in the end, an outline of principles. It is not a legal code, any more than the Constitution itself can be seen as one.[311] It is set of principles and guidelines. As Justice Brandeis wisely noted in *Olmstead*, "in the application of a [c]onstitution, our contemplation cannot be only of what has been, but of what may be."[312] This must remain the guiding star of liberty under the existing Bill of Rights.

309. U.S. CONST. amend. V.

310. U.S. CONST. amend. VIII.

311. As Chief Justice John Marshall taught us: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind." M'Culloch v. Maryland, 17 U.S. 316, 407 (1819).

312. *Olmstead,* 277 U.S. at 474.